IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Gachuhi, Apaloo & Masime JJA)

CIVIL APPEAL NO. 10 OF 1988

BETWEEN

KINYATTI .....APPELLANT

AND

ATTORNEY-GENERAL.....RESPONDENT

JUDGMENT

(Appeal from a Ruling of the High Court at Nairobi, Gicheru J)

July 13, 1988, **Gachuhi JA** delivered the following Judgment.

The appellant in his suit filed on April 3, 1987 prayed for (a) a declaration that the decision of the Commissioner depriving the plaintiff of his remission was arbitrary, contrary to the rules of natural justice and the provision of the Laws of Constitution of Kenya and is therefore a nullity; (b) restoration of the plaintiff remission in whole and (c) costs of the action.

The defendant filed a defence which was a bare denial. Later the defendant in the course of hearing of the suit applied for an adjournment to enable him to apply for leave to amend the defence with a further prayer that the plaintiff may have liberty to amend his plaint. The order for amending the defence was granted. The plaintiff was granted leave to file an amended reply. From the record, it does not appear that the plaintiff pressed for leave to amend the plaint in the light of the amended defence.

The amended defence was more elaborate. In fact the original defence with an exception of clause 1, the rest was completely replaced. More defences were brought in. The defence the respondent heavily relied upon is clause 4 which is:

> "avers that the Commissioner of Prisons is by section 46(3A) (1) of the Prisons Act (cap 90) authorised in the interest of reforming and rehabilitating the plaintiff to act as he did on February 16, 1983. Alternatively, and without prejudice to the foregoing, the defendant contends that the acts complained of having occurred as far back as February 16, 1983 and the plaintiff's suit having not been filed until April 3, 1987, a lapse of more than 4 years, the plaintiff's suit is both incompetent and not maintainable in law in as much as the same was not instituted as required by the provisions of section 3(1) of the Public Authorities Limitation Act cap 39 of the Laws of Kenya. This defence is filed without prejudice to the defendant's right to raise a preliminary point that this suit will be dismissed in terms of the mandatory provisions of section 3(3) of the Public Authorities Limitation Act".

As defence of limitation was raised in the amended defence the plaintiff filed a reply to it. Paragraphs 5 and 6 of the reply to the amended defence are important as they were relied upon heavily by the respondent in having the plaint dismissed. They read:

> "5 Further, the plaintiff denies that this suit is incompetent and not maintainable in law by virtue of section 3(1) of the Public Authorities Limitation Act cap 39. The plaintiff avers and contends that this cause of action accrued on or after October 18, 1986 when the Commissioner of Prisons refused or failed and/or neglected to cause the plaintiff to be released or discharged form prison at the end of the plaintiff's two third sentence served in accordance with the provisions of section 46(1) and (2) of the Prisons Act cap 90.
>
> 6. In the alternative and without prejudice to what is stated in paragraph 5 hereof, the plaintiff avers and contends that in law, his cause of action accrued or would accrue on or after or between October 18, 1986 and within the period between the latter date and after the end of his sentence of six years imposed by the learned Chief Magistrate and consequently the provisions of section 3(1) of the Public Authorities Limitation Act cap 39 do not and would not apply to the plaintiff's claim."

This reply to the amended defence was not an amended reply. As the pleadings appear, both the reply to defence filed on July 10, 1987 and the reply to the amended defence dated October 26, 1987 and filed thereabout, exist as replies to the defendant defences.

At the resumed hearing, the counsel for the defendant raised a preliminary objection in the matter basing his objection on order VI rule 6(1) of the Civil Procedures Rules that there has been a departure from pleadings.

This is not allowed. Order VI rule 6(1) and (2) provides:

> "(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
>
> (2) Sub-rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."

It was contended that paragraph 5 and 6 of the reply to the amended defence are in conflict with the plaint and the earlier reply to the defence and that they introduced a new cause of action which was never pleaded in the plaint. The appellant in the lower court argued that the court should not rule on preliminary point on limitation without having heard the evidence. What the counsel argued as reason for this is that in case of a tort an action cannot be brought before a court when the damage is still continuing and unless damage has been done which is a fact to be proved by evidence. He argued that the plaintiff's cause of action accrued on October 18, 1986 when the plaintiff could have shown actionable injury, see *Cartledge v E Jobling and Sons Ltd* [1963] AC 758 at page 777. He further argued that suit could not be filed if the plaintiff could not prove any damage. It is stated that the plaintiff suffered damage when he was not allowed to leave the prison on October 18, 1986 so that is when the cause of action arose.

The respondent's pleading on limitation is based on the plaint paragraph 4 which was not amended and still remains as the basis of his claim in tort. To make this judgment clear, paragraph three of the plaint is also relevant; these paragraphs are:

> "3. Immediately after the plaintiff was admitted into Kamiti Prison in 1982 to commence serving his sentence of six years imprisonment, the Commissioner of Prisons showed and read a letter to the plaintiff addressed to the plaintiff as a prisoner, the said letter being duly signed by the said Commissioner of Prisons (hereinafter referred to as "The Commissioner") in which the Commissioner informed the plaintiff that he (the Commissioner) had been directed to inform the plaintiff that the sentence imposed on the plaintiff by the Chief Magistrate, Nairobi, was not sufficient to rehabilitate and reform the

plaintiff and that the plaintiff would therefore not be entitled to any remission of sentence.

4. The plaintiff avers that the decision of the Commissioner as conveyed to the plaintiff in the said letter, in fact, deprived the plaintiff of the remission, to which he is entitled by virtue of section 46(1) and (2) of the Prisons Act cap 90".

The paragraphs in the reply to defence complained of are inconsistent with the plaint. The plaint complained of the letter that deprived the plaintiff of his remission while the reply complained of the failure to release the plaintiff on October 18, 1986. Failure to release was not pleaded in the plaint. The argument by the plaintiff to fix the cause of action as at October 18, 1986 is to defeat the defence of limitation set up by statute. This cannot be allowed.

The reply is a departure from the plaint which is disallowed by order VI rule 6 of the Civil Procedure Rules. Mr. Khaminwa does not accept this as a departure but states that the plaintiff in his reply he may plead a "new assign". He referred to *Bullen and Leake and Jacob's Precedents of Pleadings* at page 107 where departure is not permitted. But at page 8 there is this provision:

> Although the plaintiff is not allowed to make a "departure" in his reply, yet he may "new assign". A new assignment was a pleading in the nature of a special reply, which explained the declaration in such a manner as to point out the real or supposed mistake of the defendant, and to show that the defence pleaded was either wholly inapplicable to the causes of action relied upon by the plaintiff, or was applicable only to a part of them. Such a reply is very seldom necessary under the present system of pleading owing to the greater particularity now required in a statement of claim; but it is still sometimes used. As a rule, however, if there be any mistake or possible ambiguity as to the precise nature or extent of the acts complained of or of the right which the defendant relies on as justifying those acts, the pleadings already served should be amended or further particulars ordered".

Clearly the system of pleadings is not in favour of "new assign" which the counsel for the plaintiff tends to rely on. Order VI rules 3 and 4 of the Civil Procedure Rules are clear on this that the statement of claim must be precise, clear, free from any ambiguity and clearly set out including limitation.

To be able to ascertain whether there was a departure in the reply the departure has to be established by the pleadings as to when the cause of action arose. The plaint pleaded of a letter. There is no dispute of this letter. The plaintiff accepts having been shown the letter and of its contents read over to him. There is a complaint that the said letter was not produced. Though the time for proving it had not materialised, yet where there is no dispute over it there is no need of proving it. Both parties have accepted it together with its content. It was set out in the amended defence that the letter complained of is dated February 16, 1983. The date the letter was shown to the plaintiff was precisely on February 26, 1983. The plaintiff having been convicted and sentenced to a term of 6 years imprisonment on October 18, 1982 he had been in prison for four months before he was served with the letter depriving him of the remission. On conviction and sentence, the plaintiff was credited with a remission of one third of the sentence. On computation of time instead of serving the whole period of six years he was only to serve four years which would have entitled him to the release on 18th October 1986. In February 1983 when his remission was taken away, he reverted to serve the full term of sentence of six years.

The plaintiff was fully made aware that he was to serve six years and should not expect to be released after serving only four years. This is what was pleaded in the plaint. If there could have been any injury to the plaintiff it was caused by the letter complained of. If there was a continuous damage, it must have started when the contents of the letter taking away the remission was communicated to the plaintiff. The damage could not have been caused by the failure to release. On sentence, a prisoner is bound to serve full term of the sentence unless he is granted a remission under section 46(1) of Prisons Act (cap 90). Such remission is to certain prisoners who, may by industry and good conduct earn a remission of one third of their sentence or sentences. A prisoner may be deprived of remission by the Commissioner in the interest of reformation and rehabilitation and by the Minister in the interest of public security. The Minister on recommendation of the Commissioner may grant further remission on exceptional merit. The

Minister has power to restore forfeited remission in whole or in part. The whole of sec 46 which deals with remission if not applied, a prisoner will not be credited with any remission but has to serve full term of sentence. In my view, paragraphs 5 and 6 of the reply to the amended defence were a departure from the pleadings and could not be accepted as new assign and was rightly struck out.

Dealing with the defence of limitation, I have indicated that damage that could be claimed by the plaintiff was caused by the letter of February 16, 1983. The plaintiff having been aware of its contents, if he wished to be released on October 18, 1986, the date he was expecting to be released if remission was not taken away, he was entitled to remove the embargo created by the said letter. He had twelve months from February 26, 1983 or thereabout to file suit, as tort had been committed by the letter. In the present suit, it cannot be rightly stated that the tort was committed by non-release. The non-release is the effect of the said letter. This suit was filed on April 3, 1987. It is my view that the plaintiff slept over his rights by allowing his suit to be time-barred under the provisions of section 3(3)(a) of the Public Authorities Limitation Act (cap 39) see *Thuo v Attorney General* [1977] KLR 89 at page 91 letter B. The learned trial judge was within his right to allow the preliminary point to be raised. He was also right in striking out the plaint.

In the course of argument, other claims pleaded in the plaint were argued.

I do not consider these arguments as relevant in this appeal because these matters were considered in *David Oloo Onyango v Attorney General* CA No 152/86. In that appeal limitation was not raised so it was not considered but that appeal was decided on other factors.

In my view, the plaintiff's claim was time barred and the learned judge was right in striking out the plaint. I would dismiss this appeal.

Mr. Ole Keiwua has asked for costs for two counsel. I do not think this case was so complicated to warrant two counsel. I would award costs for one counsel only in this appeal.

As Apaloo and Masime JJA so agree, the appeal is dismissed with costs.

Apaloo JA. I also think that this appeal fails. As this case raised somewhat uncommon points of law, I think I should express my conclusion in my own words.

The appellant was said to be a Senior Lecturer in the department of History in the Kenyatta University College. On October 18, 1982, he was convicted of an offence not disclosed in the pleadings and was sentenced to prison for a term of 6 years.

Under section 46 of the Prisons Act, he was entitled to a remission of one third of the sentence. In other words, he was only to serve a term of 4 years' imprisonment. Had his remission not been disturbed, he would have been entitled to gain his release from prison on the 17th or possibly 18th October 1986.

The available evidence shows that on February 16, 1983, the Commissioner of Prisons sent him a written notification. This informed him that the Commissioner had cancelled his 2 years remission. The Commissioner has power under section 46 of the Prison Act to do that. Under the Prisons Act, the remission was to be credited as soon as a convict was admitted. So the appellant would have known, when with remission, he would have been due to be discharged. It stands to reason that as the appellant's remission was withheld he would also be aware that he would not be due for discharge until October 18, 1988.

On April 3, 1987, the appellant, acting by counsel, brought a plaint in which he sought a declaration that the Commissioner acted arbitrarily and in breach of the rules of natural justice when he deprived him of his remission. He sought an order for its restoration. The respondent, by his amended statement of defence, pleaded *inter alia*, that the action was barred by the provisions of section 3(1) of the Public Authorities Limitation Act inasmuch as it was commenced after 12 months from the date when the cause of action accrued. On receipt of the statement of defence, the appellant filed a reply in which he averred

in paragraphs 5 and 6 in sum that has caused of action accrued on October 18, 1986 that being the date the Commissioner, wrongly, it was said, refused or neglected to release him.

This matter came up for hearing before the High Court (Gicheru J) on November 11, 1987. Before evidence could be heard, the respondent raised a number of preliminary objections. The only two relevant for this appeal, were: First, that paragraph 5 and 6 introduced a new cause of action. It was urged that this was a departure in pleading which was not permissible. Counsel relied on order 6 rule 6(1) of the Civil Procedure Rules and invited the learned judge to strike out the two offending paragraphs. Counsel then contended that the only cause of action disclosed in the plaint was the alleged wrongful deprivation of the appellant's remission by the Commissioner. It was urged for the respondent, that that cause of action arose or accrued to the appellant on February 16, 1983 and as the plaint was not brought until April 1987, the suit was statute barred. Counsel accordingly invited the court to strike it out. For the appellant, it was urged that it would be wrong to strike out the alleged offending paragraphs of the reply or strike out the suit on the point of time bar. It was said the proper course was for the issues to go to trial and evidence adduced to determine the rights of the parties in the ordinary way.

On December 8, 1987, the learned judge delivered a reserved ruling in which he not only struck out paragraphs 5 and 6 of the reply, but proceeded to strike out the whole suit on the ground that it was time-barred. The appellant contests these two holdings by this appeal. I think it is necessary to take the pleading point first. Order 6 rule 6(1) of the Civil Procedure Rules enacts that:

"No person may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit".

In *Herbert v Vaughan* [1972] 1 WLR 1128 it was held that "inconsistent" for this purpose does not mean mutually exclusive but merely new or different. If a pleader breaches this procedural injunction, the remedy is an application to strike out the paragraphs in which the defect occurs.

The question for determination on this part of the case is simply this: Has the appellant raised in his reply a new ground of claim which does not harmonise with his plaint? To answer this question, one must look at the ground on which the relief is based in the plaint. That ground is contained in paragraph 4 and as pleaded, is in the following terms:

> "The plaintiff avers that the decision of the Commissioner as conveyed to the plaintiff … deprived the plaintiff of the remission to which he is entitled by virtue of section 46(1) and (2) of the Prisons Act".

It is plain the appellant's complaint here is the decision which damnified him. He sought a reversal of that decision and a restoration of the right to remission. But in paragraphs 5 and 6 of the amended reply, his complaint was "the Commissioner of Prisons refused or failed or neglected to cause the plaintiff to be released." It does not require a great deal of perspicacity to see that the ground put forward for the relief in the reply, is wholly different from the one pleaded in the plaint. They simply do not harmonise. The reason for this change of front by the appellant, will become apparent in the second ground of complaint. I think the averment in paragraphs 5 and 6 of the reply, were violative of order 6 rule 6(1) and the proper remedy is to have them struck out. That was the relief the respondent sought successfully. In my opinion, the learned judge was right in striking out the two offending paragraphs.

The appellant next says, since his cause of action accrued on October 18, 1986 and not on February 16, 1983, he was not caught by the time bar provided by section 3(1) of the Public Authorities Limitation Act and that the learned judge was wrong in holding the contrary.

The question to be determined on this part of the case, is "what was the appellant's cause of action?" It was pleaded in paragraph 4 of the plaint which I have earlier set out. Properly analysed, the appellant's complaint was that the legal right to remission granted him by section 46 of the Act was wrongly taken away by the Commissioner. Such alleged wrongful action by the Commissioner was notified to him in the latter's letter of February 16, 1983. It must be plain that if he suffered any legal injury from the

Commissioner's act, it was on that day. If he had brought an action say, on February 19, 1983, he would be obliged to establish (1) that fact of the taking away of the remission, (2) that such deprivation, was wrongful and (3) that it resulted in legal "damnum" to him inasmuch as it would result in his being kept in prison for 2 years longer. If he establishes these, he would be entitled to judgment for an order for restoration of the remission even if these facts were traversed by the respondent. So, he clearly, he had a cause of action as conceived by Lord Esher MR. in *Read v Brown* (1888) 22 QBD page 128 at page 131 on February 16, 1983. The appellant's contention that he suffered damage only on October 18, 1986, must be wrong.

The legal damage he suffered, was the termination of his intangible legal right to 2 years' remission. That plainly, was sustained by him on February 16, 1983. It is only the consequence of his deprivation of that was manifested on October 18, 1986. Had the appellant brought a successful suit by 1984 – that is within the time bar, the right to remission would have been restored and he would have been eligible for release on October 18, 1986. To say that the damage was sustained on October 1986 is to confuse the intangible right which was allegedly violated in February 1983, with the consequence of that violation which occurred much later. My conclusion therefore is, that the appellant's cause of action accrued on February 16, 1983 and that the learned trial judge was right in so holding.

I deferred for consideration, the reason why the appellant changed front and contended that his cause of action accrued in October 1986 notwithstanding his pleading in paragraph 4 to the contrary. The reason, clearly, is to get round the plea of limitation which was set up by the respondent against him. Had the statute of limitation not been pleaded, it is plain to me that the appellant would have proceeded to fight his case on the averment made in paragraph 4 of his plaint that the Commissioner's letter of February 16, 1983, arbitrarily deprived him of the remission granted him by section 46 of the Prisons Act. That argument, ingenious though it is, must fail.

I cannot help feeling some sympathy for the appellant. For all we know, he may have launched a successful case against the exercise of the Commissioner's discretion on the merits. The time bar relied on by the respondent, disables him from doing so. But the statute of limitation is not concerned with merits. It has been described as a tyrant's axe. Once it falls, it falls and a person on whose side it falls, is entitled to insist on his strict legal rights. It has fallen on the respondent's side and he insists on his legal rights. He is entitled to so insist.

In my opinion, this appeal fails and must be dismissed.

Masime JA. The facts of this appeal are set out fully in the judgment of Gachuhi JA which I have had the advantage of reading in draft. I had also read in draft the judgment of Apaloo JA. I agree that there is no merit in this appeal and it should be dismissed with costs.

As a convicted criminal prisoner the appellant was on admission to prison on 18th October 1982 "entitled to be credited with the full amount of remission" i.e. one third of the sentence- See section 46(1) as read with section 46(2) of the Prisons Act Cap 90 of the Laws of Kenya. Under section 46(3A)(a) however, such remission may be lost, *inter alia*, where the Commissioner considers that it is in the interests of the reformation and rehabilitation of the prisoner. It was surely the "loss" of remission that constituted the cause of action of the appellant; that being so it is clear that the cause of action arose when the appellant was told of it by the Commissioner of Prisons on 18th February 1983. Indeed that is what the appellant's plaint states:

> "4. The Plaintiff avers that the decision of the Commissioner as conveyed to the Plaintiff in the said letter, in fact deprived the Plaintiff of the remission to which he is entitled by virtue of section 46(1) and (2) of the Prisons Act Cap. 90"

That being so the learned trial Judge was clearly right in holding that the plaint filed in court on 3rd April 1988 was filed when the cause of action was statute barred by section 3(1) of the Public Authorities Limitation Act having been commenced more than 12 months after the cause of action arose.

But this appeal was fought on another footing also: in reply to the Respondent's amended defence whereby the issue of Limitation was raised, the appellant introduced two paragraphs- 5 and 6 – which averred that the cause of action accrued on 18.10.86, the date when the appellant should have been released but was not released because of the Commissioner's decision to deprive the appellant of his entitlement to remission. At the opening of the hearing, the respondent took exception to those paragraphs as contravening Order 6 rule 1 and moved the court to strike them out. The court sustained the preliminary objection and not only struck out the paragraphs but having done so went on to strike out the whole plaint. I have for my part considered the legal submissions made by the appellant's learned counsel but cannot find that the learned Judge erred in doing so.

In the result I agree with my Lords Gachuhi and Apaloo JJ A that this appeal fails and should be dismissed with costs.

Dated and delivered at Nairobi this 13 th day of July , 1988

J.M GACHUHI

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JUDGE OF APPEAL

F.K APALOO

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JUDGE OF APPEAL

J.R.O MASIME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR