**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Kneller, Hancox JJA & Chesoni Ag JA )**

**CIVIL APPEAL NO. 74 OF 1982**

**BETWEEN**

**ALFRED NJAU..... 1ST APPELLANT**

**ALUCHIO LIBOI..... 2ND APPELLANT**

**JOSEPH MUYA MUKABI..... 3RD APPELLANT**

**PETER INYANGALA..... 4TH APPELLANT**

**AKHONYA ANALO ..... 5TH APPELLANT**

**JACOB GICHIGO.....6TH APPELLANT**

**AND**

**CITY COUNCIL OF NAIROBI.....RESPONDENT**

**JUDGMENT**

Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala, Akhonya Analo and Jacob Gichigo, the appellants, are aggrieved by the dismissal of their plaint with costs by the High Court (Platt J) (so was Alfred Njau, a coplaintiff, but he died after the appeal was filed).

The learned judge found, among other things, that the appellants, had no *locus standi* and the appellants submitted that he erred in this on two grounds. First, because it was not raised in the written statement of defence of the City Council of Nairobi, the respondent, or raised as a preliminary objection before the trial began. Secondly, on the evidence, the appellants were proved on the balance of probabilities to have a right to bring this action and appear before the High Court.

The appellants therefore ask this court to reverse Platt J, hold that they have *locus standi*, send the suit back to him to deal with the other issue or issues, subject to further submissions by the advocates for both sides, answer them and so decide the matter on the merits.

The respondent, in turn, asks this court to uphold the finding of the High Court and dismiss the appeal with costs.

The appellants live and work within the respondent’s boundaries and in their plaint of January 20, 1981,

they explained that they joined in this suit because common questions of law and fact arose out of the actions or transactions of the respondent so instead of bringing separate suits they joined in one, as the provisions of order I rule 1 of the Civil Procedure Rules allows them to do.

They also claimed to sue on their own behalf and on behalf of all other persons having the same interest because order I rule 8 provides for this but, according to their advocate, Mr Ombete, they could not do this because they were not authorized by the court to do so and they did not follow the procedure which is set out in order I rule 8(2) for giving due notice of the institution of this suit. He said, I think, that they abandoned at the trial their assertion that they were suing on behalf of all other people having the same interest and so proceeded with it as individuals and that suit was treated as a "test action" and Mr Opiacha, for the respondent, agreed, I think, that this is what happened. None of this appears in the record of the trial but it is clear that it was the right course for the trial to take. *Smith and Others v Cardiff Corporation* [1953] 2 All ER 1373 (CA).

They described the respondent as a body corporate with perpetual succession established under section 12 of the Local Government Act (cap 265) and this was admitted.

The appellants asked the High Court to make and grant two declarations and one order. The two declarations were, first, that the respondent's resolutions allocating 125 houses to 125 people claiming to be former residents of Pangani estate were invalid because they were *ultra vires*. Secondly, if the respondent acted within its powers, it did not give effect to its own resolutions because the houses were not allocated to those who used to live in Pangani estate or their next-of-kin but to strangers, so the allocations were unlawful and must be rescinded. The order was in the form of an injunction asking the respondent to take back the 125 houses it had allocated to the strangers.

The basis for asking for these declarations and that order was set out in paragraphs 5 to 18 inclusive of the plaint. Briefly, the appellants asserted, Nairobi was divided in 1932 and 1933 into three different "residential areas", one for Europeans, one for Asians and one for Africans, as a result of a recommendation of the Carter Land Commission.

The area reserved for the Asians to occupy included the village of Pangani in which Africans then lived so the respondent's predecessor, the Nairobi Town Council, built 175 blocks of rooms or houses in Pumwani which is now known as Shauri Moyo. They were ready by 1937 and 1938 and the Town Council offered them to the Africans who were no longer allowed to live in Pangani. This was unwelcome to some of the Pangani villagers, not only because they did not want to leave Pangani, in any event, and it was unclear what interest they would get in the new houses and or plots, but also because the Town Council had unwisely or inadvertently built them on what had been a burial ground and most of the Pangani people did not wish to disturb the spirits of those who had been buried there by living in houses built above their graves. Only 39 Africans moved and one of them left and went back to his home in Tanganyika and then there were only 38 from Pangani in the Town Council's 175 new houses in Pumwani (Shauri-Moyo). All the others from Pangani were paid compensation by the Town Council and with this they migrated to another part of Nairobi known as Kibera.

The remaining 137 houses were owned by the Town Council as the landlord and it rented out rooms in them on a month to month tenancy to any African who wanted one and who could afford the rent which varied over the years and was only Kshs 49 a month at the end of January 1981. These appellants were neither former residents of Pangani nor their next of kin and they were renting their rooms in the 137 houses on monthly tenancies at Kshs 49 a month.

The Town Council, and the respondent, apparently abandoned the scheme to put the erstwhile Pangani villagers or their next-of-kin in the houses at Shauri-Moyo and when the former Pangani residents who were unconcerned as to what the spirits of those buried beneath the houses felt about those in them began to die off, the Town Council or the respondent took over their houses and let them out to Africans with no Pangani residence qualifications of any sort on the same terms. They did this with 20 of the 38 houses allocated to those who had trekked from Pangani.

Later the respondent revived the Pangani policy and resolved that the next-of-kin of the Pangani Africans who had been moved to the houses at Shauri-Moyo and later died should be allocated the houses of the deceased. The respondent selected 20 such people for 20 houses and that was according to its resolutions of November 20, 1973. This led to other resolutions allocating the other 117 houses to people who said they were either from Pangani or their next-of-kin and 105 houses were handed over to 105 people who were said to have qualified under this resolution but 95 of these were not allowed to occupy theirs because there was an uproar from those who did not get one and the Government asked the respondent to think again.

The respondent by resolution then chose on June 6, 1979, 115 people whom it accepted and asserted were either former Pangani residents of Pangani village or their next-of-kin. These were to receive something called a "head title", but in the meantime they were given a "tenancy agreement by the respondent. So, by the middle of 1979, the respondent had allocated 25 houses from 137 houses at Shauri-Moyo to people said to have been villagers in Pangani in 1938 or their next-of -kin (although in 1938 the Town Council could not find anyone from Pangani brave enough to accept their new 137 houses there and had compensated the superstitious who dared not live there).

The respondent, in its written statement of defence, admitted the houses were built in 1938 and 20 were allocated to people who lived in Pangani but not their next-of-kin and that later 105 houses were allocated to the same group of Africans and then in early June 1979 another 115 to ex- Pangani residents. All along, those to whom those were handed over were people who had lived in Pangani before 1933 and not their next-of-kin or strangers.

The appellant's case was all those resolutions of the respondent allocating 137 houses to 125 People, claiming to be former Pangani villagers, were beyond and outside the respondents statutory powers, without legal authority, and so *ultra vires* and if that were wrong and the resolutions were *ultra vires*, the respondent did not, in fact, allocate 125 houses to those who used to live in Pangani.

The respondent denied all this, and said those resolutions were lawful and within its statutory powers and they had allocated the houses to people who used to live in Pangani.

The appellants also pleaded that they were aggrieved by the respondent's actions because they used to be tenants of the respondent and now they have become tenants of the 125 "strange" people which meant that their tenancies were subject to the jurisdiction of the rent tribunal under Rent Restriction Act (cap 296) which was not so when they were tenants of the respondent.

The appellants also claim to have a right to sue the respondent because they were voters in the civic elections to the City Council.

The respondent denies that the appellants were entitled to sue either as tenants or as voters. The issues were not framed by the advocates for the parties and no preliminary objection was taken by the respondent to the appellants' capacity to bring the action or have it heard in the High Court until the final submissions by the advocate for the respondent (to which Mr Ombete for the appellants made a full reply). The cross-examination of the witnesses for the appellants was also directed (in part) to what was the standing of these appellants.

It may be that, in so many words, the respondent had not pleaded that the appellants had no capacity to file this action, but they had denied that the appellants were tenants of the respondent or that they voted or had the right to vote in the civic elections for the respondent council, so, in effect, "capacity" was in issue and the course the trial took reveals that the appellants were not taken by surprise when Mr Opiacha made his submission that they had no *locus standi*. The first of the two attenuated grounds of appeal fails.

Did the appellants, as they asserted, prove on the balance of probabilities, that they had the capacity to institute this action? There was no question of their being infants or anything but of sound mind or suffering from any legal disability. They did not bring their action as tenants against the respondent as landlord. Their prayers would have been different. They were not asking for the leave of the court to

bring an application for an order of *mandamus* or *certiorari* or prohibition and they did not ask the court to exercise its discretion as to whether or not such an order should go forth, when they would have had to show that they had some 'real interest' to enable them to come to court and ask for leave or such an order. Compare *Reg v Lewisham Union* [1897] 1 QB 498, 500, 501 in which the test was held to be that the applicant must have "a legal specific right" to ask the court to exercise its general power to enforce the performance of its statutory duty by a public body and *Regina v Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424 (QBD) in which, again, in another application for an order of *mandamus*, the test was held to be whether the applicants had "sufficient interest" to enable them to come to court and ask for this order.

Nor was this an action in which the appellants could only sue by joining the Attorney General? The authorities on this declare that a plaintiff can sue without joining him:

> a) where an interference with a public right involves interference with some private right of the plaintiff; or
> b) no private right is interfered with, but the plaintiff, in respect of his private right, suffers special damages to himself from interference with the public right. See Buckley J in *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114; *Barrs v Bethell* [1981] 3 WLR 890 (Ch D) Warner J.

No; this was not an ordinary suit by six tenants of the respondent, whose resolutions, actions and transactions, so far as their tenancies were concerned, they claim were illegal and, as a consequence, they have a right to ask the High Court to make a declaration saying so and an order to reverse what they had done, as a consequence of these illegal resolutions, actions and transactions. Now, it is certain, that a local authority is accountable to a court of justice for the lawlessness of what it does, and the court is the judge of this. It is accountable to parliament for the way it does it, and parliament is the judge of that. See Lord Diplock in *IRC v National Federation of Self Employed and Small Businesses Limited* [1981] 2 WLR 722, 723 (HL). The House was concerned with an application for judicial review under order LIII rule 3(5) of the Rules of the Supreme Court which date from 1977, it is true, and we do not have such an order and rule, but I am only respectfully culling from that speech the general law on the accountability of a local authority to a court of law.

A century and half ago, or so, it was held that a council, such as the respondent, holds its property for public purposes. Sir Charles Pepys MR in *AG v Mayor of Liverpool* (1835), 1 M & Cr 171, 201-202 and 30 years ago it was held that it was right and proper that the management of a council's housing estates should be capable of being challenged in a court of law. See Dankwets J in *Smith v Cardiff Corporation* (No 2) [1955] Ch 159, 176 (Ch D).

So the next question, in my view, is who can challenge the respondent, about this? Certainly not a busybody interfering in things which do not concern him, whether he lives within the boundaries of the city or outside it. See *Regina v Greater London Council, ex parte Blackburn and Another* [1976] 1 WLR 550 (CA). It must be someone who has sufficient interest in the matter to which the suit relates, just as under RSC order LIII rule 3(5) the applicant must have a sufficient interest in the matter to which his application relates.

An example of just such an action before Platt J was that of the plaintiff in *Luby v Newcastle-Under-Lyme Corporation* [1964] 1 All ER 84, in which Luby sought declarations that, in determining his rent, the defendants ought to have regard to his financial position and personal circumstances and that the resolutions of 1962 increasing his rent by 4s 3d a week (!) were *ultra vires* and void. The issues in that action revolved around the provisions of sections 111 (1) of the Housing Act 1957 under which the defendant was empowered to charge rent (and change them) for the tenancy or occupation of its houses, provided under Part 5 of the Act.

The only relevant statutory provision cited to the High Court, and in this appeal, was section 145(f) of the Local Government Act (cap 265), which permits a local authority to sell, let or otherwise dispose of any of its moveable or immovable property, subject, in some instances, to the consent of the Minister.

Diplock LJ, sitting alone as an additional judge in the Queen's Bench Division in *Luby's* case, had to consider whether the English Housing Act required the defendant to operate a differential rent scheme for its houses, based on the means of its tenants, and that, in turn, involved a dose analysis of the Act's sections dealing with rents, which the defendant could charge, which were to be 'reasonable' ones. The respondent, in this appeal is authorised to let its immovable property seemingly without qualification of that discretion.

During the course of his judgment Diplock LJ, said (at p 89 ff):

> "The court's control over the exercise by a local authority of a discretion conferred on the authority by parliament is limited to ensuring that the local authority has acted within the powers conferred. It is not for the court to substitute its own view of what is a desirable policy in relation to the subject matter of the discretion so conferred. It is only if it is exercised in a manner which no reasonable man could consider justifiable that the court is entitled to interfere."

and it may be that the passage will help the High Court to deal with the appellants' claim for declarations and one order. Diplock LJ dismissed Luby's action because he found the defendant's decision not to institute or operate a differential rent scheme was a lawful exercise of its discretion. He did not hold the plaintiff had no capacity to sue for the relief he did or suggest he should ask the Attorney General to do it for him (and it was never suggested he should do either).

Platt J found that in the suit before him, each plaintiff was a tenant of the respondent who suddenly received a circular notice saying that he now became a tenant of someone who was living in Pangani before 1933.

Thus, by a side wind, as it were, the appellants became sub-tenants of the respondents. This was done as a consequence of resolutions which the appellants claimed were *ultra vires* the statutory powers of the respondent. One result was that the appellants and, presumably, the new 'direct' tenants of the respondent, were subject to the jurisdiction of the relevant Rent Tribunal. The appellants say that the rents were raised threefold and one former tenant of the respondent, but now a sub-tenant of it, was evicted for arrears of rent, which was not what happened in the good old days when they were all simply the direct tenants of the respondent. As landlords, local authorities are in a privileged position. They are not harassed by the frustrations of the Rent Restriction Act, Dankwerts J in *Smith v Cardiff Corporation* (ibid). Here is a case where tenants wish to be free of them (which is unusual).

The respondent cancelled what it had done so the appellants became direct tenants of the respondent but the favoured or fortunate 125 people who had been made the respondent's direct tenants of the houses at Shauri- Moyo brought an action asking for an injunction against the respondent restraining it from repossessing those 125 houses. They were given by Simpson J (as he then was) a temporary injunction in those terms until the trial was heard. The learned judge suggested that there should be an inquiry into whether or not those 125 people were indeed former residents of Pangani or their next of kin. The appellants are saying, however, that the respondent is acting illegally when it changes their monthly tenancy, as a result of resolutions which resurrect a policy of the late 1930's, which provided in Shauri-Moyo new houses for those who gave up their old ones in Pangani, when it became an Asian residential area, especially when the Pangani residents who refused to go there were given compensation and re-settled at Kibera, and when for nearly fifty years, rooms in these houses had been let to any African. Furthermore, the appellants continue, the respondent is not even following this revived policy, if it is a lawful one, because the houses are being handed over to people who were never living at Pangani or their next of kin.

Now, on all that, it seems to me that this action was well constituted. These appellants, as tenants of these rooms, were the very people, perhaps the only people, to challenge the respondent in the High Court in the management of their housing estates, and they were not just busybodies interfering in things which did not concern them. They had a *locus standi* because they were tenants of the respondent and adversely affected by these resolutions.

The fact that they were voters in the civic elections would not, to my mind, in these circumstances, have given them this capacity to sue the respondent in this matter although it might if they were appealing under section 238 of the Act against a decision of a Local Government Inspector. *Evans v Collins* [1964] 1 All ER 808 (QBD).

Capacity to sue is a matter of mixed law and fact, which is to be decided on legal principles (with common sense coming into it) and not a matter of discretion. The learned judge, with respect, erred when he decided that the appellants had no *locus standi* in the matter to which the suit related. The second ground of appeal succeeds.

The appellants' advocates asked this court to reverse the judge on this point and then proceed to answer the other issues but when he agreed that the answers to them involve, among other things, the credibility of the witnesses who testified in the High Court, he backed and submitted that the action should be resumed before the same learned judge to answer the remaining issues framed by the advocates for the parties after he had heard any further submissions on them.

Accordingly, in my view, the appeal should be allowed with costs here and below to date, and the action remitted to the learned judge to answer the remaining issues accordingly. Hancox JA and Chesoni Ag JA agree, so those are the orders of this court.

**Hancox JA.** In the years 1922 and 1923, in order to re-settle certain residents of Nairobi who had been displaced in pursuance of a policy by the Nairobi City Council or its predecessor in title, a total of 175 houses were built in the district of Nairobi that is now known as Shauri-Moyo. It was said that they were intended for former Pangani residents but, in the event, only 38 such persons were re-settled. The remaining 137 houses were said in the plaint filed in the High Court on January 29, 1981 to have been occupied, not as units, but by individuals who were granted monthly tenants of separate rooms in those houses, the rental of each of which was at the material time Kshs 49. Examples of the rent cards, though not part of the appeal record, were exhibited at the High Court hearing and handed in by counsel during this appeal.

Of the 38 houses in which Pangani residents were re-settled, some 20 became vacant in the course of time and were duly repossessed by the Council. Of the remaining 137, 105 were re-allocated in November, 1973 to persons who purported to be ex-Pangani residents or their next of kin, but the relevant resolution as to 95 of those houses were subsequently rescinded. Then, on June 6, 1979, by a further resolution, 115 of the 137 houses were again re-allocated (the appellants said irrespective of whether the new allottees had any legitimate connection with Pangani), with the result that some 125 persons then became direct tenants of the Council under a tenancy agreement in the form of annexure E to the plaint. This had the effect of relegating those who still occupied individual rooms in the houses concerned to the status of sub-tenants of the new tenants, who had thus been interpolated between them and the Council.

The six named appellants were some of the occupants of these individual rooms. The first appellant has died since the decision of the High Court and we were informed that one of the witnesses called for the appellants was disposed by his new head tenant, so that five of the appellants now remain in possession of these individual rooms. All six had claimed declarations from the High Court that the several resolutions of the Council were *ultra vires* and invalid, and a mandatory order that the Council should repossess the 125 houses wrongfully allocated. They were said to be aggrieved because they were adversely affected by becoming sub-tenants. It was said in evidence and in the appeal that substantial increases in rent were being charged by the new head tenants. Since the tenancies were thenceforth (as those from the Council had not been) subject to the Rent Restriction Act (cap 296) they were liable to run into substantial arrears (because of the increases) which would be recoverable from them on the order of the Rent Tribunal.

The new head tenants also brought an action in the High Court (Civil Court Case 422 of 1980). The recital of the preliminary facts in the plaint in the instant case very largely follows those in that other action, and the tenancy agreement annexed thereto as annexure C is the same as that annexed to the plaint in this case. In the other case, however, the 118 head tenants who are named as plaintiffs claimed that their tenancies had been wrongfully terminated by the Council pursuant to a resolution of January 24,

1980 and that the sub-tenants (meaning the occupants of the individual rooms of whom these appellants were representative) were asked to pay their rents directly to the Council. They sought consequent declarations, injunctions to restrain their evictions and an order for refund of the rent so collected.

The other action was filed nearly a year earlier than the instant one but that has not yet been heard. It was however the subject of a preliminary objection before Platt J in this case, and indeed, an order sought by 135 sub-tenants (who included five of the present appellants) that they be joined as parties in that action was refused by Simpson J (as he then was) on December 11, 1980. He had, on March 18, of that year, granted a temporary injunction to the head tenants in substantially the same terms as that claimed in the plaint in that case, namely restrain the Council from evicting them, from the subtenants. Thus the head tenants have remained and the subtenants have remained with their respective rights to the premises in question. This may have been the reason why Platt J said in the course of his judgment that the leases were concurrent, rather than that the one class of persons were the subtenants of the other, and that accordingly.

> "the (appellants) having been left where they were with their tenancies intact have suffered no infringement of their private rights, which arise from a private contractual relationship."

Nevertheless he went on to hold that the appellants had not shown sufficient interest in bringing the proceedings: that they had not shown that the public wrong the Council was alleged to have committed had resulted in an infringement of their private rights, or damage to them over and above that which the public has suffered therefrom, on the authority of *Gouriet v Union of Post Office Workers* [1977] 3All ER 70, and *Inland Revenue Commissioners v National Federation of Self Employed and Small Business Ltd* [1981] 2 All ER 93. Consequently the appellants had no *locus standi* to enable them to institute the proceedings and he therefore dismissed the action with costs.

This action, unlike High Court Civil Case 422 of 1980 where all 118 persons appeared in the title of the action and in the list of ex-Pangani residents annexed to that plaint, was brought as a representative action on behalf of themselves and of all other persons said to have the same interest in the suit, notwithstanding that no steps had been taken under order I rule 8 of the Civil Procedure Rules to notify the other persons interested, either individually or by public advertisement. Mr Ombete, for the appellants, conceded in the course of the hearing before us that the case was incorrectly brought as a representative action, and that his case rested on that of the six, or rather the remaining five appellants. This concession was clearly right for this was in the nature of a test action, that is to say that it raised the same questions, and that the evidence called would be substantially the same, as in the cases of all the other sub-tenants and it would be a colossal waste of court time and of costs to the parties if separate actions had to be brought in respect of all 135 sub-tenants, or even if they were all named as plaintiffs (assuming they consented) in the same action - see *Amos v Chadwick* (1876) 9 Ch D 459.

But that is different from a representative action, an example of which was *Bedford (Duke of) v Ellis* [1901] AC 1, where all the produce growers in the market were held to have a common interest and that the relief, if granted, would be in its nature beneficial to all whom the plaintiff proposed to represent. That decision was explained in *Smith v Cardiff Corporation* [1953] 2 All ER 1373 (which was cited to us in a different context by Mr Ombete) where Evershed MR said in relation to the then corresponding English Rule:

> "The question, however, which we have to determine is whether this case falls within the scope of RSC, order 16 rule 9. One might be disposed to say that if you have thirteen thousand weekly tenants with tenancies, so far as relevant, in identical form, then the case is one which the rule would be designed to meet, on grounds at least of convenience. But on second thoughts, taking the rule according to its own language and without for the moment considering any expositions of it in the decided cases, one cannot see how these thirteen thousand individual tenants can be said to have 'the same interest in one case or matter.' The truth is that they have similar or identical interests in similar or identical matters. It is, I think, important to bear in mind the strict legal position."

The underlying basis for his reasoning appears at p 1377, as follows:

> "I am bound to say that I am not sorry to reach this conclusion. It seems to me startling, if this claim to bring the case within RSC, order 16 rule 9, is correct, to note the consequences. An example was taken of the season ticket holders of British Railways between London and, say, Folkstone. If one individual sought to challenge the validity of some increase in the season ticket rate he could, apparently (if the plaintiffs are right), bring an action on behalf of all the season ticket holders, whether they liked it or not. The remedy, counsel for the plaintiffs says, is adequate and simple (though I doubt if it would seem so to a great many people). The person who says: 'I do not want to be represented by you' can ask to be joined as a defendant. It seems to me that such a result involves a serious inroad on the ordinary individual's liberty to make his own terms as he will with some other party with whom he is under no obligation to make any contract."

Accordingly, as was said in *Campos & D'Cruz (representing members of the Goan Institute) v De Souza & Others* (1933) 15 KLR at p 87, in a representative action it is mandatory for the court to see that notice of the institution of the suit is given to all parties interested.

I now turn to the main point advanced by Mr Ombete in this appeal which is that the judge erred in holding that the appellants had no *locus standi* to having been before the High Court and, following from that, the point as to *locus standi* not having been pleaded and not raised until the final submissions, the judge also erred in basing his decision on that ground. Consequently the question as to whether the relevant resolutions were *ultra vires* and whether the appellants' private rights had been infringed still remained to be decided.

The term *locus standi* means a right to appear in Court and, conversely, as is stated in *Jowitt's Dictionary of English Law*, 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 proceeding. Therefore the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue, the latter course being disapproved in the particular circumstances of that case by the House of Lords in *IRC v National Federation of Self Employed and Small Businesses Ltd* (supra), was that the appellant had no right to bring or to appear in this suit against the Council.

The *National Federation* case was an application under the procedure of what is now in England called "judicial review', which replaced the former prerogative orders of *mandamus*, prohibition and *certiorari*. The respondents wished to challenge a decision of the Inland Revenue whereby it had granted a tax amnesty to a number of journalists who worked for the newspapers and who had been evading income tax for several years. Under that amnesty, investigations and arrears in respect of the year of assessment 1977 - 1978 were to be proceeded with and collected, and the journalists would in future register in respect of their casual employment, but investigations as to tax lost in earlier years were not to be made. The Federation sought a declaration that the Revenue had acted unlawfully in making this arrangement and an order of *mandamus* directing it to assess and collect tax on those casual journalists in respect of the previous years.

An application for judicial review is brought under the new order 53 of the Rules of the Supreme Court rule 3(5) of which states that the court shall not grant leave to apply for the order,

> "Unless it considers that the applicant has sufficient interest in the matter to which the application relates."

Lord Wilberforce and Lord Diplock described this as a threshold requirement in all cases of judicial review. The rules as to sufficient interest which would found the necessary standing or *locus standi*, for the purpose of applying for prerogative orders or judicial review are not to be found in any statute, but is not difficult to deduce from the decided authorities where the line is to be drawn and upon which side of the line any particular case would fall.

The requirement of sufficient interest is an important safeguard to prevent, as Mr Opiacha, appearing for

the respondent council put it, people running to the courts to challenge the actions of local authorities all over the country. Its purpose is to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left whether they could safely proceed with administrative action while judicial review proceedings were actually pending, even though misconceived. If the requirement were not there the courts would be flooded and public bodies harassed by irresponsible applications.

In the instant case the only interest, in the context of an application such as had been made in the *National Federation* case, was that the appellants were said to be persons with the right to vote and elect people on to the Council and thereby had an interest to see that the Council carried out its duties properly and within the law. I agree that had this been an application for an order of *certiorari*, prohibition or *mandamus* and had the appellants no other legitimate right or interest which they could reasonably say required protection, then the judge would have been fully justified in saying that the mere fact of their being so entitled, along with the whole body of electors in Nairobi, would not have constituted sufficient interest to found an application for leave, as the majority of the House of Lords held in relation to the fact that the only interest the Federation in the *National Federation* case could show was that they were taxpayers amongst the general body of taxpayers throughout the country. It could not be said that there was any common fund of the produce of income tax in which taxpayers as a whole had any interest. Moreover the duties of the Revenue to assess each taxpayer individually in relation to his circumstances, the confidentiality of such assessments and the information upon which they were and are based, meant that no other taxpayer (or, as Lord Diplock described them, a pressure group of taxpayers) could be said to have a sufficient interest to complain of that which the Revenue had done or omitted.

The position of ratepayers was different because, as was stated by Lord Morris in *Arsenal Football Club v Smith (Valuation Officer)* [1977] 2 All ER at p 278, (in which the second respondent had challenged the ratable value of the appellants' stadium as being too low) if a rating assessment was too low, the result would be that all other ratepayers in the borough would be paying more than they need pay, even though the likely consequences to the pockets of those ratepayers might not be appreciable. The second respondent's position as a taxpayer was also an issue in that case, in as much as he also, in that capacity, contributed to the national exchequer, which in turn provided the rate support grant for the local authority.The House of Lords was unanimous in stating that his interest as a taxpayer (as opposed to his interest as a ratepayer) was too remote to give him the necessary *locus standi* to make the proposals for rating that he did in that case. On the other side of the line, in *AG (on the relation of McWhirter) v Independent Broadcasting Authorit*y [1973] 1 All ER 689, which, as its title says, was a relator action, it was held that Mr McWhirter did, as a member of the viewing public (before he obtained the Attorney General's leave), have the right to issue a writ claiming an injunction to restrain the showing of a film likely to offend against public decency and morals. Even though that became a relator action, the tenor of Lord Denning's remarks and of those 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 to getting the unlawful conduct stopped.

This action was not, however, by way of an application for, or the issue of, a prerogative order. The crucial difference between that and an action of the present kind is that the former requires the leave of the court and the latter can be brought as of right. It may be that this case is a strong case, or a weak case.

It may be, as Mr Opiacha urged before us, that the Council could pick and choose its tenants at will, as in his illustration by Lawton LJ's judgment in *Bristol District Council v Clark* [1975] 3 All ER at p 981, or that it had the right to determine the existing tenancies and offer the tenants new terms, as was suggested in *Smith v Cardiff Corporation* (supra). It may be that the Council's action will be held to be justified and *intra vires*, as in *Smith v Cardiff Corporation* (No 2) [1955] 1 CH 159, which Mr Ombete cited to us. It may even be that there could be an application under order VI rule 13. Upon those matters I refrain from expressing an opinion. But that is a different thing entirely from saying that the appellants had no *locus standi*: that they had no right to bring the action or to appear at all. That would shut them out from access to the courts altogether and is a course to which I cannot subscribe in the circumstances of this case. As Danckwerts J said in *Smith v Cardiff Corporation* (No 2) it is right and proper that, subject to certain limits, local authorities' management of their housing estate should be capable of being challenged in a

court of law.

Some reliance was placed in the High Court on *Gouriet v Union of Post Office Workers* (supra) where the appellant, having been refused the Attorney General's consent to bring an action at his relation, began an action for an injunction to prevent the postal union from soliciting or procuring any (of their members) not to handle, or wilfully to delay, postal material in the course of transmission between the United Kingdom and South Africa; it being contended that it was a criminal offence so to do. It was held that a private citizen, except as a relator in an action brought by the Attorney General, has no *locus standi* as plaintiff in a civil action to obtain either an injunction to restrain another private citizen from committing a public wrong by breaking the criminal law, or a declaration that his conduct is unlawful, unless the plaintiff can show that some legal or equitable right of his own has been infringed, or that he will sustain some special damage over and above that suffered by the general public.

The learned judge obviously considered that this case should have been brought as a relator action, for he regretted that no approach had been made to the Attorney General for this purpose. The Attorney General's right to seek, in the civil courts, anticipatory prevention of a breach of the law is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney General can and the individual cannot (without special interest) seek to enforce is fundamental, but may not always be as easy to draw as might appear. For instance in *Barrs v Bethell* [1982] 1 All ER 106, decided after the *National Federation* case, Warner J in the Chancery Division held that an action by the plaintiffs against the Council and certain councillors claiming that they are freezing council house rents regardless of the consequences to the ratepayers of adopting such a policy, were in breach of their duty to exercise their powers so as to hold the balance between the welfare of their tenants and the interests of the ratepayers, should be brought either by way of a relator action or judicial review. There would thus be provided a filter procedure against the local authority's vulnerability to actions by busybodies and cranks in the form of the consent of the Attorney General or the leave of the court.

I do not think that decision militates against the kind of interest which the ratepayers were held to have in the *Arsenal Football Club* case, for not only did counsel for the defendants in *Barrsu v Bethell* concede that a ratepayer might well have a sufficient interest to challenge the assessment of another ratepayer, but the plaintiffs' solicitors had actually received from the Attorney General a letter stating that the relator procedure was reserved for cases where the plaintiffs had no *locus standi* to proceed against the Council in their own name and that he was not prepared to give his consent unless the court ruled that they had no *locus standi*. Accordingly the action was adjourned to enable the plaintiffs to renew their application to the Attorney General.

Since preparing this judgment, I have had the advantage of reading in draft the judgment of my learned colleague, Chesoni Ag JA and I find myself in full agreement with that which he has said regarding the position of the Attorney General and the question of relator action. Speaking for myself, I cannot see what the Attorney General has to do with this matter, unless he has merely to look on and see fair play for neither party required him. This was an action by summons and plaint by people who had a distinct interest in the subject matter in respect of which they were seeking declarations and a mandatory injunction, namely the rooms which they have admittedly been occupying, in one capacity or another, and for which they have been charged rent, which they have been paying either to the Council or to persons installed in the premises which comprise those rooms. It did not involve any questions as to the infringement of any right appertaining to the public at large, but only to persons who were within a particular class (even if it is, ultimately, a large class), namely the former tenants, and now allegedly sub-tenants, of the individual rooms comprising the 137 houses at Shauri Moyo. A defence was filed specifically pleading to each paragraph of this plaint. Like Chesoni Ag JA, I am satisfied in this case that appellants had the right to be heard and to have the matters that they raised determined. I would hold that they had the necessary *locus standi* to bring the action and I would, accordingly, allow the appeal on that ground alone.

I do think the second part of Mr Ombete's submission, that the point as to *locus standi* was not pleaded or raised until a late stage, really arises in view of the foregoing. Mr Opiacha cited *Bruce v Odhams Press* [1936] 1 KB 697 for the proposition that if a material fact had not been pleaded in the plaint, (because the

plaintiffs' interest was not shown beyond that they were voters) then the plaint was bad in law as being too vague. That case, however, related to the special pleading required in a libel action, and to the necessary particulars to identify the plaintiff as the person libelled, and I do not see that it is of much assistance here, since I am not of the view that the plaintiff's case was referable to their position as voters, but to their specific position in relation to these 137 houses.

I would therefore give the appellants the orders they seek to the extent of remitting the case to the High Court to determine the issues as to whether the defendants' actions were *ultra vires*, and as to whether the appellants' private rights have been infringed. As regards costs I agree with the orders proposed by Kneller JA.

**Chesoni Ag JA.** The six appellants Alfred Njau, Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala, Akhonya Analo and Jacob Gichigo filed a suit by way of plaint against the City Council of Nairobi (hereinafter called 'the Council') in January, 1981. Their prayer in the plaint was for –

> a) Declaration that the defendant's resolutions allocating 125 houses to 125 persons purporting to be ex-Pangani residents were and are invalid as being *ultra vires*;
> b) an order that the defendant should repossess all of the said 125 houses allocated under the said resolutions;
> c) a declaration that even if the defendant acted within its powers the houses were not in any event allocated to ex-Pangani residents or their next of kin and as it was intended and consequently the said allocation was and is unlawful and should be rescinded.

The case was heard and completed in that all the witnesses were called and testified and judgment was delivered by Platt J. The learned judge dismissed the suit on the ground that the plaintiffs had no *locus standi* and does not appear to have proceeded to consider the case on merit, in case he was wrong on the question of *locus standi*. The plaintiffs being dissatisfied with that judgment appealed to this court on eight grounds, which at the hearing Mr Ombete for the appellants grouped into two grounds as follows –

> 1. The appellants had *locus standi* to enable them to bring the case in the High Court
> 2. Because the question of *locus standi* was not pleaded in the written defence and was only raised at the hearing the learned judge erred in basing his decision on lack of *locus standi*.

Mr Ombete added that even if *locus standi* were to be considered in the absence of being pleaded, it had to be raised as a preliminary point of objection and not when it was raised almost at the end of the case. The appellants had not been given the opportunity of preparing their case to meet that defence. Perhaps Mr Ombete should have asked for an adjournment when the point was raised, but it appears that this did not happen.

During the pre-independence era, Nairobi was zoned into three racial areas, namely, European, Asian and Africans. Pangani area was for Asians only. There was a village within the Pangani area which was inhabited by Africans. Arrangements were made to provide the ex-Pangani Africans with accommodation at Pumwani and in the result, 175 houses were constructed at Pumwani for that purpose. These houses were built at a cemetery and so due to superstition, only 39 ex-Pangani residents took up the allocations and of those, 39 one left. As in effect only 38 houses were taken, the individual rooms of the remaining 137 houses were let to the general African residents of Nairobi on monthly tenancies at the rental of Kshs 49 per room.

The plaintiffs' case was that after only 38 ex-Pangani residents had taken up the allocations, the ex-Panganis who refused to move to Pumwani were fully compensated and established themselves at Kibera, Nairobi. So the 137 houses remain City Council property and were let like other council houses. The Council resolved that it would repossess the 38 houses whenever each ex-Pangani owner dies, but later, it resolved to re-allocate such houses to the next of kin of the ex-Pangani deceased owners. In pursuance of a similar policy, the Council purported since 1970 - 1971 to also allocate the 137 house to ex-Panganis and by a resolution dated June 6, 1979, some 115 houses were allocated to persons purporting to be ex-Panganis. As at the date of the suit, 125 houses had been allocated. The practice turned the allottees into

head-tenants whose subtenants the plaintiffs and others were. Both counsel informed us that the Council by circular informed the plaintiffs in 1979 that they were then to pay the monthly rent to the new head-tenants, and no longer to the Council. That was what led to the suit. The plaintiffs did not want to cease being tenants of the Council and be thrown to the mercies of the purporting ex-Panganis who hiked the rent from Kshs 49 to 150 per month. If the plaintiffs remained tenants of the Council, they would not be subject to the Rent Restriction Act (cap 296).

The learned judge had this to say in his judgment:

> "As I understand the situation, the case deals with the infringement of public rights in the sense that the Council has acted *ultra vires* in the above respects; and of private rights, in the sense of interference with the tenancy relationship between the plaintiffs and the defendant council. The rule applicable is that only the Attorney General as guardian of the public interests can sue on behalf of the public for the purpose of preventing public wrongs. A private individual can not do so, unless a private right of the individual would also be infringed in the cause of the execution of the public wrong, or the private individual had or would suffer damage. See *Gouriet's* case, [1978] 3 All ER 70 and the later debate on the subject in the House of Lords in *Inland Revenue v Federation of Self Employed & Small Businesses Ltd* [1981] 2 All ER 93. Unless the individual can come within the rule, his suit will be struck out, because he has no personal ground of complaint."

The learned judge also pointed out that Mr Opiacha who appeared for the Council then and in this appeal pressed the view that besides the fact that the appellants could not sue, they had shown no cause of action. Both counsel took us through some English authorities which I had time to read but the appeal can be disposed of without those authorities. Lack of *locus standi* and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas *locus standi* is the right to appear or be heard, in court or other proceedings; literally it means a place of standing - see *Jowitt's Dictionary of English Law* (2nd Edn). To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no *locus standi* means he cannot be heard, even on whether or not he has a case worth listening to.

Although there was an allegation that the Council had acted *ultra vires*, the case involved landlord and tenant relationship.

As I have said above, *locus standi* involves the right to be heard and then determine whether there is or there is no reasonable cause of action or defence. The appellants had in paragraph 19 of the plaint alleged that they derived their tenancies direct from the Council.

The learned judge appears to have treated the suit as a relator action, which Mr Ombete told us it was not and the position was made clear at the hearing in the High Court. In England, it has been said that the Attorney General as a custodian of public interest is the correct party to initiate relator proceedings but if he refuses improperly or unreasonably to exercise his powers to initiate the proceedings or if there is insufficient time to do so, an aggrieved member of the public who had a sufficient interest could himself sue and seek a declaration and, in a proper case, an injunction, joining the Attorney General, if need be, as defendant - see *AG (on the relation of McWhirter) v Independent Broadcasting Authority* [1973] 1 All ER 689.

The position in this country is not clear, but in my opinion it should be the same as was stated in that case. The present case was not one where a public authority (the Council) had transgressed the law laid down by parliament or had threatened to transgress it and six members (the appellants) of the public had come to the court to draw the matter to its attention. Though appearing to have been instituted as such, it was not, in effect, relator proceedings, but a case of plaintiffs who considered themselves either tenants or sub-tenants of a public body (the Council) and who considered themselves aggrieved by the Council's action affecting their tenancies with or through it. In those circumstances it would in my view be unjust to shut them away from coming to the court for a hearing on their grievances. They had the capacity to sue and hence had the right to be heard and that is what is meant by *locus standi*. Even if the case had

involved relator proceedings, they had alleged that they would suffer damage by becoming sub-tenants. The proper procedure, therefore, if it was treated as a relator action, was to adjourn the case and give the appellants time either to request the Attorney General to take over the proceedings or if he refused improperly or unreasonably to exercise his powers in such proceedings, to join him, if there was need as defendant. There was no question of the appellants having sufficient interest by virtue of being rent payers or rate payers or voters. They had a right to be heard as to the effect of the Council's action in allocating the 125 houses to head-tenants especially on how that action affected their tenancies with the Council and whether as a result of the change they suffered any damage at all. The learned judge did not make any findings on these issues and had he considered them, he would have most likely realized that the appellants had *locus standi*.

The learned judge's finding that 'here leases or tenancies were granted for concurrent term, from month to month' to me appears to be in contradiction to his conclusion that the appellants had no *locus standi* to sue in the matter. Some cases are so simple that it can at once be seen that the party suing has no capacity i.e. no place to stand on in the matter and so cannot sue, but this perhaps was not one of such cases. I am, satisfied in this case that the appellant had the right to be heard and the learned judge erred in holding otherwise. I would allow this appeal, set aside the High Court judgment and remit the case back to the High Court for trial and determination of the issues. I agree to the order for costs proposed by Kneller JA.

**Dated and delivered at Nairobi this 28th day of June, 1983.**

**A.A KNELLER**

**……**

**JUDGE OF APPEAL**

**A.R.W HANCOX**

**……**

**JUDGE OF APPEAL**

**Z.R CHESONI**

**……**

**Ag JUDGE OF APPEAL**

**I certify that this is a true copy of the original**

**DEPUTY REGISTRAR**