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Multi-Party Litigation in Tanzania: A Case for Class Action Suits

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Abstract

Purpose: In suits involving numerous parties, legal technicalities are involved. Such suits call for special litigation devices. Multiparty litigation devices in Tanzania can take different forms such as joinder, next of kin, representative suits and class action suits. However, representative suit is currently the main means of handling claims for compensation involving large groups of similarly affected victims.

Methodology: This study carries out an appraisal of the legal framework in Tanzania concerning multiparty litigation devices. It is shown that too strict an adherence to same interest and locus standi requirements in Tanzania makes multiparty litigation devices too restrictive. In addition, multiparty litigation devices for group actions are not clearly provided for.

Findings: Litigation devices have a great potential of helping parties to realize effective right to remedy. In order for litigation devices to effectively play that role, they should be friendly, timely and affordable. Similarly, such devices should be properly managed and clearly provided for under legislations.

Unique Contribution to Theory, Practice and Policy: Currently, a representative suit in Tanzania is interchangeably used both in public interest litigation and group action. In order to guarantee proper management of group actions, a case for class action rules is made. Indeed, a call for reform of the legal framework is recommended in this study to the effect that class action rules should be enacted in form of regulations or under a specific legislation.

Keywords: Multi-Party Litigation, Tanzania, Representative Suits, Class Action Suits

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INTRODUCTION

Multi-party litigation means litigation where there are more than just one claimant and/or one defendant. Stated simply, multi-party litigation is a litigation which involves numerous parties to the suit. These numerous parties can be either plaintiffs or defendants. While plaintiffs are persons or parties who directly claim a right against another or others, defendants are persons or parties against whom a right in law is claimed. The right in question is not a moral right but a legal right-a right in law.[1] Thus, a party claiming in a suit must "show that he has a fair question as to the existence of a legal right."[2] In that regard, "existence of such legal rights is an indispensable pre-requisite of initiating any proceedings in a court of law."[3]

Parties to suits claiming for or against a right in law can be grouped into two categories, namely, necessary parties and proper parties. A necessary party is one whose presence is necessary or indispensable for the purpose of determining legal questions of liability of the case. Stated simply, a necessary party is one whose presence is necessary in order for the court to effectively and completely adjudicate on the issues in the suit.[4] Thus, for the purpose of determining whether a party is a necessary party or not, the determining factor is always whether an effective decree can be issued in his absence.[5] On the other hand, a proper party is one whose presence is not necessary for the court to issue an effective decree but whose presence is important.[6]

Multi-party Litigation Devices in Tanzania

Multi-party litigation devices are specific procedures or set of rules for bringing, handling, litigating or legally resolving claims relating to groups of people or parties.[7] These are devices enabling classes of individuals to sue or be sued. Similarly, they are devices enabling persons to be made parties to suit.[8] As such, multi-party litigation devices in Tanzania come in the form of joinder of parties, next friends, representative suits and class-action suits.

Joinder of Parties

The position of joinder of parties is provided under to Order 1 rule 10 (2) Civil Procedure Code. This position was underscored in the case of *Conrad Berege v. Registrar of Cooperative Societies and the Attorney General*[9] where it was reiterated that "in accordance with the provisions of Order I rule 10 (2) of the Civil Procedure Code 1966, the court may at any stage

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1 ICLG, "Canada: Class and Group Action Laws and Regulations 2021", at https://iclg.com/practice-areas/class-and-group-actions-laws-and-regulations/canada. (accessed on 18th June, 2022).

2 *Agency Cargo International v. Eurafrican Bank (T) Ltd*, Civil Case No. 44 of 1998, High Court of Tanzania at Dar-es-salaam, (Unreported).

3 *Omary Yusuph v. Albert Munuo,* Civil Appeal No. 12 of 2018, Court of Appeal of Tanzania at Dar-es-salaam (Unreported).

4 *Massawe and Company v. Jashbai P. Patel & 18 others* [1998] TLR 445; *Charles Mwangi Wanyai v. Nelson Muraguri Mbekenya & 2 others* [2009] eKLR.

5 Utamwa *J* in *Oilcom Tanzania Ltd versus Christopher Letson Mgalla*, Land Case No. 29 of 2015, High Court of Tanzania, at Mbeya, (unreported) at page 23-24.

6 *Suryakant D. Ramji v*. Savings and *Finance LTD* and 3. *Others*, [2002] TLR 121 at 128.

7 ICLG (n 1).

8 Harvard Law Review, "Developments in the Law: Multiparty Litigation in the Federal Courts", Essays on Civil Procedure (Cambridge: Harvard Law Review Association., 1961) 879 & 928.

9 *Conrad Berege v. Registrar of Cooperative Societies and the Attorney General* [1998] TLR 22.

of the proceedings either upon or without application of either party, order that the name of any person who ought to have been joined, be added."[10]

According to order 1 rule 2 of the Civil Procedure Code[11] "all persons jointly entitled to a right must be joined as plaintiffs" save for circumstances under which it may be too cumbersome to try the suit as one by joining all the plaintiffs or when the court is of opinion that by trying the suit as one, defendants will be embarrassed by being sued be several plaintiffs simultaneously in the sense that they may be unable to answer various claims in one trial. The court may also order separate trials if it is of the view that by trying the suit as one will result in protracted and long trial. Otherwise, if such circumstances do not exist, non-joinder or misjoinder of persons might not occasion to injustice to parties.[12]

However, it has to be borne in mind that for persons to be joined in one action as plaintiffs or defendants,[13] it is not enough that the person desiring or wishing to be joined to the suit should not only be connected with the same subject – matter, rather, "the intervener must also be directly and legally interested or legally affected in/by the answers to the questions involved in the case"[14] It follows therefore that, for joinder of parties to be applicable, two legal conditions must be satisfied before the court can order joinder of parties. Firstly, there should be joint interest in the subject matter, and secondly, there should be the same defendants. These legal conditions were laid down in the famous case of *Stroud v. Lawson*,[15] where it was stated that "the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and also that there should be a common question of fact or law, in order that the case may be within the rule."[16]

These conditions were recently underscored in the case of *Johari Ibrahim Chate v. Mpanda Municipal Council, Daniel Tarimo and the Attorney General.*[17] Furthermore, some East African cases also allude to the legal conditions for applicability of joinder of parties. In *Barclay Bank v. Patel*[18] there were two guarantors involved. Two guarantors guaranteed two different third parties. One gurantor guaranteed one of the third parties while the other guaranteed the other. Since the cause of action arose out of two different or separate contracts of guarantees, joinder of parties could not be applicable. Hence, the two guarantors could not be jointly sued as co-defendants. Similarly, in the case of *Yohana v. Lunjo Estates Ltd*[19] there were two separate contracts of tenancy but notice to quit the premises was issued to all the tenants. When the tenants instituted a joint suit against the landlord in one action, it was held that the question of

10 *Ibid.*

11 Cap 33 R.E 2002 [herein after referred to as the code].

12 *Hamisi Salum Kizenga v. Moses Malaki Sewando and 18 others*, Land Appeal no. 51 of 2019, in the High Court of the United Republic of Tanzania (Land Division) at Dar es salaam at p. 8-9.

13 Order 1 rule 2 of the Civil Procedure Code.

14 An Indian case of *Sampat Bai v. Madhu Singh* (A.I.R.) 1960.

15 (1989) 2 QB 44. See also *Bangue De Mosccu v Midland Bank* (1939) AH E.R. 354.

16 *Ibid.*

17 Case no. 4 of 2021, High Court of Tanzania Sumbawanga District Registry at Sumbawanga (unreported).

18 (1959) E.A 214.

19 (1959) E.A 319.

tenancy gave rise to different principles of law as these plaintiffs were not joint tenants. Hence the joinder of plaintiffs in this case offended rule 1 of order 10 of the Code.

Next Friends

This is a procedural device in which a party can be added in a case as a next friend. This device is normally used to represent a party who is a minor and who cannot sue or litigate the case on his own.[20] However, a party can only be added as a next friend once he consents. Thus, the main legal condition for the application of this procedure is that the court cannot award an order of adding a party (defendant) in a suit relating to tort without the consent of the plaintiff. A plaintiff cannot be compelled or forced to sue a defendant he had chosen not to include without consent of the plaintiff. As stated in the case of *Fernandes v. Kara Arjan & Sons*[21] "a plaintiff being the *dominus litis* cannot be compelled to sue a person, for damages in respect of a tort, whom he does not wish to sue. The instant case has demonstrated only too clearly the impossible situation in which an unwilling plaintiff is likely to find himself at the trial while a defendant is forced upon him against his will." The principle therefore is, you cannot compel a party to enforce his rights. It has to be with his knowledge, free will or consent. In other words, status of a party as a plaintiff has to be deliberate and voluntary. You cannot drag a person into a suit he has no idea about nor wish so.[22] This is why the requirement of consent is necessary by the proposed new party. The written consent by the proposed new party in fact operates as a demand letter. The case of *Lombard Banking (K) Ltd v. Shah Baichand Bhagwaji*[23] is of authority that substitution of parties must be supported by the written constent of the proposed new party.

Representative Suit

According to a representative suit, where there are many people with the same interest, one of them can sue the defendant on behalf of others. Representative action is provided under Order 1 rule 8 (1) (2) of "Civil Procedure Code", 1966[24] (hereinafter referred to as "the Code") which provides as follows:

(1)Where there are numerous persons having the same interest in one suit, one or more of such persons, with the permission of the court, may sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, the public advertisement, as the court in each case may direct.

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20 See for example the case of Hamad Humud (Suing as a Next Friend of Humud Seif Riyami v. Emiliana Kegere) Misc. Land Application 23 of 2021, High Court of Tanzania, Mwanza Registry [2021] TZHC 5380 (29 July 2021).

21 (1961) E.A 693.

22 *Charles Mwangi Wanyai v Nelson Muraguri Mbekenya & 2 Others* [2009] eKLR, Civil case 101 of 2008, High Court of Kenya at Nyeri.

23 (1960) E.A 969.

24 Cap 33 R.E. 2002.

(2) 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.

It is submitted that the purpose of this provision is to enable adjudication of questions or issues in which large number of persons are involved.[25] However, according to the provisions of order 1 rule 8 of the civil procedure code, in order to sue in a representative capacity, there are legal conditions which must be satisfied before the court can give order for representative suit. One, the suit has to involve numerous number of parties, who, two; must have same or common interest in a suit and three, permission or leave of court should be sought and granted and this fact has to be mentioned in the body of the plaint. Lastly, notice should be issued to parties concerned.[26] In the case of *Sonko and others v. Haluma and another*,[27] the two plaintiffs who sued the defendants purpoted to sue on behalf of 21 infants without having obtained permission of the court. Mandatory provisions of order 1 rule 8 were not complied with since plaintiffs sued in the representative capacity for numerous persons without having obtained permission of the court. It was held that "in the absence of representative order, the claim on behalf of unnamed plaintiffs could not stand and would be struck out." Similarly, in the case of *Bora Industries Ltd v. Mohamedi Ally and 19 Others*[28] it was reiterated that "it is rule of law and practice that where there are numerous persons with common interest in a suit, with leave of the court one person can sue or defend the suit on behalf of others. One cannot sign a document on behalf of others without leave of the court to represent others."[29]

The rationale for these conditions are laid down in *K.J. Motors and 3 Others v. Richard Kishamba and Others*[30] where it was stated that the person seeking to represent others in a suit should show that they in fact exist and have duly authorized him to do so and that the represented are not dead, non-existent or rather fictitious.

The cases of *Abdallah Mohamed Msakandeo & Others vs. The City Commission of Dar es Salaam*,[31] *Christopher Gasper and Others v. Tanzania Harbours Authority*[32] and *Kirigiti Sasi v. Genkuru Village Manager & 6 others*[33] underscored these conditions by reiterating that "filing a representative suit is not a matter of right, one must first obtain leave of the court, and the court must give notice to all the interested persons to the suit, be it plaintiffs or defendants."[34] The case of *Kiteria Menezes and 33 Others v. Mra Engineering Work Ltd*,[35] reiterates the legal condition that application for leave is a precondition to filing a representative suit. Any suit which is filed before seeking such leave is prematurely filed.

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25 Judiciary of Tanzania, *A Bench Book for Judges in Tanzania*, Judiciary of Tanzania with support of World Bank, 2019, 12.

26 *Ibid*, 13.

27 (1971) E.A 443.

28 Revision no. 279 of 2013: High Court of Tanzania (Labour Division) at Dar es Salaam (Unreported).

29 *Ibid.*

30 Civ App No. 74 of 1999, High Court of Tanzania at Dar es Salaam (unreported).

31 [1998] TLR 439.

32 [1997] TLR 301.

33 Misc Civ. App. No. 74 of 2003, High Court of Tanzania at Mwanza, (unreported).

34 *Ibid*.

35 [1998] TLR 434.

Notably, a representative suit in Tanzania can be interchangeably used both in public interest litigation and/or group action suits. In that sense, representative suits in Tanzania can take these two forms. In public interest litigation, private parties or individuals sue the state to enforce their public rights as a result of the state having interfered or rather infringed with their constitutional rights or interests. Thus, suits can be brought in case of declrarataion of rights and injunctions. In group action, as per order 1 rule 8(1) of the Code, one can sue by leave of the court on behalf of others who are claiming the same rights.[36]

Public Interest Actions

A public interest action is defined as an action brought by a "plaintiff who, in claiming the relief he or she seeks, is moved by a desire to benefit the public at large or a segment of the public." [37] Similarly, it has been defined as "an action instituted by a representative in the interest of the public generally, or in the interests of a section of the public, but not necessarily in that representative's own interest."[38] Public interest actions are explicitly provided for environmental issues under Section 202 of Environmental Management Act which states that:

An individual or legal persons may bring action and seek appropriate relief in respect of any breach, violation or threatened breach or violation of any provision of this Act or of any individual and legal persons use of article, substance or natural resources: to sue

a) in that individual's or legal persons own interest;
b) in the interest or on behalf of a person who is, for practical reasons, unable to bring such action;
c) in the interest of or on behalf of a group or class of person whose interest are affected;
d) in the public interest**;** and
e) in the interest of the environment or other habitats.

The main purpose of a public interest litigation is not only to vindicate or protect personal interest of plaintiff but rather, the main purpose of a public interest action is the interest of the public at large. As such, reliefs sought in public interest action such as injunction, mandamus or declaratory reliefs or other reliefs seek to automatically benefit public interest by restraining or invalidating a government action. Public interest actions are suitable for cases regarding implementation and enforcement of collective rights such enforcement of fundamental human rights; constitutional cases or questions, and environmental rights.[39]

Group Action Suits

A group action is a litigation device of handling multi-party litigation or claims for compensation involving large groups of similarly affected persons or entities. This is a legal system's treatment of multi-party litigation (an opt-in system). It is a special form of joinder by

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[36] The Law Reform Commission of Tanzania, "Delays in the Disposal of Civil Suits," Report No. 1 of 1986, Dar-es-salaam, 29.

[37] South African Law Commission, "the Recognition of Class Actions and Public Interest Actions in South African Law", (1998) (South African Law Commission, project report 88) available at: http://www.law.wits.ac.za/salc/salc.html, 6.

[38] *Ibid*, 23.

[39] South African Law Commission, (n 37) 6, 23-24.

listing of claims in a group register.[40] A group action effectively expands multi-party litigation beyond the 'same interest' constraint of representative proceedings to common or related isssues of fact or law. A group action is meant to be different from representative proceedings. Under representative proceedings, the representative brings a suit on behalf of himself and the represented class who are not parties to the action or suit. He is the only claimant.[41]

In Tanzania, there are no rules under civil procedure code providing for group action system. So a representative suit is interchangeably used both in public interest litigation and/or group action suits.[42] This is an anomaly which should be rectified.

Class-Action Suits

A class action is defined as "an action instituted by a representative on behalf of a class of persons in respect of whom the relief claimed and the issues involved are substantially similar in respect of all members of the class, and which action is certified as a class action."[43] It is a device whereby "a plaintiff may pursue an action on behalf of all persons with a common interest in the subject matter of the suit."[44] A class action is suitable where parties are indigent or poor or cannot afford costs of litigation or otherwise not sophisticated to know their rights. As a result, claimants resort to class action in order to 'pool resources and reduce the cost burden of litigating.'[45] Simply stated, class action is meant to achieve judicial economy.[46]

Class action suits in Tanzania are explicitly stipulated under section 202 of Environmental Management Act. It states as follows:

An individual or legal persons may bring action and seek appropriate relief in respect of any breach, violation or threatened breach or violation of any provision of this Act or of any individual and legal persons use of article, substance or natural resources: to sue

a) in that individual's or legal persons own interest;
b) in the interest or on behalf of a person who is, for practical reasons, unable to bring such action;
c) in the interest of or on behalf of a group or class of person whose interest are affected;
d) in the public interest; and
e) in the interest of the environment or other habitats.[47]

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40 Neil Andrews, "Multi-party Litigation in England", Legal Studies Research Paper Series No. 39/2013, University of Cambridge Faculty of Law, 2013, available at http://www.law.cam.ac.uk/ssrn/, 8.

41 *Ibid.*

42 The Law Reform Commission of Tanzania, (n 36) 29.

43 South African Law Commission, (n 37) 23-24.

44 *Ibid.*

45 *Ibid*, 6, 23-24.

46 Theo Broodryk, "Why South Africa Needs Formal Rules for Class Action Lawsuits", 2018 at https://theconversation.com/why-south-africa-needs-formal-rules-for-class-action-lawsuits-90702 (accessed on 2nd September, 2021).

47 Section 202 of Environmental Management Act, especially section 202 (c).

Thus, class action suits are permitted as far as environmental issues are concerned but there is no detailed procedure provided under a specific legislation to govern application of such suits. As such, how class action suits can be managed in Tanzania is still hazzy.

Appraisal of Multi-party Litigation Devices in Tanzania

Generally, multi-party litigation devices are mainly provided for under the civil procedire code of Tanzania. However, such devices can also be provided under other pieces of legislation. Thus, the main shortcoming of multiparty litigation devices in Tanzania stems from the unprogressive nature of Constitution of United Republic of Tanzania. The constitution of Tanzania does not expressly provide for multi party litigation devices including public interest actions. In contrast, the Kenyan Constitution provides under article 22 while South African Constitution provides under article 38. Per Article 22 (1) (2) of Kenya's 2010 Constitution:

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by; a person acting on behalf of another person who cannot act in their own name; a person acting as a member of, or in the interest of, a group or class of persons; a person acting in the public interest; or an association acting in the interest of one or more of its members.[48]

Having a provision like this gives legal recognition to multi-party litigation devices. These devices will enjoy constitutional protection. As such, no other law would be passed providing to the contrary. Because of absence of such provision, the Written Laws (Miscellaneous Amendment) Act" no. 3 of 2020 was passed to amend the "Basic Rights and Duties Enforcement Act" Cap 3 of Revised Laws of Tanzania. Section 4 (2) now requires that:
a litigant who files a petition before the court challenging the constitutional validity of an act of the executive or an act of parliament should state in his affidavit accompanying the petition the extent to which the contravention of a fundamental right has affected such person personally.

Such a provision would have been challenged for being unconstitutional if multi-party litigation procedures were provided directly under the constitution. Unfortunately, the constitution of Tanzania does not provide constitutional protection nor interpretative guidance to multi-party litigation devices. Consequently, multi-party litigation devices in Tanzania are considered inadequate to protect and vindicate rights of litigants in several respects.

First and foremost, courts require 'personal, sufficient and direct' interest before a litigant is accorded standing in court.[49] The landmark interpretation of 'same interest' requirement was given by McNaughten in *Duke of Bedford v. Ellis* that *"*given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent." [50] This landmark interpretation is illustrated in the case of *K.J. Motors And 3 Others v. Richard Kishamba And Others* to mean that "the representative(s) must be suing or defending the case not on his/their own but on behalf or for

[48] Article 22 of Kenyan Constitution.

[49] The Law Reform Commission of Hong Kong, "Class Actions", (2012) (Law Reform Commission report), available at *http://www.hkreform.gov.hk*, 11.

[50] [1901] AC 1, 8.

the benefit of all persons so interested in the suit."[51] In view of these cases, 'same interest' has traditionally been interpreted to include "a common interest, a common grievance and a remedy which is beneficial to all the plaintiffs."[52] In effect, this means that "only the party who has suffered a legal injury personally may approach the court for relief."[53] No matter how laudable it is, this requirement is is problematic when it comes to non-Bill of Rights issues where, for example, an administrative or a private organization acts unlawfully. As in this instance "no individual or organisation's interest is affected to such an extent that it qualifies as sufficiently direct and substantial.'"[54] In that regard, too strict an adheherence to "sufficient identity of interest or same interest requirement" means that "only few actions can be brought under the representative actions rule." Hence, the same interest requirement is in this sense relatively restrictive.[55] The case of *Lujuna Shubi Ballonzi, Senior v. Registered Trustees of Chama cha Mapinduzi*[56] serves to underscore that where same interest requirement is not fulfilled then the representative suit will be rendered incompetent for failure to meet mandatory provisions of order 1 rule 8. As a result, the case will be dismissed.

This study submits that too strict an adherence to same interest requirement prohibits interested parties or claimants to vindicate rights in court. Parties whose rights have been infringed might be unable to access courts because of lack of means to finance costs of litigation or even lack of education to litigate highly technical claims. To such parties, it would have been prudent to allow a group of citizens or Non-Governmental Organisations to sue on their behalf. However, such organisations lack standing for want of direct interest other than that of their common interest in environment with other citizens.[57] Consequently, too strict an adherance to the traditional notion of same interest requirement prohibits public spirited individuals or organisations from claiming relief either in the 'public interest or in the interests of persons who for various reasons are unable to enforce their rights."[58]

It follows tharefore that rigid application of same interest requirement is detrimental to cases involving mass claims like human rights or environmental rights.[59] In *Shell Petroleum Development Company Nig. Ltd v Chief Otoko and Others*[60] environmental rights were infringed. Andoni Rivers were polluted by spillage of crude oil. However, the same interest requirement was invoked to defeat the purported representative action of plaintiffs for compensation.

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51 *K.J. Motors* (n 30).

52 Lord MacNaughten famous statement in *Duke of Bedford v Ellis* (n 978).

53 South African Law Commission, (n37) 23-24.

54 *Ibid.*

55 *Ibid.*

56 [1996] TLR 203.

57 Busisiwe Mqingwana, "An Analysis of Locus Standi in Public Interest Litigation with specific reference to environmental law; A Comparative Study between the Law of South Africa and the Law of the United States of America" *LLM Thesis*, (Faculty of Law, University of Pretoria, 2011)

58 South African Law Commission, (n 37) 6, 23-24.

59 Rufus A. Mmadu, "Judicial attitude to Environmental Litigation and Access to Environmental Justice in Nigeria: Lessons from Kiobel," [2013], Vol. 2 Isue 1, *Journal of Sustainable Development Law and Policy*, 161.

60 (1990) 6 NWLRb (pt. 159-693.)

Another weakness of representative action is that it is unsuitable for those who seek to claim special damages. Most mass claims like human rights or environmental rights are not suitable to be litigated by way of representation because special damages cannot be claimed for people who do not suffer equally. In *Amos v. Shell BPP.D.C. Ltd* [61] one of the issues was "whether special damages could be claimed in a representative action, when the plaintiffs suffered unequal losses, or whether the plaintiffs as general public could claim for losses suffered by them individually." In dismissing the claim it was held :

> 1. That since the creek was a public waterway, its blocking was a public nuisance and no individual could recover damages therefore unless he could prove special damage peculiar to himself from the interference with a public right. 2. That since the interest and losses suffered by the plaintiffs were separate in character and not communal, they could not maintain an action for special representative capacity.[62]

The third weakness of multiparty litigation devices regards the issue of standing or *locus standi*. This shortcoming is more pronounced in Tanzania because representative suits are used interchangeably for public interest actions as well as group actions. As such, test of standing is restrictively used for both public interest actions as well as group or class action. Standing or *locus standi* is the term used to denote "the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenges to support the party's participation in the case."[63] The case of *Omary Yusuph v Albert Munuo*,[64] offered an interpretation to the term *locus standi* to mean "directness of a litigant's interest in proceeding which warrant his or her tittle to prosecute the claim asserted." Thus, two factors are important in order to determining whether a litigant has standing. The first requires proof of harm or injury to the litigant. The second factor involves whether a litigant has a legally protected interest or legal interest standing.[65] The Written Laws (Miscellaneous Amendment) Act no. 3 of 2020, which is an amendment to the "Basic Rights and Duties Enforcement Act" Cap 3 of Revised Laws of Tanzania, provides for the test of standing in public interest actions. Section 4 (2) now requires that:

A litigant who files a petition before the court challenging the constitutional validity of an act of the executive or an act of parliament should state in his affidavit accompanying the petition the extent to which the contravention of a fundamental right has affected such person personally.[66]

Therefore, in order to institute a public interest action, a person must to show standing. In that view, the traditional doctrine of standing is "relatively restrictive." It acts as a barrier to access

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61 (1974) 4 ECSLR 48.

62 Quoted in Mmadu, (n 61)162.

63 Brian Sanchez, "Class Action Law Suits in South Africa," March 29, 2018, Blog, available at https://lawfirmsinthenews.com/class-action-law-suits-in-south-africa/ (accessed on 17th June 2019)

64 Civil Appeal No. 12 of 2018, Court of Appeal in Tanzania at Dar-es-salaam (Unreported).

65 Lee A. Albert, "Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief," [1974] Vol. 83, No. 3, *The Yale Law Journal*, 425-497.

66 Issa G. Shivji, "Tanzania abolishes Public Interest Litigation: A comment on the amendment of Basic Rights and Duties Enforcement Act" in https://muckrack.com/issa-shivji/articles (accessed on 9th June, 2021).

to justice when seeking collective redress. [67] Tanzania's judiciary has not always interpreted the test of standing in a liberal manner. Instead, judges have taken a cautious approach to standing and thus interpreted standing cautiously or restrictively. [68] There is a thread of cases which have consistently required the plaintiff to be personally affected by the wrong in issue.[69] In *Mulbadaw Village Council & 67 Others v. National Agricultural and Food Corporation (NAFCO)*[70] rights to land of the pastoral Barabaig and the Maasai were claimed. The High Court held that "the members held rights over the disputed lands, and were thus entitled to compensation for the defendant company's destruction of crops and property." However, on appeal decision was overturned on "technical grounds of *locus standi*."[71] The same situation applied in the case of *Lekengere Faru Parutu Kamunyu & Others v. Minister of Tourism, Natural Resources and Environment & Others.*[72]

However, other cases have interpreted *locus standi* liberally. In *Mtikila & 3 Others v. Republic,*[73] the petitioner challenged the prohibition against independent candidates to stand for elections. Justice Lugakingira stated:

> The orthodox common law position regarding *locus standi* no longer holds good in the context of constitutional litigation . . . In the circumstances of Tanzania, if a public spirited individual springs up in search of the Court's intervention . . . the Court, as guardian and trustee of the Constitution, must grant him standing. [74]

Lugakingira adopted a broad approach to standing and hence declared that the prohibition against independent candidates was unconstitutional. In the process, Justice Lugakingira amplified article 26 (2) of Constitution of Tanzania[75] regarding "capacity of citizens by virtue of articles 25 to 28 of the Constitution," to broaden the place of Public Interest Litigation thereby according individuals with double standing to sue.[76] Again in the case of *Legal and Human Rights Centre v. Attorney General*,[77] it was held that :

> Ifa public spirited individual (and we add a corporation like the petitioners) spring up in search of the Court's intervention against legislation or actions that pervert the Constitution, the Court as guardian and trustee of the Constitution, must grant him (her/it) a standing;
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> Furthermore, the court was of the opinion that *locus standi* is vested in every person in the capacity of an individual by virtue of Articles 12 to 24 of the Constitution and for body

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67 Albert, (n 67), 427.

68 Oloka J. Onyango, "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View*"* [2015] Vol. 47, *The George Washington International Law Review,* at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3621124

69 *Ibid.*

70 1984 TLR 15.

71 Onyango, (n 70) 18.

72 Civil Appeal No 53 of 1998, Court of Appeal of Tanzania (unreported).

73 [1995] TLR 31.

74 [1966] EA 514.

75 The article states that "every person has the right..to take legal action to ensure the protection of this constitution and the laws of the land."

76 Onyango, (n 70) 18-19.

77 [2006] TLR 240.

> corporate in the capacity of a member of the community by virtue of Articles 25 to 28 of the Constitution. For that reason, since body corporate is also persons, they have sufficient interest in public interest litigation.

Significantly, in *Festo Balegele and 749 Other v.Dar es Salaam City Council*[78] and in *Joseph D. Kessy v. Dar es salaam City Council*[79], the issue of *locus standi* did not surface. The High Court adopted a broad approach to standing to affected persons and allowed residents to sue. However, the trend was reversed in *Lujuna Shubi Ballonzi v. Registered Trustees of CCM.*[80] This case centred on *locus standi* or standing for public and private interest litigation. The court stated that the applicant failed to adhere to the rules regarding the filing of a representative suit.[81] In Dismissing the case, it was stated that;

> a plaintiff or an applicant must show not only that the court has power to determine the issue but also that he is entitled to bring the matter before the court. Locus standi in Tanzania is governed by the common law which is made applicable by virtue of section 2(2) of Judicature and Application of Laws Act, cap 453. Under it, to maintain an action before it a litigant must assert interference with or deprivation of or a threat of interference with or deprivation of a right or interest which the law takes cognizance of.[82]

Similarly, in *Legal and Human Rights Center and Tanganyika Law Society v. Hon. Mizengo Pinda and the AG,*[83] (famously Mizengo Pinda case) *locus standi* was also invoked. These two cases upheld requirement of *locus standi* before a person can have recourse to law.

Therefore, despite some cases adopting a liberal interpretation, the issue of *locus standi* keeps cropping up time and time again. This is despite the fact that when it comes to protection of human rights issues, it is imperative that courts interpret *locus standi* liberally. This has rendered public interest litigation in Tanzania unpredictable and ncertain because it has always depended on the judicial activism and discretion of independent judges.[84] Now the Written Laws (Miscellaneous Amendment) Act no. 3 of 2020 is the final straw. Shivji submits that the "amendment seems to apply private law rules of standing to constitutional cases."[85]

In view of above, multi-party litigation devices do not meet effective right to remedy. According to the effectiveness criteria of Pillar III of UN Guiding Principles[86], right to effective remedy entails victim's right to equal and effective justice; adequate, effective and prompt reparation for harm suffered.[87] Importantly, the right entails having practical and meaningful

78 Rubama J., Miscellaneous Civil Cause No. 90 of 1991, High Court of Tanzania at Dares Salaam (Unreported).

79 Lugakingira, J., Civil Case No. 299 of 1988, High Court of Tanzania at Dares Salaam, (Unreported).

80 [1996] TLR 203.

81 Onyango, (n 70) 18-19.19.

82 Ballonzi (n 82).

83 Misc. civil cause no. 24 of 20013, High Court of Tanzania at Dar es salaam, (Unreported).

84 Onyango, (n 70) 18-19.

85 Shivji, (n 68).

86 United Nations, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, United Nations Human Rights Office of the High Commissioner, New York and Geneva, 2011,

87 Principal 11, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of

access to a procedure that is capable of ending and repairing the effects of a human right violation.[88] The remedy should be afforadble, friendly and timely.[89] According to the principles of the African Commission on Human and Peoples' Rights, "everyone has the right to an effective justice by the constitution, by law or by the Charter." [90] This means that to be regarded as effective justice, there should be a judicial remedy which can "lead to a prompt, thorough, and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition."[91] In that regard, there can never be effective access to justice where multi-party litigation devices are inadequate, unclear or incomprehensively provided for.

A Case for Class-action Suits in Tanzania

Though the Environmental Management Act provides for class action suits, the constitution does not recognize class action suits. In contrast, South African constitution and Kenyan constitution recognize class actions and public interest actions. Section 38 of the South African Constitution of 1996 echoes section 7(4) of the old Constitution, 1993. It reads as follows:

> Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:
>
> anyone acting in their own interest; anyone acting on behalf of another person who cannot act in their own name; anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; an association acting in the interest of its members.[92]

In similar manner, The constitution of Kenya of 2010, under article 22 (1) and (2) gives recognition to multi-party litigation devices such as class action suits.[93] Under section 4 of the Consumer Protection Act of 2012 of Kenya, class action proceedings are also extended to other types of lawsuits like consumer cases.

In that regard, class action proceedings in Tanzania are inadequate to afford access to justice to claimants. This inadequacy stems from the fact that there are no formal rules for class action

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Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" UN Doc A/RES/60/147 (21 March 2006).

88 Principles 2(b), 3(c), 11(a), 12, 19, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc A/RES/60/147, 21 March 2006.

89 Committee on Economic, Social and Cultural Rights, General Comment 9: The domestic application of the Covenant, UN Doc E/C.12/1998/24, 3 December 1998, para 9.

90 African Commission on Human and Peoples' Rights, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa", Principle C (a), available at http://www.achpr.org/instruments/fair-trial/ (accessed 9th June, 2022).

91 Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, "'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", [2013] *ICAR, CORE, ECCJ* (December 2013), p. 30.

92 Section 38 of the new South African Constitution, 1996.

93 Article 22 (1) and (2).

procedure in Tanzania. In particular, there are no rules passed by parliament nor rules set by courts to not only regulate class action procedure but also guide courts on a practical way of how to manage a class action suit. The Environmental Management Act has left it to the courts or minister to develop procedural framework for class action. This approach is regarded as being a haphazard approach which only leads to uncertainty and inconsistency.[94] Instead, a better approach is to have a comprehensive legislation which articulates clearly the procedures of managing class action.[95] Consequently, for want of detailed procedural framework, class action suits in Tanzania is an illusory mechanism for accessing justice by litigants.

The advantages of a class action are numerous. A class action envisages the concept of ideological plaintiffs and for that matter a class action gives more potential plaintiffs a chance to initiate suits. Through the innovative concept of ideological plaintiffs, in order to initiate a class action, a representative of the class "need not be a member of the class and thus, need not have a direct interest in the relief sought. Instead, he only needs to be a suitable person appointed to adequately represent the best interest of members of class."[96] As such, class actions confer individual standing, entity standing (interest groups or NGO's and even Governments have standing).

Furthermore, class action proceedings also have broad substantive scope in terms of subject matter to be adjudicated. This is based on the belief that the broader the scope, the more effective the class action device is. As such, where a class action device is trans-substantive, it can be filed for almost every law suit available – no matter the cause of action. It is imperative that class action proceedings should not only be available to bill of rights cases but should also extend to non-bill of rights cases such as consumer cases, labour disputes, tort cases, insurance cases, securities cases, antitrust/competition cases, and many others. Thus, some jurisdictions allow class action to enforce also non-constitutional rights. While some countries have piecemeal legislations permitting class actions in types of cases such as consumer cases, other countries prefer to have a specific legislation devoted to class actions which details the procedure applicable to class proceedings. Other countries provide the procedure partly in civil procedure laws and partly in other laws while other countries have class actions provided under the civil procedure law only.[97]

Another great advantage of class action is that it is very suitable for mass claims pertaining violations of human rights or environmental rights. For instance, class action suits were used in South Africa in the Silicosis litigation. The lawsuit was filed on behalf of members hosting mining investments who contracted incurable silicosis disease after inhaling silica dust from gold-bearing rocks. This case ended in land-mark class-action settlement for claimants.[98] Consequently, in orderto realize effective access to remedy, class action devices are an apt mechanism for achieving that goal,

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94 Broodryk, (n 47).

95 Sisanda Gerald Mfundisi, and Robert Parring, "United States: The Difficulties Of Class Action Claims In South Africa", 2019 at https://www.mondaq.com/unitedstates/class-actions/821906/the-difficulties-of-class-action-claims-in-south-africa (accessed on 2nd June, 2022)

96 South African Law Commission, (n 37) 6, 23.

97 The Law Reform Commission of Hong Kong, (n 51) 6.

98 Reuters, "First claimants paid in South African silicosis settlement", https://www.reuters.com/article/uk-safrica-mining-silicosis-idUSKCN2AU1FX (accessed on 2nd September, 2021).

Conclusion and Way Forward

As noted above, class action suits are permitted under section 202 of Environmental Management Act. This Act applies as far as environmental issues are concerned. However, other types of lawsuits cannot be litigated through class action suits. For want of class action suits in respect of human rights issues and other types of lawsuits, Tanzania legal system does not have a comprehensive procedure to address "multi-party actions in a consistent, effective and expeditious manner."[99] Consequently, the ability of a civil lawsuit to transform from one to another is limited in Tanzania as the current procedures governing class action suits are not comprehensive.

Despite the fact that Tanzania permits class action suits under The Environmental Management Act, there are no regulations passed to manage the procedure. Tanzania should provide detailed procedures how class action suits should be managed. Important questions to be addressed include who are class members and how the members should be determined. Should potential class members opt into the class proceedings by taking procedural steps within stipulated time or should they opt-out by taking an affirmative step to indicate they do not wish to be included from the action and resultant judgment ?[100] The procedures should also mention basic ingredients or criteria for an application to be certified as a class action.[101] Other procedures pertain to publication of notices to prospective class members. It is imperative that these procedures be clealry provided for either under a specific legislation or regulations.[102]

Tanzania may be able to learn from South Africa and India that developed statutory frameworks to guide class actions. The civil procedure in these countries share common law features of legal system such as judicial precedent and adversarial system of litigation amongst others. The procedures will shed light on how to avoid frivolous claims and frivolous settlements like the possibility of using settlement-pre screening powers giving courts powers to approve or reject settlements.[103] Thus, the overall utility of class action devices is gauged through metrics. These metrics will only be known through detailed formal procedures provided to guide class action suits.

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99 The Law Reform Commission-Ireland, "Consultation paper on Multi-party Litigation (class actions)", (2003) (The Law Reform Commission, Consultation paper no. 25), at https://www.lawreform.ie/_fileupload/consultation%20papers/cp25.htm (accessed on 22nd July, 2020).

100 *Ibid*, 6 – 7.

101 *Children's Resource Centre Trust,* 2013 1 All SA 648 (SCA).

102 Broodryk, (n 47) 14-15.

103 *Ibid.*

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