REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 6153 of 1992

Locus standi – rate payers – whether a rate payer has sufficient interest to challenge in court the action of a public body whose expenses he contributes –

Judicial Review – public authorities – whether public authorities are accountable to a court of law for the lawfulness of their action

The applicants are two Nairobi residents and rate payers. They have instituted the present action against the 1st respondent, the Nairobi City Council and the 2nd respondent, the erstwhile Chairman of the Nairobi City Commission inter alia to restrain the 1st respondent from permitting the 2nd respondent to continue to enjoy certain facilities and perquisites which he had enjoyed when he had been the Chairman of the Nairobi City Commission. These facilities and perquisites are the 1st respondent's house LR No 330/492 Korosho Road (it had been described in the pleadings as LR No 330/493 Korosho Road, but this was subsequently corrected to read LR 330/492 Korosho Road), its office known as the Mayor's Parlour and telephones therein, and its Mercedez Benz motor car registration number KAA 807S.

Upon the filing of the suit, the applicants applied for and obtained exparte, a temporary injunction which did not apply to the 1st respondent's Korosho Road house because at that time the correction in its description had not yet been made, but which did apply to all the other facilities and perquisites of the 1st respondent already described. At the beginning of the subsequent, inter partes hearing of the related application, a preliminary objection was raised on behalf of the 2nd respondent that the applicants had no locus standi to bring the action they had brought. This same ground was among the grounds of objection filed on behalf of the 1st sefendant. I decided it would be convenient and proper that this ground should be argued first, for if it succeeded, that would be the end of the that matter. The arguments put forward in support of the objection were that the applicants had no locus standi since they had not shown that they had sufficient interest in seeking the relief they were seeking; that since what they claimed was a matter in the realm of a public wrong, ex relation, they required the permission of the Attorney General to bring the action which they had not got; that the applicants have improperly brought the action in a representative capacity; and that the applicants are mere busy bodies who seek to abuse the process of the court by instituting the action. But in considering this matter of a mixed question of law and fact, I have to take into consideration its surrounding circumstances. They are simply this that the applicants say among other things, that as rate payers, they object to the 1st respondent continuing to extend its facilities and perquisites to the 2nd respondent after he had ceased to be the Chairman of the Nairobi

City Commission and that this amounted to a misuse of the funds of the 1st respondent and that as ratepayers, they had sufficient interest to bring the action. I think that it is now well settled that a ratepayer as opposed to a tax payer, has sufficient interest as such, to challenge in court the action of a public body to whose expenses he contributes. This was eloquently set forth in the following passage from the speech of Lord Diplock in the House of Lords case of IRC v National Federation of Self-Employed and Small Business Ltd (1982) AC 617 at 740 et seq:

"For my part I need only refer to Reg v Greater London Council, Ex parte Blackburn (1976) 1. WLR 550. In that case Mr Blackburn who lived in London with his wife who was a ratepayer, applied successfully for an order of prohibition against the council to stop them acting in breach of their statutory duty to prevent the exhibition or pornographic films within their administrative area. Mrs Blackburn was also a party to the application. Lord Denning MR and Stephenson LJ were of opinion that both Mr and Mrs Blackburn had locus standi to make the application: Mr Blackburn because he lived within the administrative area of the council and had children who might be harmed by seeing pornographic films and Mrs Blackburn not only as a parent but also on the additional ground that she was a ratepayer. Bridge LJ relied only on Mrs Blackburn's status as a ratepayer; a class of persons to whom for historical reasons the court of King's Bench afforded generous access to control ultra vires activities of the public bodies to whose expenses they contributed. But now that local government franchise is not limited to ratepayers, this distinction between the two applicants strikes me as carrying technicality to the limits of absurdity having regard to the subject matter of the application in the Blackburn case. I agree in substance with what Lord Denning MR said at p559, though in language more eloquent than it would be my normal style to use:

'I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and courts in their discretion can grant whatever remedy is appropriate'. (The italics in this quotation are my own)".

Lord Diplock concluded his speech with the following penultimate paragraph with which I respectfully also agree and adopt, in my consideration of the matter now before me:

"It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped. The

Attorney General, although he occasionally applies for prerogative orders against public authorities that do not form part of central government, in practice never does Kenya Law Reports so against government departments. It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge".

The matter that the applicants have raised is not a misguided or trivial complaint of an administrative error; it is one that involve a serious allegation of misapplication of public funds by a local authority.

As stated in Constitutional and Administrative Law, ECS Wade and AW Bradley, (10th Edn, 1985 pp 660 - 661):

"An injunction may be claimed against a public authority or official, to restrain unlawful acts which are threatened or are being threatened, for example to restrain unlawful interference with private rights or to restrain ultra vires action such as improper expenditure of local funds".

This brings me to the issue whether the present suit can be instituted as a relator action without leave of the Attorney General. In the recent case of Oginga Odinga and 3 others v Zachariah Richard Chesoni and the Attorney General, Misc Civil Application No 602 of 1992, the three judge constitutional bench of the High Court, when dealing with the question of relator actions had this to say:

"When it comes to the public interest, where a party suffers generally as any other, then relator actions lie. These actions fall under as 61 and 62 of the Civil Procedure Act and they are limited to public nuisance and public charity. The Attorney General is the principal aggrieved party but 2 or more private persons, having interest in the given action, and with the Attorney General's written consent, can sue".

That a relator action was required in the specific action concerning a public charity as provided for by the Civil Procedure Act, was reiterated in the case of Wakf Commissioners v Mohamed bin Umeya bin Abdulmajid bin Mwijabu and Ali Mohamed Ali Bashir (1984) 2 KAR. Hancox JA as he then was had this to say:

"One other final matter remains. The respondents did not initially obtain the Attorney General's consent required under s 62 of the Civil Procedure Act. It was given for the institution of this suit by the then Attorney General on 4th June, 1977".

But even if the present action can be said to be a relator action, and I do not think so, I will not prevent the applicants from bringing to the notice of this court the improper conduct of the 1st respondent. I have already referred to the penultimate paragraph of Lord Diplock speech in the National Federation case supra. Nearer home, Hancox JA as he then was, stated in Njau v Nairobi City Council (1982-1988) 1 KAR 229 at 239 that:

"Even though that became a relator action, the tenor of Lord Denning's remarks, and that of Lord Diplock in the National Federation case, show that the tendency is not to prevent people bringing to the attention of the courts unlawful conduct by public authorities with a view to redress or getting the unlawful conduct stopped".

As to the objection that the applicants had followed the wrong procedure in bringing a representative suit, that has only to be stated to be rejected. It is true that in the plaint and the affidavits in support of the injunction application, it is averred that the 2nd respondents' use of the facilities and perquisites of the 1st respondent would give him an unfair advantage over the applicant and other persons who are like the 2nd respondent, aspirants in the forthcoming civic elections, but this passing remark does not make the present suit a representative one. And though I do not think that the political rivalry between the applicants and the 2nd respondent gives the former any cause of action and locus standi, the applicants as I have already stated, have as rate payers, sufficient interest in bringing to the attention of this court any alleged unlawful act being committed by the 1st respondent and to seek its stoppage.

The issue of locus standi is not a matter to be considered in the abstract and apart from the surrounding circumstances which I have already alluded to, there are other relevant matters revealed in the affidavits filed in support of and in opposition to the injunction application. It seems to me that there is more than meets the eye concerning the circumstances under which the 2nd respondent because a tenant of the 1st respondent. Secondly how did house No LR 330/493 which had been repaired and lavishly furnished as the official residence of the Mayor of the 1st respondent pass into the hands of another person.

In the result and taking into account all the authorities cited to me in this matter, I rule that the applicants have locus standi to bring the present suit.