

IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE. 197 OF 2005

PROTACE MUGONDO.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL &

ANOTHER.....DEFENDANTS

Date of last order – 16/7/2010

Date of Ruling – 16/9/2010

RULING

Mwarija, J.

In this suit, the learned State Attorney raised a preliminary objection which has five grounds as follows:-

1. That the plaintiff has not mentioned specific provisions of articles 12 to 29 of the Constitution which is being or is likely to be contravened in relation to him contrary to the requirement of s.4 of

the Basic[Rights] and Duties Enforcement Act, No. 33 of 1994.

2. The suit has been instituted in contravention of the mandatory requirement of the provisions of section 5 of Basic Rights and Duties Enforcement Act No. 33 of 1994.
3. This Hon. Court has no jurisdiction to entertain this matter as it contravenes section 10 of the Basic Rights and Duties Enforcement Act No. 33 of 1994.
4. The plaintiff's plaint contravenes O.VII of the Civil Procedure Code
5. This matter is time barred.

At the hearing of the preliminary objection, Ms. Makondoo, learned State Attorney appeared for the respondents. She was assisted by Ms. Punzi, learned State Attorney. The plaintiff on the other hand appeared in person.

Arguing the first ground of the preliminary objection, Ms. Makondoo submitted that although the plaintiff has alleged in paragraph 6 of his plaint that the defendants have breached his constitutional rights, he did not cite the specific provision of the Constitution which was breached. Citing the Court of Appeal decisions in the cases of **Almasi Iddie Mwinyi v. National Bank of Commerce & Anr**, Civil 88 of 1988 (unreported) and **Citi Bank (T) Ltd v. TTCL & 4 others**, Civil Application No. 64 of 2003 (unreported), the learned State Attorney submitted that, like in the case of an application, non-citation of a constitutional provision is fatal and as such the plaintiff should be taken to have not properly moved the court.

In ground two of the preliminary objection, the learned State Attorney submitted that the claim by the plaintiff should not have been by way of a plaint, rather it ought to have been brought by way of a petition through an

originating summons. She argued that since s.5 of the Basic Rights and Duties Enforcement Act, Cap. 3 has been breached, the matter now before the court should be found to be incompetent.

As to the third ground, Ms. Makondoo submitted that the court has no jurisdiction to entertain the claim filed by the plaintiff because under paragraph 6 of the plaint, the claim is based on a breach of constitutional rights provided for under articles 12 – 29 of the constitution. According to the learned State Attorney, that being the case, the proceedings for redress should be made in accordance with the provisions of the Basic Rights and Duties Enforcement Act, and for that matter under s.10 of the said Act the matter ought to be determined by a full bench of this court.

On the fourth and fifth grounds, the learned State Attorney argued that since the claim is founded on the appeal process and since the plaintiff did not show when

he did file his notice of intention to appeal, by instituting his claim 15 years after the date when he was supposed to have been released from prison, the claim is time barred. She said that given the preferred claim which is in the nature of tort, under the Law of Limitation Act, the plaintiff should have filed his claim within three years. It was further argued by the learned State Attorney that by filing the claim out of time and without stating the grounds for the delay, the plaintiff contravened the provisions of O. VII r. 7 of the Civil Procedure Code and therefore on those grounds the suit ought to be dismissed.

Responding to the submissions by the learned State Attorney, the plaintiff submitted that his claim does not fall with the provisions of articles 12- 29 of the Constitution and therefore according to him, he was not bound to bring it in accordance with the provisions of the Basic Rights and Duties Enforcement Act. He said therefore that his claim

was properly brought by way of a plaint. On the citation of the constitutional provision which he alleged to have been breached, he replied that since the court is better placed to know the particular provision, it was not necessary for him to cite it. He added that the court is vested with a duty of determining the case on the relevant provisions of the Constitution and by citing those provisions, it would have amounted to teaching the court on how to exercise its function.

On the question of jurisdiction, he submitted that it was not for the parties to decide whether a case should be presided over by a panel of three judges or otherwise. He argued further that his case is an ordinary suit based on the claim of special and general damages, not one based under the Basic Rights and Duties Enforcement Act.

Finally on the question that his suit is time bared, his response was that he was not provided with a copy of the

judgment which he intended to appeal against. He said however that he managed to get a copy through his own means, not officially.

In deciding the preliminary objection, I intend to start with grounds three and two jointly. The issue raised in the submissions on the two grounds is whether the claim is one in which the plaintiff is seeking redress under article 30 (3) of the constitution or not. To answer that issue, it is pertinent to reproduce part of paragraph 6 of the plaint. It reads as follows:-

“To refuse intentionally to attend the plaintiff’s appeal in the ideal and good time has resulted to (made) the plaintiff to serve his imprisonment to the most and of it without reasonable and portable cause innocently. But this habit and custom the Government and the High Court of

Tanzania both have very intentionally refused to respect our constitution. And have also deliberately refused to respect and protect the life and properties of the plaintiff as it is very described clearly in our constitution to be their duties. It does not matter if the result of the plaintiff's appeal were good or bad for him. But it was very necessary to be released in ideal and good time. In order to sue the complainant of that case in civil case for damages or to appeal further to Tanzania Court of Appeal. As their duties which are very described clearly in the constitution. They intentionally betrayed and cheated the plaintiff completely in actions contrary to what are stated clearly in our constitution

*(by refusing to attend the plaintiffs as
appeal in good and ideal time)... therefore
they intentionally broke our constitution
which is a legitimate and legal contract
between the plaintiff and them”.*

As can be gathered from that part of the plaint
which was not drafted by an advocate, reference to
the Constitution was intended to emphasize the
allegations of irresponsibility on the part of the
officials who according to the plaintiff failed to
supply him with the necessary documents to
enable him file his appeal. He is emphasizing that,
had the said officials performed their duties in
accordance with the requirements of the
Constitution, he would not have failed to get the
documents promptly.

But notwithstanding the above stated position, a wholistic reading of the plaint clearly shows that what is claimed by the plaintiff is special and general damages resulting from the alleged delay or denial of necessary documents including a copy of judgment to enable him appeal against his conviction, the result of which he had to remain in prison until completion of his sentence. As correctly put by Ms. Makondoo in her argument in ground No. 4 of the preliminary objection, the plaintiff's claim was in the nature of a tortious liability. In my considered view, the plaintiff was not claiming for a redress as a result of breach of Constitution rights under articles 12 – 29 of the Constitution but for damages as stipulated under paragraph 7 of his plaint. For the reasons stated

above therefore, I find the 2nd and 3rd grounds to be lacking in merit and hereby overrule them.

Having answered grounds No. 2 and 3rd in the negative, the first ground need not detain me. Apart from the fact, as found above, that the claim by the plaintiff is not governed by the Basic Rights and Duties Enforcement Act, non-citation of a provision of a Constitution or law in a paragraph of a plaint cannot, in my view, render a claim incompetent. This is because a paragraph is merely a part of a plaint. Unlike an application, a plaint does not require citation of a specific provision of the law apart from its contents as provided for under O.VII r.1 of the CPC. On that basis that ground fails as well.

Turning now to grounds No. 4 and 5 of the preliminary objection, the issue on these grounds is

whether the claim is time barred or otherwise. As correctly submitted by the learned State Attorney, the plaintiff's claim which is founded in tort was supposed to have been brought within 3 years from the time of accrual of the cause of action. That period of limitation is provided for under item 6 of the schedule to the Law of Limitation Act, Cap. 89 RE 2002. By bringing this suit after about 17 years from the date of his conviction and 15 years after completing his sentence, the suit is undoubtedly time barred.

In his submissions however, the plaintiff gave an explanation to the delay. He contended that the delay was occasioned by the fact that he was denied a copy of the judgment until when, through his own means, unofficially obtained one. In essence, what was submitted by the plaintiff is that he had a

ground for failing to file his suit within time and thus his suit is exempted from the time of limitation. That being the plaintiff's reply, if he thought that such is a sound ground upon which the suit can be exempted from the period of limitation, he must have shown so in his plaint.

I had an occasion to consider a similar situation in the case of **Mampashe Matatizo v. National Microfinance Bank & 2 others**, Civil Case No. 155 of 2006. In that case the plaintiff filed his claim out of time prescribed by law for claims arising out of tort. Since he did not state in the plaint the grounds upon which he intended to be exempted from the period of limitation, his plaint was rejected. The requirement to show the ground for exemption of the time of limitation is provided

for under O.VII r. 6 of the CPC cited by the learned State Attorney. That provision states as follows:

“Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed.”

Since compliance with the above cited provision is mandatory, a suit filed out of the prescribed period of limitation without stating the ground upon which that period of limitation can be exempted, becomes time barred. In the case of **Alfons Mohamed Chilumba v. Dar es Salaam Small Industries Development Cooperative Society** (1986) TLR 91, this court, Mapigano, J. (as he then was) held as follows regarding a suit filed out of time without statement of the ground for exemption of the time of limitation.

*“ Order 7 rule 6 CPC provides that where the suit is instituted after the expiry of the period prescribed by law of limitation, the plaintiff shall show the ground upon which exemption from such law is claimed. In other words, where but for some ground of exemption from the law of limitation, a suit would **prime facie** be barred by limitation, it is necessary for the plaintiff to show in his plaint such ground of exemption. If such ground is not shown in the plaint, it is liable to be rejected under rule 11 (c) of the same Order.”*

On the basis of the above stated position of the law since the plaint was filed out of time and because the plaintiff did not state in his plaint the grounds upon which

exemption from the time of limitation is claimed, the suit ought to be rejected. Accordingly the suit is hereby rejected under O.7 r. 11 (c) of the CPC. I make no order as to costs.

A.G.Mwarija
JUDGE
16/9/2010

Date : 16/9/2010

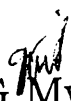
Coram: A.G. Mwarija, J.

For the Plaintiff – Present in person

For the Defendant – Ms. Makondoo, State Attorney

CC: Butahe

Ruling delivered


A.G.Mwarija
JUDGE
16/9/2010