

**IN THE HIGH COURT OF TANZANIA  
(DARESALAAM DISTRICT REGISTRY)**

**CIVIL CASE 90 OF 2010.**

HASSAN MPOCHO .....PLAINTIFF

Versus;

BERNAD EDMUND MNDOLWA .....1<sup>st</sup> DEFENDANT

NATIONAL BANK OF COMMERCE.....2<sup>nd</sup> DEFENDANT

**RULING:**

**15<sup>th</sup> September, 2010 & 13<sup>th</sup> October, 2010.**

Before; Utamwa, J.

This is a ruling arising from arguments made by the parties to this suit before me in respect of the *locus standi* on the part of the plaintiff HASSAN MPOCHO.

The brief facts of this matter go thus; the plaintiff through his learned Counsel **Mr. Muganyizi** from **Decorum Attorneys** instituted a suit before this court against both defendants, BERNAD EDMUND MNDOLWA (First Defendant) and The NATIONAL BANK OF COMMERCE (NBC), the Second Defendant, claiming for some relieves following an overdraft facility allegedly executed by HASBEN HOLDING LIMITED and the 2<sup>nd</sup> Defendant.

According to the plaint, the plaintiff asks this court to declare the overdraft facility null and void *ab initio*. He further claims a

lost sum of USD 50,000 and USD 67,000,000 as well as Tanzanian shillings 266,560,000/= per month as special damages, and lastly he claims for general damages and costs for the suit.

The plaint further demonstrates that; the plaintiff is a businessman and one of the directors in the said HASBERN HOLDINGS LIMITED of which another director is the first defendant, the plaintiff is also a director in another company going by the name of **Mercury Finance Ltd and Rama Group Agencies Limited**. The plaint also informs that; sometimes back in the year 2009 the 2<sup>nd</sup> defendant purported to grant the overdraft facility to HASBERN HOLDING LIMITED without involving the plaintiff, and such overdraft facility was fraudulently granted and the money wherefrom were not used for the companies benefits but remitted to un known accounts abroad.

The plaint further depicts to the effect that; pursuant to the fraudulent execution of the overdraft by the defendants the plaintiff was frequently interrogated by officials of the **Prevention And Combating Of Corruption Bureau** (PCCB) on a suspicion that he had mortgaged property with fake title deed for the overdraft. The plaint further pleads that; the whole transaction has tarnished the plaintiff's reputation and affected his business, hence this suit.

Apart from filing their respective Written Statements of Defence disputing the claim, both defendants raised preliminary objections against the plaint on points of law. The generality of the objections is to this effect; that the suit is not maintainable in law for two grounds, **one** that the plaintiff has no *locus standi* to institute the suit as the overdraft facility, the subject matter of

the suit was between HASBEN HOLDING LIMITED and the 2<sup>nd</sup> defendant and **two** that, the plaint does not disclose any cause of action against the first defendant. The defendants therefore, unanimously urged this court to dismiss the suit with costs.

When the matter came before this court, **Mr. Rwegasira** and **Mrs. Agness Tulia** learned Counsel appeared for the first and second Defendant respectively, they reminded the court of the so filed preliminary objections. Mr. Muganyizi learned Counsel for the plaintiff honestly succumbed to the first point of preliminary objection admitting that the plaintiff has no *locus standi*. He however, resisted the second point which alleges that the plaint does not disclose any cause of action against the first defendant. He thus prayed the court to allow him amend the plaint instead of dismissing it with costs. **Mr. Rwegasira** and **Mrs. Agness Tulia** learned Counsel were not in favour of the prayed amendment of the plaint saying that if granted, their preliminary objection will be pre-empted.

Mr. Muganyizi learned advocate in emphasising his prayer to amend referred the court to Order 6 Rule 17 of the Civil Procedure Code, (Cap. 33, R. E. 2002) saying that the court can permit any part to amend his pleading at any stage of the suit and further that, his prayer will neither cause any injustice nor pre-empty the preliminary objection, but the prayed amendments will assist the court to decide the real controversy between the parties, he backed this particular argument by the decision in GEROGE SHAMBWE v. ATTORNEY GENERAL (1996) TLR. 334 which he said instructed that amendments of pleading should be freely allowed if no injustice will be caused. Mr. Muganyizi learned Advocate also argued that, at paragraphs 13 (a)- (e) of the plaint the plaintiff mentions

companies which are being operated by him (including the said HASBEN HOLDING LIMITED), he further said that, the legal technicality that each company has a separate legal personality is notwithstanding, and further that the amendment will only add to the plaint the companies mentioned under paragraph 13 of the plaint.

In reply to the submissions made by Mr. Muganyizi learned Counsel for the plaintiff, **Mr. Rwegasira** and **Mrs. Agness Tulia** were of the view that the law cited by Mr. Muganyizi do not render any assistance to him for, Order 6 Rule 17 of Cap. 33 only gives discretion to the court on whether or not to grant a prayer for amendment and Shambwes's case only permits amendments which do not cause injustice, but the preliminary objection goes to the roots of the matter that is why they pray for a dismissal of the same. They added that, what the plaintiff wants to do is to re-write the plaint which is improper.

When examined by the court Mr. Rwegasira said that, the defendants pray the court to absolutely dismiss the suit and not to strike it out, for they want to bar the plaintiff from coming back to the court again suing the two defendants now in court.

Having considered the arguments of the parties and their prayers my views are that, so long as it is not disputed that the plaintiff has no *locus standi* in this suit, the issue before me is narrowed to this extent; *what is the legal remedy for the suit in which the plaintiff lacks locus standi?*

The prudence of Mr. Muganyizi learned Advocate for plaintiff envisages that an amendment of the plaint will be a solution while that of Mr. Rwegasira and Mrs. Tulia is to the effect that a dismissal is an adequate antidote for the plight. I opt to discuss

the suggestions by the parties one after another. I will begin with that of the learned Counsel for the plaintiff. In the first place I agree with both Counsel for the Defendants that Order 6 rule 17 of Cap. 33 and Shambwe's case cited by the learned counsel for the plaintiff do not create any shelter for him. As rightly argued by the Defendants' Counsel Order 6 rule 17 merely gives the court a discretion to permit amendments of pleadings. But upon reading these provisions between lines the following discovery will be manifest, that; one of the conditions precedent for this court to exercise its discretion in permitting amendments is that, *all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties*".

The sub-issue here is this; is the amendment suggested by the plaintiff *necessary for the purpose of determining the real questions in controversy between the parties*? As per the submissions by Mr. Muganyizi learned advocate for the plaintiff the suggested amendments are none other than adding to the plaint the companies mentioned under paragraph 13 of the current plaint. The answer to this sub-issue is therefore, definitely in the negative because, by his admission that he has no *locus standi* in this suit, the plaintiff rendered himself a legally unrecognised party into these proceedings, hence there is no any question in controversy between him (the current plaintiff) on one hand and the two defendants on the other.

Indeed, the undisputed want of the *locus standi* on the part of the plaintiff incapacitates him not only to proceed with the suit against the defendants, but also to make any application before this court including the application to amend the plaint. In LUJUNA SHUBI BALLONZI SENIOR v. REGISTERED TRUSTEES OF

CHAMA CHA MAPINDUZI 1996 TLR 203 my brother, **Hon. Samatta, JK** (as he then was) was of the view that to maintain an action before the court one must have the *locus standi* and he prudently remarked, I quote him for easy of reference;

"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....**" (Bold emphasis is mine).

It follows therefore that, to grant the plaintiff's prayer for amending the plaint will amount to awarding him the *locus standi* while he admits that he has none, that step will in fact taint these proceedings with serious incurable imperfection. In this respect I am sponsored by Another Brother of mine, **Hon. Nchalla, J.** (as he then was) who cemented this stance of the law in BARNABAS ALPHONCE v. MELKIORY MLERA HC. PC. CIV. APPEAL NO; 7/92 AT ARUSHA. (Unreported) Where he quashed court proceedings of the two courts bellow on grounds that the party who had moved the court lacked *Locus Standi* in the proceedings of the suit. In my finding I further gain support from Earl Jowitt, The Dictionary of English Law (edited by Clifford Walsh), London, Sweet & Maxwell Ltd, 1956, at 1110 where he illustrated the phrase "*Locus Standi*" thus, and I quote for the sake of a readymade reference;

- "*Locus Standi*, a place to stand on. To say that a person has no *locus standi* means that he has no**
- right to appear or be heard in such-and-such a proceedings"**

It is for these grounds that the plaintiff is deprived of the forum to stand and pray to amend or to actually amend the plaint following the undisputed want of *locus standi*, hence his prayer to amend the plaint cannot stand too. The kind of the amendments prayed by the plaintiff's learned Counsel are therefore, neither covered by order 6 rule 17 of Cap. 33 nor by Shambwe's case cited by him, these authorities are thus distinguishable in this matter. I also agree with both defendants' learned Counsel that to grant the plaintiff's prayer for amending the plaint will indeed pre-empt their preliminary objection which is a serious unfair practice in our jurisdiction. The ultimate effect of the want of *locus standi* on the part of the plaintiff is therefore this, the suit becomes incompetent before this court, and the plaintiff cannot thus amend an incompetent suit. Consequently, this court cannot exercise its discretion under the laws cited by the learned counsel for the plaintiff in this matter for, a court of law is enjoined to exercise its discretion judiciously, I am not convinced that this matter is a fit atmosphere to exercise such discretion. The Court of Appeal in JAPAN INTERNATIONAL COOPERATION AGENCY v. KHAKI COMPLEX LIMITED, CIVIL APPLICATION NO; 39 OF 2004, AT DAR ES SALAAM (RULING) held that a court cannot exercise its jurisdiction in an incompetent application; this rule of practice applies *mutatis mutandis* in the matter at hand. I thus turn down the plaintiff's prayer to amend the plaint.

As to the suggestion by both learned Counsel for the defendants that the remedy for want of *locus standi* is to dismiss the suit I am of the settled view that, their proposal is not tenable for, in our civil practice a **dismissal Order** presupposes that a matter has been heard on merits, which is not the case here. On the other hand a **Striking Out Order** envisages putting court proceedings to an end by virtue of a technical or legal defect, this particular attitude is sustained by the prudence of the Court of Appeal in ZAID SOZY MZIBA v. DIRECTOR OF BROADCASTING, RADIO TANZANIA DAR ES SALAAM AND ANOTHER, CIVIL APPEAL NO; 4 OF 2001, AT MWANZA. The Court of Appeal envisaged this same stance in BERNARD MALINGA v. PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION (PSRC) AND ANOTHER, CIVIL APPEAL NO; 65 OF 2007, AT MBEYA and in ALLIANCE INSURANCE CORPORATION LTD AND 9 OTHERS v. COMMISSIONER OF INSURANCE AND 2 OTHERS, CIVIL REFERENCE NO; 5 OF 2005, AT DAR ES SALAAM as well as in MAKINYUMBI ESTATE LTD AND ANOTHER v. VIDYADHAR GIRDHARLAL CHAVDA AND ANOTHER, CIVIL APPL. NO; 187 OF 2005, AT DAR ES SALAAM. It must also be noted here that, the effect of the Dismissal Order on one hand and the Striking Out Order on the other are distinct. Though both orders in effect put the proceedings before the court to an end, the former will render the matter a *res judicata* if re-filed in court while the latter order will not, i.e. the party against whom the Striking Out Order is made has a room to re-file the matter in court upon legally rectifying the defect.

Under the circumstances of this matter at hand, I am not convinced that a Dismissal Order is applicable. As I found before herein above, I consider this suit at hand as being



incompetent for being filed by a person lacking *Locus Standi*, the suit must thus be put to an end for this legal technicality, hence the proper remedy for the suit is not to dismiss it as urged by both learned Counsel for the defendants, but to strike it out as per the decisions of the Court of Appeal just cited herein above. I accordingly strike out the plaint/suit. The plaintiff is condemned to pay half of the costs to the defendants.

I have apportioned the costs for the following grounds; It is true that the defendants have been dragged to this court unnecessarily and they have toiled to fight against the incompetent suit by filing their respective written statements of defence and by successfully raising the preliminary objections now under consideration, but Mr. Muganyizi, the learned counsel for the plaintiff on the other hand, has been cooperative enough by readily admitting the lack of *locus standi* before the battle in respect of the preliminary objections went to a full fight of trial. By that good conduct, he has served the precious time of both the court and parties; he has also demonstrated an adequate maturity in the legal practice. It is ordered accordingly.

JHK. UTAMWA,  
JUDGE  
06/10/2010

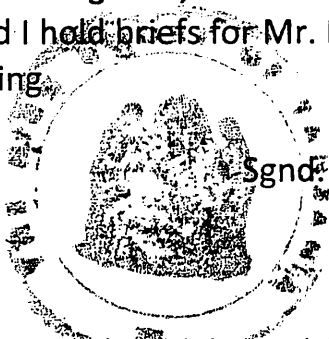
**DATE; 13/10/2010;**

**CORAM;** Hon. Utamwa, J.

**For the Plaintiff;** - Mr. Rwegasira advocate, holding briefs for Mr. Muganyizi advocate.

For the First Defendant; Mr. Rwegasira Advocate.  
For the Second Defendant; - Absent without notice.

Mr. Rwegasira, learned Advocate; My Lord, I appear for the first defendant and I hold briefs for Mr. Muganyizi for the plaintiff, the matter is coming for ruling.



Sgnd.

JHK. Utamwa  
Judge  
13/10/2010

Court; Ruling delivered in chambers this 13<sup>th</sup> day of October, 2010 in the presence of Mr. Rwegasira, learned advocate for the first defendant who also holds briefs for Mr. Muganyizi learned advocate for the plaintiff.

Sgnd.

JHK. Utamwa  
Judge  
13/10/2010