REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL CASE NO 613 OF 2001

KHELEF KHALIFA EL-BUSAIDY.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS & 2 OTHERS.....DEFENDANTS

RULING

The Plaintiff in his plaint dated 5.12.2001 avers that he lives and works in Mombasa City to which he pays his taxes and to which he is a rates payer for a long time. He resides in Tudor area and for as long as he can remember, he has enjoyed the use of a public facility being an open space maintained by the Mombasa City or Municipal Council as the case may be. That the public park is called "Dickson Garden" but more popularly known as *"Uwanja wa Mayaya"* by most Mombasa residents, especially those who live or reside near the park. It was not only himself alone who enjoyed and depended at the facility for its recreational use but many other members of the public used the park in a similar or related manner. The above was the situation, according to the Plaintiff, until the year 2000 when he learnt that the said public park was no more. It had apparently been converted from a public park which was in the custody and ownership of Mombasa Municipal Council into the Central Government's ownership and then alienated into private ownership of the 2nd Defendant who is fronted by the 3rd Defendant as the prelate and head of the Catholic Church in the Coast Province. That the suit premises which was originally held under a freehold title by the Mombasa Municipal Council, was deliberately converted into leasehold and then allotted to the 2nd Defendant by the 1st Defendant who is the Commissioner of Lands. The Plaintiff also stated that the land, the suit premises, originally belonged to a Coast family by the name of Khelef Khalifa El-Busaidy before it reverted to the ownership of Mombasa Municipal Council and before it finally passed to the ownership of the 2nd Defendant. That it passed through various mysterious conversions, apparently from the ownership under Registration of Titles Act to that under Registered Land Act under which it was transferred or allocated to the 2nd Defendant in a lease for 99 years from 1971. The allocation itself, it is argued, is indicated to have been done on 31.3.2000 when also the Certificate of Lease in favour of the Catholic Diocese of Mombasa, the 2nd Defendant, was issued. The suit premises is designated as Plot No.102/Block XI/MOMBASA.

From the above facts the original applicant avers that there was no basis either in fact or in law upon which the 1st Defendant could have proceeded to grant any leasehold title of the said plot. That the plot comprised of a public park for many years and had not ceased to be such public park or had not been surrendered to the said original holder. He further argued that any such alienation of the plot is null and void and that if however such allocation is indeed an allocation, then the plot should be held by the 2nd Defendant not for itself but in trust for the original applicant/plaintiff so that the same is nevertheless used as a public park for the benefit of the plaintiff. He added that the plot was in any case originally being held by Mombasa Municipal Council in trust for the Plaintiff and those others aforementioned for their use, and that if it has passed into the ownership of the 2nd Defendant, which is denied, it so did, carrying with it the trust in favour of the Plaintiff and others who used to enjoy the facility. The Plaintiff further

averred that 1st Defendant, the Commissioner of Lands did not himself own the premises and that under those circumstances, he had no powers himself, to allocate the same to the 2nd Defendant. He further averred that if the Commissioner of Lands is shown at one stage to have owned the plot, it is because the 1st Defendant unlawfully converted the suit premises to operate or exist under a different law which purported to allow the 1st Defendant to allocate the same, a process which was unlawful and null and void. The Plaintiff further averred that his efforts to secure information about the process of conversion of the title from under one Act of Parliament to under another Act as averred above, was seriously opposed and obstructed by the Defendants with a view to prevent the Plaintiff from exposing the unlawful methods used by the Defendants to convert the title and to allocate the same to the 2nd Defendant, but that when he finally succeeded to obtain enough or any such information, he filed this matter in court to stop the Defendants from acting unlawfully to disentitle the Plaintiff and other Mombasa residents who used to enjoy the facility as aforementioned.

It was under these circumstances that the Plaintiff filed an application dated 5.12.2001 seeking orders of injunction with a view to restraining the 2nd and 3rd Defendants, their agents and servants, affiliates and followers, from interfering with or occupying or developing or constructing or disposing off, selling, mortgaging, leasing, charging or in any other way whatsoever, dealing with or interfering in the property the subject matter of this suit, being Plot No.102/IX/MI, pending the hearing and determination of this suit. They also sought to restrain the defendants from obstructing and or in any other manner whatsoever restricting access to the said plot. The Plaintiff at the same time in addition sought for a mandatory injunction to force the 2nd and 3rd defendants to demolish the perimeter wall the latter have began to construct around the suit premises together with any other structures that the 2nd Defendant has constructed in or around the said Plot No.102/IX/M and to ensure that the Plaintiffs and others of his class do get a general access to the said premises without any hindrance. Lastly the Plaintiff sought for an injunction restraining the 1st Defendant from registering any transfer or further transfer or transaction of the said plot from the 2nd Defendant and/or any other party to the favour of any other third parties and/or registering or accepting documents that will in any manner alter the existing status quo.

Before the above Chamber Summons were fixed for a hearing and final determination the firm of Otieno Omuga & Co., Advocates on 19.2.2002 on behalf of the 2nd and 3rd Defendants filed a Notice of Preliminary Objection dated 18.2.2002. The grounds raised therein were as follows:-

> a) That the Plaintiff lacks *Locus Standi* to bring the suit and the application against the Defendants.
> b) That the Plaintiff's suit is bad in law as it contravenes the mandatory provisions of the Government Lands Act, Cap.280 of the Laws of Kenya.

The preliminary grounds of objection on points of law were argued before me on 22.4.2002 and on 2.5.2002. Mr. Mabeya representing the defendants, led a team of his colleagues who included Miss Mbiyu the State Counsel for 1st Defendant and Mr. Ouma for the 2nd and 3rd Defendants. Mr. Taib A. Taib represented the Plaintiff. All counsel ably presented their client's cases, availing to court several legal authorities, thus fairly assisting the court. It is to those arguments that I now turn.

Mr. Mabeya leading the Defendants' team argued that the Plaintiff's suit cannot stand because it is time barred under Section 136(1) of the Government Lands Act, Cap.280 of the Laws of Kenya. The Section states as follows:-

> "136.(1) All actions, unless brought on behalf of the Government, for anything done under this Act shall be commenced within one year after the cause of action arose and not afterwards."

The clear meaning of this section is that unless the contemplated action is brought within a year after the cause of action arose, it will be time-barred. When did the cause of action arise in this matter? Is the issue involved thereto only related to Government Lands Act so that the issue arising is only related to computation of time under the Act and Section and nothing more?

The records in evidence before me indicate clearly that Plot No. Mombasa/ Block XI/102 which is the

subject matter of this case, was registered in the name of the Government of Kenya in absolute title on 31.3.2000. Immediately before that date the suit premises appear to have been held in the name or ownership of "Coast Region" with a registered restriction in favour of the Municipal Council of Mombasa. The Restriction stated as follows:-

> "The Municipal Council of Mombasa may be interested in this land by virtue of Section 274(g) of the Local Government Regulations 1963."

The plot then was held in absolute title and measured in acres as confirmed in the property and proprietorship sections of the register, Annexture "KKE 3". The date when "Coast Region" was registered as the registered proprietor is clearly omitted. Whether the omission is deliberate or not is a matter of conjecture. It is however an accepted cardinal principle of registration of land titles under whatever system and/or whatever statute that every existing title of land whether it be in fee simple or in leasehold, has its date of origin when it was first identified and registered. So also, in my opinion, would Plot No. Mombasa/Block XI/102.

Be that as it may, I have already indicated hereinabove, that the records confirm that the plot would appear to have been registered in the proprietorship of "Coast Region" before it was converted into the ownership of the Government of Kenya on 31.3.2000, as confirmed on Annexture "KKE 3". It is also not in dispute that the record, as it stands, shows that the 2nd Defendant became the registered owner of the said suit premises on the same day the Government of Kenya became the registered owner; that is to say, on the 31.1.2000. The logical conclusion from these records might therefore be that the Government of Kenya was registered as proprietor with a view and for the purpose only of enabling it to allocate the plot to the 2nd Defendant, the Catholic Diocese of Mombasa. Indeed the person or authority, who registered the Government of Kenya, simultaneously registered the title in a lease of 99 years in the 2nd Defendant, so that the longest period the Government of Kenya held the title, is possibly only within the time it took to register it and allocate it to the 2nd Defendant, a matter of minutes or at most a few hours. It is not difficult therefore to compute the time that elapsed from 31.3.2000 to 2.12.2001 to be a period of one year and about 8 months. Going by the provisions of Section 136(1) of the Government Lands Act, Cap.280, therefore, the Plaintiff's suit would without doubt, be time barred. But this is not the way the Plaintiff saw the issue. Mr. Taib argued that as the annextures relating to the suit premises title record clearly indicate and as he is set to prove in evidence the title in question was not in fact supposed to be a title under the Government Lands Act aforementioned. He argued that the plot earlier existed under the Registration of Titles Act as an absolute title and that it was unlawfully and deliberately converted into a title under the Government Lands Act, Cap.280 as recently as the year 2000. He argued further that such a conversion was unlawful and therefore null and void, so that the exercise to convert the title, as aforestated, was an exercise in futility which was incapable of passing any title from one Act to the other.

It was brought into the record by affidavit evidence that the suit premises may have been comprised of plots earlier known as Numbers 55, 57 and 65/111/MI which had existed for over 50 years they were consolidated into one plot known as No.814/III/MI before they were once more subdivided into 92 separate plots known as No.1-92/I/MI. Of the same, argued Mr. Taib, Plots No.33 –42/XI/MI later jointly became Plot No.102/XI/MI which were held under not Governments Land Act, Cap.280 but under Registered Land Act, Cap.300. According to Mr. Taib the suit premises still exist or should exist under the Act under which it originally existed, i.e. Registration of Titles Act. Accordingly, he added, the provisions of Section 136(1) of Government Lands Act, aforesaid, cannot apply or whether or not it should apply depends on the facts as to whether or not the process of conversion of the title from the Registration of Titles Act to the Government Lands Act and finally, to the Registered Land Act, was lawful or not. He argued that the correct legal status can only be agitated and proved or otherwise, by evidence in a full hearing which cannot be availed to the Plaintiff if the pleadings are struck out at a preliminary stage. From that point of view, which cannot be underestimated, argued Mr. Taib, the issue of whether or not the suit is time-barred cannot be decided at this preliminary stage. Mr. Taib also argued further that the issue as to whether or not the conversion of the title was lawfully done and the plot properly brought under the operation of the Government Lands Act, is also an issue in dispute between the parties herein and can only be proved or not upon evidence to be adduced during the hearing. He therefore thought that it is premature and improper for the Defendants to make it a point of preliminary

objection. It is presumptious, he argued, to allege that the Government Lands Act applies as this is a matter of fact and in issue to be proved by evidence. Such facts have not at this stage been brought on record, by either side. Such facts also when so brought must be undisputed and accepted by both parties to be a basis of a legal conclusion which can be used to bring the case to an end at the relevant stage. He further argued that from the Plaintiff's pleadings it is clear that the Plaintiff is prepared to prove during the hearing, that the 1st Defendant had no power to allocate the suit premises to the 2nd Defendant and that his said act was unlawful and null and void. This situation, he concluded, put most facts in the pleadings in dispute and cannot therefore form a basis of a preliminary objection on a point of law.

I have considered the arguments and the legal authorities quoted from both sides. It is my *prima facie* finding on this limb of the Defendant's application basing it on affidavit that the origin of the title known as Mombasa/Block IX/102, needs to be investigated to establish whether or not the Title was an absolute Title under the Registration of Titles Act. It should be established in evidence whether or not the conversion of the said title to operate under Government Lands Act, Cap.280 by the 1st Defendant was proper and lawful and therefore effective and not null and void. It is my further finding that until that is done, all the relevant facts thereto are in dispute. Under those circumstances the law applicable in relation to the issue of a preliminary point of objection is that laid in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* [1969] EA 696 at page 700 where the Court of Appeal stated:-

> "……..So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit ……"

and at page 701:-

> "……A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

The preliminary objection herein was raised by the defendants. Can it be said that they do accept the facts as pleaded by the Plaintiff to be true; in which case they could then apply the provisions of Section 136(1) to it to make the Plaintiff pleadings a non-starter? But the Defendants defend this suit because they do not accept the Plaintiff's facts as pleaded. Clearly therefore, the Defendants' preliminary point is not based on a commonly accepted set of facts and the set of facts herein would not therefore be the basis of a preliminary point of objection and a point of law as understood and accepted in our jurisdiction. Their objection in my view as per the statement by Sir Charles Newbold, quoted above, amounts to an-

> "……improper raising of points by way of preliminary objection" which "does nothing but unnecessarily increase costs and, on occasion, confuse the issues."

The defendants need not there have raised the objection.

The second point of preliminary objection raised by the Defendants is that the Plaintiff has no *Locus Standi* to bring this suit. Mr. Mabeya strongly argued that the Plaintiff had to have a legal interest in the subject suit or suit premises either vested in him personally or contingent thereon in the future. If his only interest is one equal to that of many others like him, then he can only come to this court having first obtained leave from those others and from this court as lawfully prescribed by Order 1 rule 8 of the Civil Procedure Rules. He could only come to court without such leave argued Mr. Mabeya if he showed exclusive private interest which in this case as confirmed by the Plaintiff's pleadings, he failed to show. That in a case where the Plaintiff shows no exclusive interest and fails to obtain leave of the other interested persons through the court to represent himself and the others in a representative case, the suit shall be struck out for lack of *locus standi*. It is only the Attorney-General, he argued further, who has the *locus standi* in such cases, and who will protect the interest of the members of the public. Then Mr. Mabeya attempted to show that the Plaintiff, from the pleadings, is only one member of the public who had no such exclusive interest in the suit premises No. Mombasa/Bock XI/102. If he used the suit

premises as a public park or garden, he did so like many other individuals of Tudor Area, Mombasa. If he, like the others who used the park, felt that their interest was being or was violated by the Mombasa Municipal Council or by the Defendants, then he could do so by obtaining leave of the others and of this court before filing this suit. Otherwise they could only petition or persuade the Attorney-General to bring an action to defend or protect their rights. The Plaintiff, Mr. Mabeya continued, did neither and that is how he ended in this court prematurely or wrongly, in respect of which this court should not assist him but should instead strike out the suit at this preliminary stage. In respect to the above submissions, Mr. Mabeya cited the following English and Kenyan authorities:-

1. *Atkin's Encyclopaedia of Court Forms in Civil Proceedings*, 2nd Ed. Volume 30 at pg. 4.
2. *Halsbury's Laws of England* 4th Ed. Vol. 37 t Paras. 216, 230, 231.
3. KLR Vol. XV, 1933 at Pg.86, 87, 88.
4. Mombasa HCCC No.134 of 1995.
5. *Thorne Rural District Council vs. Bunting*, [1971] All E.R., 439.
6. *Law Society of Kenya vs Commissioner of Lands*, Nairobi HCCC No.464 of 2000.
7. *Gouriet -vs- Union of Post Office Workers & Others* [1977] All E.R. at P.70.

Mr. Taib, in details, replied to the Defendants' submissions. He submitted that all the Defendants' arguments amounted to one single argument. It is that the Plaintiff's rights amounting to the cause of action represented by this suit is of the nature that needed to be brought to this court in a representative capacity with leave of court under Order 1 rule 8. He however went on to say that Plaintiff suit was not a representative suit that would need to be brought under Order 1 rule 8, nor did the Plaintiff bring the suit specifically on behalf of others. He argued that the structure of the Plaintiff's pleadings and the affidavits in support thereof do confirm so. He submitted further that the Plaintiff had, under the said Civil Procedure Rule, liberty to come to this court on behalf of himself and other persons or on his own behalf alone. He added that even under Order 1 Rule 8, the word "may" not "shall" is used. That allows a party to choose and that in this case, the Plaintiff came to court to protect his own interest and not necessarily that of others. Then he turned his guns in the direction of the authorities quoted by the Defendants, both local and English. He tried to distinguish all of them on the ground that the Plaintiffs in those cases, each filed his suit privately for himself and on behalf of others. In other words, although the suits were filed by one Plaintiff, he did so specifically but showed in the pleadings that he was also doing so for others. This, he argued, under Order 1 rule 8, would require the permission of the other persons so purported to be represented and also would require leave of the court which was lacking therein, and this, according to him led the courts to strike out the suits at the preliminary stages. But, argued Mr. Taib, this case is not similar to those quoted. Here, he said, the Plaintiff brought the suit specifically to protect his own interest, and if it will result later in protecting the interests of other persons, that is not his concern at the present.

The second prong of his attack was that the legal position established by the authorities quoted, while it may have been the correct legal position in Kenya before, is no longer tenable in Kenya. Our law, he argued, has separately developed and widened independently from the English position, and for the better. He then cited several recent Kenyan authorities which include:-

1. *Niaz M. J. Mohamed -vs- Commissioner of Lands.* HCCC No 423 of 1996.
2. *Albert Ruturi & J.K. Wanywela on behalf of Kenya Bankers Association & The Minister For Finance & The Attorney-General & The Central Bank of Kenya (Interested Party).*

I have carefully considered the strong and persuasive arguments from both sides of this case. I have also carefully perused documents in this case. I have further carefully perused and considered the decisions in the cases cited by both parties. I have, for the sake of clarity and to the extent I understand it, decided to carefully examine the legal positions contained in the English decisions as well as the Kenyan decisions. I will then decide what I believe is the correct or applicable position of the law in Kenya as I see it.

I understand the English authorities to state it as follows:-
That for an individual to have a *locus standi*, he must have an interest either vested or contingent in the subject matter before the court, which interest must be a legal one. Such interest must be above that of other members of the public in general. The position is well stated in the case of *Gouriet vs Union of Post*

Office Workers and Others [1977] All ER 70 at page 80 as follows:-

> "……..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 Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has a right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

Accordingly therefore, a Plaintiff in English Law, has to show that he has suffered over and above other members of the public to prove a private interest which will then give him a *locus standi* to sue. The reason is that he only has a right to assert his private rights and not public rights. If the rights violated are shown to be public and public here means a right available to every member of the general public not higher than that of all the rest and which therefore calls to the Crown alone for enforcement through the Attorney-General, he loses such right to the public. It can under those circumstances only be enforced on public's behalf by the Crown. In some the action is effectively brought by the person or body of persons seeking to prevent the commission or continuation of the public wrong. However, because such a person or body cannot by himself or itself bring the said action, it will bring the action in the Attorney-General's name with the latter's consent although the individual remains the nominal Plaintiff and will bear any possible order for costs. It is the position in English Law then, as I understand it, that where a limited number of persons are entitled along with the Plaintiff to any relief, they must all one by one assert their rights or seek such relief by joining as parties to an action, subject to any order of the court made on application for leave to file the action through one or some of them in a representative capacity.

Is the Kenyan situation the same? Mr. Mabeya argued that the legal position finding in Kenya is exactly the same as that in England. Mr. Taib disagreed. One of the earliest Kenyan cases where the issues arose is the case of *J. J. Campos and L. D'Cruz vs A.C.L. De Souza and Others*, [1933] KLR 86 – Vol. XV. The Plaintiffs who were officials of the Nairobi Goan Institute were sued in their personal capacity. A preliminary objection was taken by the Defendants alleging that there was no cause of action disclosed against the Defendants individually and that the court had no jurisdiction to grant the reliefs prayed for. It was further argued by the Defendants that the action should have been brought against the club as a whole or against the committee as representing the club. Order 1 rule 8 of the Civil Procedure Rules was cited and likened to Order 16 rule 9 of the English Supreme Court Rules. It was stated at page 87 as follows:-

> "It would seem that Order 1, Rule 8, not only lays down the practice to be followed, in cases where there are numerous persons having the same interest in one suit and one of such persons is suing or being sued on behalf of all, but contains a direction as to the manner in which the rights of all such persons must be safeguarded. It is in fact mandatory upon the Court to see that notice of institution of the suit is given to all parties interested, and from this it may be inferred that in a case of this sort the court is not at liberty to take cognizance of a suit by or against one or several persons selected from the body of interested persons unless and until the steps set out in the rule are carried out."

It will be observed from the above case that the principle under discussion is the same in Kenya as it was found in England. This principle was upheld and stressed in such authorities as HC.Misc. Application No.58 of 1997 – *Hon. Raila Odinga vs Hon. Justice Abdul Majid Cockar*, and *The Law Society of Kenya vs Commissioner of Lands and Lima Ltd and Uasin Gishu Land Registrar,* in Nakuru HCCC No 464 of 2000.

However, that is not how Mr. Taib saw the situation. He argued, forcefully, that while the Kenyan legal position had earlier been as Mr. Mabeya has argued it above, nevertheless, it has since very much changed; so much so that the current position is quite different and that the above-quoted cases do not represent the law in Kenya any more.

Mr. Taib started by stating that this is not a representative case and that the plaint does not claim it to be

one. That the Plaintiff is an individual who felt aggrieved and decided to assert a right which he felt was his right that has been violated. That the Plaint does not anywhere assert that it is being brought as a representative suit on behalf also of other persons. He further argued that the Plaintiff did not intend to come nor did he come under Order 1 Rule 8 of the Civil Procedure Rules. That the course he took was deliberately chosen, not accidentally or ignorantly. That Order 1 Rule 8, did not provide that a person must come to this court under it if the right specified therein is in question. If that were the intention of the Order and Rule, he argued, then the Rule should have been couched in an imperative language using the word "shall" but not the word "may" used therein. Accordingly, therefore, argued Mr. Taib, the Plaintiff is given a choice either to come in a representative capacity; in which case, he has to mandatorily have to follow the provisions of Order 1 Rule 8 aforesaid; or come as a private individual, provided he has a private right which he wishes to protect. From there Mr. Taib proceeded to distinguish all the authorities cited by Mr. Mabeya on behalf of the Defendants on the ground that in all of them the Plaintiff filed the suit individually but at the same time trying to act on behalf of others who had a similar interest to protect. In this case, he asserted, the Plaintiff filed the suit to protect his own interest and did not at any stage, as the pleadings indicate, claim to act on behalf of others like him.

Mr. Taib then cited several cases starting with that of *Niaz M.J. Mohamed vs Commissioner of Lands*, Mombasa HCCC No. 423 of 1996. The Plaintiff in the said case was a member of the public who resided in and paid his rates and taxes to Mombasa Municipal Council. The Commissioner of Lands meanwhile compulsorily acquired a piece of land within the Council for the purpose of a public road reserve. After the process of such acquisition was over, the Commissioner of Lands proceeded to allocate the same piece of land to a third private party for a different purpose, whereupon the Plaintiff in his private capacity filed a suit against the Commissioner of Lands questioning the source of his powers to allocate the piece of land. The Commissioner of Lands had argued that if there was a public interest to protect in respect to the plot, it was the Attorney-General and not the Plaintiff therein as an individual who had the *locus-standi* to bring the suit. The Attorney-General also argued that once the piece of land had been converted into Government land and the Commissioner of Lands had been seized with authority over it, the latter could allocate the same to anyone and for any purpose he chose. This court through my brother, Waki, J., rejected this position. He quoted an earlier case of *Babu Omar & Others vs Edward Mwirania & Another*, in Mombasa HCCC No.1 of 1996 in which he had earlier rejected the earlier English legal position and clearly made a finding that a citizen of a local authority who resided in it and who paid rates and taxes in the Council, has a right to question what on the affidavit evidence appeared to be *ultra vires* actions of the Council.

Mr. Taib also cited a second case – Nairobi High Court Misc. Civil Application No.908 of 2001 - *Albert Ruturi, J. K. Wanywela* & *Kenya Bankers Association vs The Minister of Finance & The Attorney-General and Central Bank of Kenya.* This case otherwise popularly referred to as "*DONDE*" case was a Constitutional Court case constituted of two High Court Judges. In the case it was asserted on behalf of the Respondents that for them to have a *locus standi* in the matter, the injury they complained of must be specific to them and that if the injury was suffered by everybody else, then it gave them no *locus standi* nor did it give anybody else such *locus standi* since none of them suffered over and above everybody else. The court found that the Kenya Association of Bankers was a registered Society constituted of 48 individual banks, each of which was interested in the matter which nevertheless was effectively represented by the Association. By filing the suit through the association they had made the matter easier to handle instead of each bank bringing its own separate suit. The court also established that no single member in the said association had a different view or acted against the view of others who wished to file the suit. That none of them could therefore be termed a busy-body and that there could therefore be expected no flood of cases to be filed in the court since that one single case would decide the common interest of them all. I have carefully considered the very strong arguments from both the Defendants and the Plaintiff as touching the issue of *locus standi.*

I have carefully examined the authorities cited by both sides. I have come to the conclusion that the legal position in England has always been the position here in Kenya and that English law as demonstrated by such cases as those hereinabove cited by Mr. Mabeya had always applied in Kenya. As earlier pointed out, such cases included the English case aforementioned of *Gouriet vs Union of Post Office Workers & Others, J. J. Campos & L. D. D'Cruz vs A. C. L. De Souze & Others, Hon. Raila Odinga vs Justice Abdul*

Majid Cockar and The Law Society of Kenya vs Commissioner of Lands & Lima Ltd & Uasin Gishu Land Registrar. That position if I may repeat it, is that a party to have a *locus standi* in a suit, ought to show that his own interest particularly, has been prejudiced or is about to be prejudiced. That he must show that the matter has injured him over and above the injury, loss or prejudice suffered by the rest of the public. Otherwise public interests are litigated upon by the Attorney-General or such other body as the law sets out in that regard. Furthermore that where there are numerous persons having the same interest in one suit and one of such persons wishes to sue, he has to do so for himself and on behalf of others in a representative capacity as per requirements of Order 1 Rule 8 of our Civil Procedure Rules. Under the said Order it is mandatory that leave of court has to issue before the suit is filed and that the court has mandatorily got to make a direction that notice of the institution of the suit has to be given to all the parties concerned, most preferably, through the print media or as the court will deem sufficient. In my view this legal position persisted unquestioned until the case of *Babu Omar & Others vs Edward Mwirania & another*, Mombasa HCCC. No.1 of 1996, supra. In this case my brother Waki, J. stated:-

> "There is nothing in the statutes relating to Local Authorities to exclude the court's ordinary jurisdiction to restrain ultra vires acts or nuisance or prevent breaches of trust. No authority has been cited to me to the contrary and I am not aware of one ……The applicants are members of the public. They reside and pay their rates to Mombasa Municipal Council. They would be entitled to vote here. And they have a right to question the propriety or otherwise of the dealings by their Council of the public land which the Councils hold in trust for the public. They may well be right that the Council is alienating a public road reserve contrary to the law. I would apply the same principles here in granting the orders sought even on this limb of the application."

I have carefully examined the old English cases and wish to suggest that the proposition by Waki, J., just quoted above may not be as strange or far-fetched from the thoughts of judges in the English cases which later finally formed the Kenyan legal position as shown hereinabove. For example in the *Gouriet* case, supra, at page 107, Lord Edmund –Davies stated thus:-

> "I have to say that none of the grounds advanced on behalf of the Attorney-General and trade unions have satisfied me that in the circumstances predicated it must necessarily be the public interest to deny such a claim by a private citizen. For example, it was urged that any change in the present law would open what were called the 'flood-gate' to a multiplicity of claims by busy bodies ……. I was also urged that the granting of an injunction could prejudice the subsequent jury trial of the wrong-doer, turning as it would on a different standard of proof than that applied in civil proceedings and that great complications could arise if …… the defendant was later tried and acquitted of the criminal charge. But exactly the same observation can be made at the present time in, for example, cases of nuisances …..in relation to which the Attorney-General not frequently seeks and secures injunctions. And it would always be open to the Attorney-General himself to intervene and make representations in civil proceedings brought by a private individual if he considered that the public interest required him to do so."

Although His Lordship nevertheless proceeded to deny Mr. Gouriet a *locus standi* due to what he called massive body of law supporting the position that it was only the Attorney-General who would bring such suits and not an individual like Gouriet due to fear of overturning a longestablished English tradition in such cases, it is clear from the quotation that there were occasions when necessity to widen the principle arose. I, however, observe that even Lord Denning more than once made some orbiter observation, especially in the case of *Attorney-General (on the relation of McWhirter) vs Independent Broadcasting Authority,* [1973] 1 All E.R. 689 at 698, 699 & [1973] QB 629 at 649, to the effect that an individual member of the public ought to apply for an injunction if the Attorney-General refuses leave in a proper case or improperly or unreasonably.

I do not exactly know the authority source of Waki, J's decision. It could be the cases that I have referred above or different others. What is important, however, is that he found that it was not convenient or even just or fair for this court in this respect to feel so much restricted in its approach to the principle of *locus standi* as are English Courts nor did he find it necessary to express himself in any muted language in the court's exercise of its inherent jurisdiction in relation thereto in both *Babu Omar & Others*, and *Niaz*

Mohamed Jan Mohamed's cases, supra. Then came the *Donde* case, facts of which I have explained earlier.

In the latter case on page 13 of the Court's Ruling, my brother Judges, Justice Mbaluto and Justice Kuloba, stated *inter-alia*:-

> "As a general principal relating to this type of public interest litigation, we wish to state, that what gives the *locus standi* is a minimal personal interest, and such interest gives a person a standing even though it is quite clear that he would not be more affected than any other number of the population."

Clearly, the old restrictive approach was no longer a fetter to the court. While, in my understanding of that court's judgment, the court was conscious of the English cases and the older Kenyan authorities holding the narrower approach to the principle under discussion, it nevertheless clearly felt at liberty to now take a wider perspective for reasons therein given. The court recognized that organizations can have an interest of their own as such organizations. In respect of such rights, the organizations have a right similar to that of an individual private member of the public. The organization here sues to protect the interests within the old English principle. The Court however also pronounced a representative approach by the organizations. It said on page 13, bottom –

> "With regard to representative suits by organizations on behalf of their members, ……we hold as a matter of principle, that representative organizational standing in court is permissible, provided that (a) the organization's members have standing to sue in their own right, (b) the interests which the organization seeks to protect are germane to the organization's purpose ….and (c) neither the claim nor the relief sought requires individual participation of the members ……."

Since this court is not presently concerned with organizations and having noted that there are cases in which organizations are treated as private individuals who can have *locus standi* in certain matters as of right, I decide to say no more in respect thereof. I once more however, turn court's attention to that court's decision and state that the court went further than any other court has gone to liberalize the principle of *'locus standi'* in the Kenyan jurisdiction. As I understand it the English courts for several centuries, and our courts since colonization, strictly interpreted the legal principle under discussion as earlier explained. Prominent judges, one after another, made pronouncements from time to time, guarding the principle. Perusal of such cases will show the main grounds why they continued maintaining the status quo. The basic broad principle sprung from the accepted logic that for the court to have jurisdiction to declare any legal right the right must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event; to that end such court's jurisdiction was not there to declare the law generally or to give advisory opinions but it was confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else who is not before it. That is why it became necessary that the rights of anyone else were logically and of necessity to be taken up and asserted by the Crown through the Attorney-General who alone logically should appear to represent the rest of the public over and above the private individual. While, however, the basis of such a rule at first and for many years thereafter, made sense, development of the law in my view necessitated a need for some change to accommodate new situations that arose as noted by several eminent judges such as Lord Denning as earlier noted. It is my further view, however, that the known English tradition of not easily giving way to change prevented any development in the direction of extending or expanding the legal principle under discussion. I believe however, that England is an old country in terms of constitutional development. It has had many centuries to evolve and many opportunities to test and test again its legal system. We can therefore easily say that where the English Courts have failed to bring a change, they have done so deliberately to achieve certain purposes and maintain tradition. This can be confirmed by the statement of Viscount Dilhorne in *Gouriet* case at page 95, touching on the issue of *locus standi* where he says:-

> "……we are asked not just to extend the existing law but to override a mass of authority and to say that long established law should no longer prevail. That is a question for the Legislature to

consider ……

> I must confess to considerable doubt whether it would be in the public interest that private individuals ……should be enabled to make such applications in cases where such interest as they have in common with all other members of the public and when the object is the enforcement of public rights."

In the same case at page 105, Lord Edmund-Davies in the same unwilingness to reconsider the same principle, stated:-

> "The law is so firmly established as to form.....a mould but one which he (Gouriet) invited your Lordships to reshape or, failing that, to break. Can we do so? And if so, ought we? It is certainly of considerable antiquity."

His Lordship, of course, answered the question in the negative and confirmed that unwillingness to change, even when he had an opportunity and reason to do so.

I will now revert to the Kenyan situation, where we have had political independence as a nation for only forty years. We remained linked to Britain in terms of our legal system, economic and social affairs and even in respect of our other developmental aspects. Unlike our colonial power, however, our economic, legal and social systems and structures had to grow faster to move side by side with the other systems of the world. This development was bound to bring pressure upon our above mentioned systems. Each aspect had to grow fast therefore to fit in. Our legal system was accordingly also bound to change where necessary to accommodate new situations as the need arose. The courts, thus, could not operate in isolation but needed and will need in future to be prepared to bring change where need arises for the good of all. If this court found that any principle upon which our economic or social or other structures hinge is threatened due to dependency upon any English Legal Principle which has ceased working as it ought in the best interest of our society, should we judges sit back and fold our hands helplessly? I would loudly answer in the negative. In my opinion the court should respond to the situation by adjusting the principle to suit our circumstances even if that will mean deviating away from the old basic English principles. That is why I loudly acclaim the pronouncement by my brother Judges Mbaluto, J., and Kuloba, J., in the *Donde* case, supra. In my opinion the learned Judges timely responded to a situation which was already crying for help, a cry which Justice Waki had heard and recognized in the two cases mentioned earlier. I would hold that the two courts lifted our courts in respect to the issue of the principle of *locus standi* and firmly set them on a different but higher setting from that of England. To support that view, I wish to refer to the *Donde* case where the learned Judges stated ……

> "In our very considered opinion carefully reached, ……..like in human rights cases, public interest litigation, including lawsuits challenging the constitutionality of an Act of Parliament, the procedural trappings and restrictions, the preconditions of being an aggrieved person and other similar technical objections, cannot bar the jurisdiction of the court, or let justice bleed on the alter of technicality. This court has vast powers under Section 60 of the Constitution of Kenya, to do justice without technical restrictions and restraints; and procedures and reliefs have to be moulded according to the facts and circumstances of each case and each situation. It is the fitness of things and in the interest of justice and the public good that litigation on constitutionality, entrenched fundamental human rights, and broad public interest protection, has to be viewed. Narrow pure legalism for the sake of legalism will not do. We cannot uphold technicality only to allow a clandestine activity through the net of judicial vigilance in the garb of legality.
>
> Our legal system is intended to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority which is expected to move to protect the Constitution drags its feet, any person acting in good faith may approach the court to seek judicial intervention to ensure that the sanctity of the Constitution of Kenya is protected and not violated. We state with a firm conviction, that as a part of reasonable, fair and just procedure to uphold the Constitutional guarantees, the right of access to justice entails a liberal approach to the question of *locus standi*. Accordingly in constitutional questions, human rights cases, public interest litigation

and class actions, the ordinary rules of Anglo-Saxon jurisprudence, that an action can be brought only by a person to whom legal injury is caused, must be departed from. In this type of cases, any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of the Constitution, or injury to the nation. In such cases the court will not insist on such a public-spirited individual or social action group espousing their cause, to show his or their standing to sue in the original Anglo-Saxon conception."

Having thus quoted at length the findings of *Donde's* case, I am satisfied that there is no need for me to add any further comments to it. Suffice it to say, that that court, in strong clear and in no doubtful language and terms, discarded the restrictive approach to the principle of *locus standi* as we knew it before the pronouncements made in the cases of *Babu Omar & Others* and *Niaz Mohamed Jan Mohamed's* cases (supra) by His Lordship Justice Waki. While the latter pronouncements were made by a court of similar jurisdiction as this one, the court was nevertheless a lawfully constituted Constitutional Court whose pronouncements would carry more than normal persuasive weight. I on my part state that I will follow the pronouncement therein declared. Having come to the above conclusion, it is now my duty to apply the new position I have accepted hereinabove, to this case.

The Plaintiff, as established by the affidavit depositions, is a Mombasa resident who resides in Tudor area and pays taxes and rates to the Municipality. He votes therein and has lived in the town for many years. The subject suit premises known as Plot No. 102/BLOCK XI/MI and popularly known as 'Dickson Garden' or *'Uwanja wa Mayaya'* is found within the Municipal Council of Mombasa. The plot is said to have been enjoyed by members of the public as a public park where the Plaintiff/ Applicant would go and relax for those many years. Basing it upon the said affidavit information and without deciding the point, I would hold that the plot was originally held in fee simple by a certain Mombasa family before the estate later, first reverted to what is shown in the register as 'Coast Region' with the Mombasa Municipal Council holding an interest thereon by virtue of Section 274(g) of the Local Government Regulations 1963. Thereafter the plot was, under what can be stated as mysterious circumstances, which may or may not be explained or proved during the hearing of the suit, converted from operation under the Registration of Titles Act, Cap.281 to Government Land Act, Cap. 280. From under the latter Act, the First Defendant allocated the same to the Second Defendant with the Title under the Registered Land Act, Cap.300 for the 2nd Defendant's private use. The Plaintiff who felt that he had been deprived of the enjoyment of the plot as a public park, and who also believed the plot had been wrongly and unlawfully converted to the Government Lands Act as aforesaid for the purpose of allocating the plot to a private party, filed this suit in this court seeking for the rectification of the alleged wrongful acts. He asserts that he filed the suit not under Order 1 Rule 8 of the Civil Procedure Rules or on a representative capacity but as an individual whose right of enjoying the facility as a park, were violated. I have considered these facts and come to conclusion that the applicant's rights will not conflict with those similar rights of others who have been using the park as a relaxing place. The existence or identity of this class of persons who come to the park to relax, like the applicant cannot be denied. His interest is to stop the First Defendant from allocating the plot to any third party or if it has already been allocated and the allocation is later found to be not subject of cancellation, then to force the third party allocated the plot to avail it for its original use with terms as to open access to it as were operative before allocation. I have also considered the provision of Order 1 Rule 8. It states:-

"(1) Where there are numerous persons having the same interest in one suit, one or more of such persons <u>may</u> sue or be sued, or <u>may</u> be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.
(2) ……
(3) 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."

The above provisions are quite clear. If the people having an interest in a suit are numerous one of them or more of them may sue or be sued on behalf of or for the benefit of others so interested. I understand this to mean that once the person or persons decides to sue on behalf of himself and on behalf of others in the identified class of persons, then he or they must do so in accordance with the requirement of the Order

and as clearly stated in the *Campos* case, supra. What about if a party feels aggrieved alone as in this case and files a suit to assert his right even if such a right asserted may benefit other persons? Should this court stop him from accessing the court? If the court so stops him, where else should he go to seek a remedy? Can it be validly argued that the intention of the Legislators was to deny such a party an easy access to the court of law? Or can it be argued that the legislators intended to impose on such a party a duty to stop there and start searching for or identifying the other persons who may have a similar interest to join them in suing or to obtain their consent to sue on their behalf. In my view a party who has a right to protect should have freedom to assert such a right even if the result of it will be that other members of that class may end up in benefiting. That is why I believe the legislator did not use the imperative word "shall" but instead used the word "may" to qualify the word "sue". That is why also the legislator provided in sub-rule (3) that a person may apply to the court to be joined as a party if he feels that a suit filed is on his behalf or for his benefit. It would rather be so than to stop a party access to the court of law and justice.

Before I make the final remarks, I find it necessary to point out that this case and this application also raise the issue of whether or not the Attorney- General who is the protector of public interest in the now notorious issue of land-grabbing, has played his part in the manner he should, to protect the state and public institutions from losing public land to private individuals. Has the office taken up the position of protecting the public from being deprived of the public land the subject matter of this suit? Would the Attorney-General's Office under these circumstances and in respect to this case have been expected to grant consent to the plaintiff, if requested, to assert and protect what might turn out to be a public interest in the plot here? It has been alleged in the pleadings and affidavit evidence that the plot became public land at one stage and that the conversion process was flawed, a matter the Attorney-General's Office for the good of the public, would and should be interested to investigate in the larger interest of the public. Is the Attorney-General Office's posture, in this case, projecting that image? This court finds no necessity of attempting to get answers to these questions at this stage.

It is my finding and holding however, that:-

> a) The Defendant's preliminary objection on a point of law amounted to no such preliminary objection because the issue of limitation under S.136(1) of Government Lands Act, Cap.280, stands to be decided on evidence.
>
> b) The Defendant's preliminary objection that the Plaintiff has no *locus standi* is also unsustainable.

Both are rejected and dismissed with costs to the Plaintiff/Respondent in this application.

As was stated in the *Mukisa* case, supra, by Sir Charles Newbold, improper raising of points by way of preliminary objection which do nothing but unnecessarily increase costs and on occasions, confusion of the issues. Instead of spending the much time spent herein on non-existent preliminary issues, this court could easily by now have heard and decided the main application. As it happens, that has not been done, thanks to the Defendants. However, as the said iminent Senior Judge also stated in the same occasion, the courts must discourage such practice. I accordingly order that the awarded costs to the Plaintiff will be agreed upon or be taxed before the main suit is heard and determined on a higher scale. It is so ordered.

Dated and delivered at Mombasa this 1st day of September, 2002

D.A. ONYANYA

JUDGE