IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

PC CIVIL APPEAL NO. 113 OF 2020

MARIAM NASSORO.....APPELLANT

VERSUS

MARIAM SALUM GWAU.....1st RESPONDENT

ROSE JULIUS IJENGO.....2nd RESPONDENT

(Appeal from the decision of the District Court of Kinondoni)

(Mwaisaka- Esq, RM.)

dated 25th March 2020

in

Civil Appeal No. 5 of 2020

JUDGEMENT

2nd December 2020 & 3rd February 2021

AK. Rwizile, J

Background facts leading to this appeal are that, parties to this appeal are members of their own made group, known by the name of Comfort Women Group, which they allege to have many other members. It was in 2019 when members wished to share their deposits. The respondents were leaders and custodian of the money.

It would appear before that was done a shortage of 14,448,880/=, was discovered. Members were not pleased and wanted their money be paid by the respondents who refused. To deal with them, the appellant instituted a civil suit on behalf of other members at Kimara Primary Court. The case was heard and dismissed for want of merit. Dissatisfied by the said decision, she appealed to the District Court of Kinondoni, where the appeal was dismissed for lack of *locus standi* to institute the suit. The appellant was aggrieved by the decision of Kinondoni District Court, and is now before this court appealing on two grounds thus;

1. *That the first appellate court erred in law by failing to nullify all proceedings before it and that of the primary court as required by the law after it held that, appellant lacked authority to institute a case for or on behalf of the members of Comfort Women Group.*
2. *That the first appellate court erred in law in deciding on the issue of locus of the appellant and making decision thereto without affording the appellant a right to be heard.*

At the hearing the appellant was represented by Ms. Mchau learned advocate, assisted by Ms Ndesamburo learned advocate. The respondents appeared in person. Parties agreed to argued this appeal by way of written submission. In support of the appeal, it was argued on the first ground that, it was illegal for the District Court not to quash decision of the trial court, since the appellant instituted a suit without authority from other members of the group. She said further that, the District Court was supposed to nullify the trial court decision, failure to do so according to her was an error which invite this court to intervene. She cited the cases of **Abdilah Juma vs Salum Athumani** [1986] TLR 240 at Page 243,

and **Principal Secretary, Ministry of Defence & National Service vs Devran Valambhia** [1992] TLR at Pg 185

It was her submission on the second ground that, the District court did not afford the appellant her right to be heard when deciding on *locus standi*. She submitted that, since the appellant was a necessary party to the case, she was supposed to be heard on that matter.

She cited the case of **Mbeya- Rukwa Autoparts and transport Ltd Vs Jestina George Mwakyoma** [2003] TLR 251 and the case of **Tanzania Telecommunication Co. Ltd Vs Vedasto Ngashwa & 4 others, Civil Application** No. 67of 2009 (unreported) which emphasizes the right to be heard as a fundamental principle of natural justice. She asserted that, since *locus standi* was introduced by respondent in their reply submission, according to her the same was a new issue which the court could have notified the parties to argue on. Instead, she said, appellant was condemned unheard. She therefore prayed for this appeal to be allowed and the judgement and proceedings of the lower court be set aside with costs.

Disputing the appeal, the respondents argued that there was no need for the District Court to nullify proceedings and judgement of the trial court. It was added that, the same was not among the grounds of appeal. In appeals, it was submitted, the court is restricted on grounds of appeal. The respondents went on asserting that, nullification of the decision of the trial court was a new issue which cannot be raised at this time.

Arguing on the second appeal, the respondents stated that, the appellant was afforded the right to be heard and her submission on her rejoinder dealt with the subject as at page 6 and 7 of the appellant's rejoinder.

According to respondents the applicant was heard by the court. This court was therefore asked to dismiss this appeal with costs.

In re-joining, appellant reiterate her position as submitted in submission in chief. She said, since the District Court ruled that, the appellant did not have any authority to appeal, consequently, she added, it had to nullify the proceedings of the trial court as was done in the case of **Abdilah Juma vs Salum Athumani**, [1986] TLR 240. She therefore prayed for this court to nullify the proceedings of the lower courts. On the second ground the learned advocate insisted that, the appellant was never given her right to be heard as previously submitted in chief.

Having gone through the rival submissions of the parties and the records of the lower courts. I propose to start with the second ground of appeal which I consider important to be dealt with first. The appellant argued that she was not afforded right to be heard, when a new issue on *locus standi* was introduced by the respondents in their submission. To begin, I have to state that *locus standi* is a common law principle which means ability of a person to institute and prove a case in court. As it was held in the case of **Lujuna Shubi Balonzi Senior vs. Registered Trustees of Chama Cha Mapinduzi** [1996] TLR, 203 that,

> *'In this country Locus standi is a Principle governed by common law whereby 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'.*

Before going to the crux of this ground I should first determine if the appellant had such capacity/ ability to institute a case at the trial court

and appeal thereafter. It is in record that appellant instituted a civil case on behalf of other members of Comfort Women Group without their permission. If she had any, she ought to have proved it before this trial court. Before the trial court, other members of comfort women group are not known to the court. This is to say, their identity was not disclosed to the court. I must say, the law applicable in Primary Courts (GN No. 310/1964, 119/1983) is silent on the procedure filing a representative suit. However, this court in the case of **Abdillah Juma vs Salum Athumani** [1986] TLR 240, Samatta, J (as he then was) held that the despite having no law providing such a procedure in the Primary Court, still the same is bound to apply the letter and spirit of order 1 R 8 of the Civil Procedure code. The court states;

> *Since a Primary Court can, and is bound to, exercise its civil jurisdiction in accordance with O. I r. 8 of the Civil Procedure Code, 1966, it follows that a representative action can, in law, be instituted before it. Although persons on whose behalf a representative suit is instituted are not parties to the proceeding, it is necessary that their identities be known to the Court'.*

The law under O. I R.8 of the Civil Procedure Code, [Cap 33 R.E 2019]. States as hereunder reproduced;

> *Where there are numerous person 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.*

Based on the foregoing, it is clear that appellant did none of the above, she therefore lacked *locus standi* to institute a case at the trial court. She failed to show the identities of the other members of the group and it was not proper to do. In order therefore to institute a suit in that capacity, the requirements of the law must be met. If she did so in her capacity as a member of the group, she ought to have allocated her share as agreed by other members. It is difficult, as of now to exactly know the existence of other members and the amount of their share in the claimed amount.

Turning to whether the appellant was afforded the right to be heard on whether she had the *locus* to institute the suit. It is in record that the issue was introduced by the respondents in reply submission at the District Court. That means it first featured at the appellate stage. The appellant had a chance to submit on the same. This goes by her rejoinder at page 3, paragraph 6, where it is stated thus;

> *'it is submitted that the appellant has no* ***locus standi*** *actually the Comfort Women Group is unregistered financial group…the appellant, a member and delegate of the group has instituted this appeal and all members have agreed on this since filing of the complaint at Kimara Primary Court.* ***So, the issue of locus stand has no***

merit and we humbly submit that this objection should be overruled'. *(emphasis added)*

Since the appellant was able to submit on the same in her rejoinder, it is my considered view that she was afforded a right to be heard. It is a settled rule that, the case can be heard orally or through written submission as it happened before the District Court. As well, because the same is a crucial issue touching capacity and jurisdiction of the court, it can be raised at any time. The second ground lacks merit hence dismissed.

As for the first ground I agree with the appellant that when the District Court having rightly held that the appellant had no *locus standi*, it ought to nullify the proceedings. Since, the District Court has a power to quash any proceeding of the Primary Court in its appellate capacity as provided under provision of section 21(1)(c) of the Magistrates' Court Act, [Cap 11 R.E 2019] which states that;

> *21.-(1) In the exercise of its appellate jurisdiction, a district court shall have power-*
>
> *(a)…….*
>
> *(b)…….*
>
> *(c) to quash any proceeding (including proceedings which terminated in an acquittal) and, where it is considered desirable, to order the case to be heard de novo either before the court of first instance or some other primary court, or any district court, having jurisdiction;*

It is my view that, the District Court could have quashed and set aside the proceedings of the Primary Court as suggested by the appellant. I therefore hold that the first ground has merit. Basing on the foregoing, I therefore quash and set aside all decisions of the lower courts. The appellant may, if she wishes, may file a fresh suit by following the proper procedure. No order as to costs.

A.K. Rwizile

JUDGE
03.02.2021

Recoverable Signature

X

Signed by: A.K.RWIZILE

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DAR ES SALAAM DISTRICT REGISTRY