IN THE COURT OF APPEAL

AT NAKURU

(CORAM: HANCOX, NYARANGI JJA & PLATT Ag JA)

CIVIL APPEAL NO. 79 OF 1982

BETWEEN

DAVID STEPHEN GATUNE.....APPELLANT

AND

THE HEADMASTER, NAIROBI TECHNICAL

HIGH SCHOOL & ANOTHER.....RESPONDENT

JUDGMENT

(Appeal from an Order of the High Court at Nakuru, Mead J)

April 16, 1986, **Nyarangi JA** delivered the following Judgment.

On the 23rd day of October 1981 the appellant David Stephen Gatune as applicant moved the High Court, Nakuru (Mead J as he then was) by a Notice of Motion *ex parte* pursuant to section 22 and 28 of the Limitation of Actions Act and Order L(1) of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Act for an order that, he, the applicant be granted leave to file his case against the respondents, The Headmaster, Nairobi Technical High School and the Attorney-General and the period of limitation be extended.

The trial Judge dismissed the application on 7th January 1982 and on 30th November 1982 the appellant filed this appeal against the order of the trial judge on grounds which may be summarized as under: the trial judge erred in his interpretation of the purpose of section 22 of the Limitation of Actions Act (the Act), in not appreciating that a medical certificate issued while the appellant waited to proceed to Moscow for treatment for his injury could have served no purpose in his claim for damages, the trial Judge misdirected himself in that he failed to consider the appellant's evidence that he contacted and consulted the Chambers of the Attorney-General in an attempt to reach a settlement out of court and that the two Respondents were considering some compensation even after the period for filing a suit was over, and further misdirected himself in failure to understand that the appellant would require a medial certificate from the hospital in Moscow, and that any such medical certificate would not immediately reach the relevant authorities in Kenya, erred in overlooking the nature of injury he had sustained as a result of which his mobility was considerably reduced and he could not personally and expeditiously carry out the tasks connected with his claim, did not consider that the medical report demanded of him

during the negotiations out of court was not received by him until October 1981 and that, all in all, the trial judge failed adequately to consider his evidence and did not properly interpret the term ‘disability’ which appears in the Act.

I would strongly emphasize the special circumstances of this case.

The appellant is a graduate of Moscow State University with a BSc degree in the rather rare field of Nuclear and Atomic Physics. On his return to Kenya during 1967, he was employed as a school teacher by the Teachers’ Service Commission, a section of the Department of Education, and posted to Nairobi Technical High School to teach Physics, Chemistry and Mathematics. In the course of his work as a teacher the appellant handled poisonous material such as acids and sodium and phosphorous. In the month of May, 1970 in the cause of performing experiments in the school’s laboratory, the appellant fell unconscious and experienced failure of his optic nerves and so he was taken to Kenyatta National Hospital where he was admitted for treatment for three weeks. That was followed by extensive medical treatment in local private and Government hospitals. Later the appellant was offered free medical treatment in Moscow but he had to pay for his ticket to the U.S.S.R. He was permitted to collect money to cover his fare to the U.S.S.R where he was treated and held to have suffered permanent incapacity to his eyesight and a certificate to that effect, dated 6th August 1976, was issued. The appellant claims that he did not know that he had become totally blind until the medical certificate on his treatment Moscow was received here. Also that since the year 1977, he has been negotiating with the Attorney General’s Chambers for payment of damages for his total loss of his eyesight but that, as he put it

“their promise has not materialized”,

that he has a valid claim against he Government for negligence because their was failure to provide devices to protect the appellant from poisonous gaseous products, that but for the delay in obtaining medical certificate and for protracted negotiations with the Attorney-General he would have filed an action in time and therefore that there had not been any inordinate delay on his part in filing a suit. That is the march of events.

There was no replying affidavit from the respondents.

Arguing the appeal, Mr Kariuki referred to Section 28 of the Limitation of Actions Act (the Act) under which the appellant had applied for leave of the Court for purposes of section 27 of the Act and pointed out that the appellant did not lose his eyesight as soon as he was injured but that he was admitted at the Kenyatta National Hospital for three weeks and that thereafter he received tretment for several months in other hospitals. It was argued that the appellant became aware of total loss of eyesight in 1977 and not in 1976 when his employer gave notice of the accident as he was not aware of the notice by the employer.

On receipt of the certificate the appellant entered into negotiations with the Attorney-General until 1981 when the negotiations failed. The appellant’s contention is that the facts relating to the loss of eyesight came to his knowledge after the three year period of limitation and that some of the facts which the appellant did not know about were; in 1977 when he received the medical certificate he was not certain that he had suffered total blindness; between 1973 and 1974 the appellant was still hoping he would be cured by the treatment he was receiving, he could vaguely see after the accident; in 1976 he would lose sight for a number of days and then be able to see a bit (recover some eyesight) and that the employer did not serve the requisite notice on the labour office until 2nd August 1976, well after three years from the time the cause of action arose, a fact which could not be held to be in the knowledge of the appellant. Mr Kariuki’s final submission was that the trial judge failed to give sufficient thought to the

facts which were outside the appellant's knowledge and that had the judge done so, he would have granted leave.

For the respondents, learned Principal State Counsel, Mr Etyang, supported the order of the trial Judge and said the appellant should have filed his action by August 1979. The appellant received a sum of Shs 38,000 and so a claim on negligence was within his knowledge; the appellant knew he had been injured and that his employer should have supplied facilities for safety. Mr Etyang argued that the appellant is out of time by some eight years and that to give leave would be to strain the language of the Act a bit too far. Sub-section (1) and (2) of Section 27 of the Act provide,

27. (1) Section 4(2) does not afford a defence to an action founded on tort where:

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law); and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person ; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purpose of this section; and

(d) the requirements of subsection(2) of theis section are fulfilled in relation to the cause of action.

(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which:

(a) Either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and

(b) In either case, was a date not earlier than one year before the date on which the action was brought.

Sub-section (1) (2) and (3) of section 30 of the Act provide;

30. (1) In sections 27, 28 and 29 of this Act, any reference to the material facts relating to a cause of action is a reference to one or more of the following:

(a) the fact that personal injuries resulting from the negligence, nuisance or breach of duty;

(b) the nature or extent of the personal injuries resulting from that negligence, nuisance or breach of duty constituting that cause of action;

(c) the fact that the personal injuries so resulting were attributable to that negligence, nuisance or breach of duty, or the extent to which any of those personal injuries were so attributable.

(2) For the purpose of sections 27, 28 and 29 of this Act, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a reasonable person, knowing those facts and having obtained appropriate advice with respect to them would have regarded at that time as determining, in relation to that cause of action, that (apart from section 4 (2) of this Act) an action would have a reasonable prospect of succeeding and of resulting in

the award of damages sufficient to justify the bringing of the action.

(3) Subject to subsection (4) of this section, for the purpose of sections 27, 28 and 29 of this Act a fact shall be taken at any particular time, to have been outside the knowledge (actual or constructive) of a person if, but only if

(a) he did not know that fact; and

(b) in so far as that fact was capable of being ascertained by him, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of ascertaining it; and

(c) in so far as there existed, and were known to him, circumstances from which, with appropriate advice, that fact might have been ascertained or inferred, he had taken all such steps (if any) as it was reasonable for him to have taken before that time for the purpose of obtaining appropriate advice with respect of those circumstances.

The two provisions are relevant in the consideration of the respective stands taken in this appeal.

The medical report stating that the appellant had suffered one hundred percent loss of eyesight is dated 6th August, 1976. That report must have been prepared after receipt Kenya of the medical report of the treatment in Moscow. There is no evidence that a copy of the report was sent to or read out to the appellant. There was no replying affidavit to challenge the appellant's affidavit evidence that it was not until 1977 that he became aware of that report. The appellant had long been discharged from hospital in Kenya by the 6th August 1976. I see no reason for not accepting the appellant's evidence that he obtained the medical report in 1977. That then means that the appellant had knowledge of the material fact of the nature of the personal injury, which facts were at all times outside his knowledge, during 1977. The appellant does not in his affidavit give the month or date in 1977 when he was informed of the contents of the medical report. The month and date should have been stated. In the circumstances, I will take the month as January 1977 and the date as 2nd January which would be the first day on which offices reopen: *Pritam Kaur v S Russell & Sons Ltd*. [1973] 1 All ER 617 and para 622 *Halsbury's Laws of England* 14th edition, vol. 28. That would be the earliest possible time. Any other subsequent date would in my view unduly benefit the appellant. The appellant's action founded on tort had therefore to be brought after the end of three years from the time the appellant could sue the Respondents i.e from 2nd January 1977. That is the date when the appellant had the material proof of which would entitle him to succeed. The damage was discovered on that date and so time started to run; *Halsbury's Laws of England* 14th edition vol 28 para 623;

The appellant stated in paragraph 12 of his affidavit in support of the *exparte* application that,

"since 1977 I have been negotiating with the office of the Attorney-General for payment of damages in respect of total loss of my eye-sight but their promise has not materialized, upto date"

The affidavit was sworn on 16th October 1981. The respondents did not deny that. There was no replying affidavit to the contrary. Once again, I seen no reason for not believing the appellant's case that he commenced negotiations with the Attorney-General soon after he had knowledge of the extent of this injury, that the negotiations were promising but that by the 16th October, 1981, there was nothing fruitful.

Mr. Etyang's reply was that the appellant, an educated and articulate man, should have safeguarded his position by filing an action while the discussions with the Attorney-General continued. However, the Attorney- General occupies a crucial role in the country's litigation. Protracted negotiations with the

Attorney-General for payment of damages are not to be taken lightly. Practicing advocates do take such negotiations seriously.

Claimants who appear in person in the negotiating table would regard the proceedings even more seriously. So much so that the mere fact of continuing negotiation would reasonably be taken to mean an appreciation by the Attorney-General of the correctness and substance of the claim. Only a foolhardy and vexations claimant would want to prejudice the negotiations and thereby earn the displeasure of the Attorney-General by filing an action on the vary same cause of action which had given rise to the negotiation.The reasonable lay claimant would continue with the negotiations and would feel that the Attorney-General would advice him on what action to take if and when negotiations failed. Ordinarily, the more educated the claimant, the more reliance he would place on the Attorney-General and the greater the hope would be that there would be a fair end to the negotiations. A claimant in that position would reasonably feel that by negotiating with him, the Attorney-General had invited him to delay court proceedings and that he would not be prejudiced by the delay.

The appellant negotiated with the Attorney General from 1977 to October 1981. He had faith in the negotiations. The respondents would now be barred from setting up the provisions of the Act; *Halsbury's Laws of England*, 14th edition, Volume 28, para. 608.

Certainly the appellant pursued his claim which he believes is a good one with reasonable diligence – he has not been idle since he received the medical report: See also *Board of Trade v Gayzer, Iruine Feo*. [1927] A.C 610. I do not therefore regard it as accurate to say that the appellant waited from August 1979 to 1981. On the evidence as I understand it, the appellant should have brought his action by 2nd January 1980. The delay of 10 months appears to have been due to negotiations. In my view, the Attorney-General should have informed the appellant well before 2nd January 1980 that it was in his interests to file an action within three years from the 6th August 1967 and that by doing so he would not be prejudicingd the negotiations out of court. Having not done so and therefore having caused the appellant to continue the negotiations, it is only fair that the appellant should not be penalized for attempting to settle the dispute our to court. I fear that a contrary view will operate harshly on the appellant who has been guilty of no laches and has negotiated in good faith.

So it comes to this although the appellant was aware of the injury to his eyes from the 21st May 1973, that knowledge alone did not in the circumstances to his case constitute material facts relating to the cause of action. The appellant underwent considerable medical treatment here and in the U.S.S.R before the medical report that he had lost eye-sight in both eyes was issued. The medical report which came to the knowledge of the appellant early in 1977 included a fact of decisive character – i.e total loss of eye-sight which was outside the appellant's knowledge prior to 2nd January 1977. In my judgment the trial Judge erred in finding that the material facts which facts the trial Judge considered far too narrowly, were not outside the knowledge of the appellant. The appellant acted reasonably in seeking medical treatment than in obtaining legal advice with a view to filing an action. The trial Judge refers to the negotiations between the appellant and the Attorney-General. However, the relevance or otherwise of the negotiations to this appeal is nowhere he stated, a factor which is prejudicial to the appellant. For that was one of the two real points of the application which needed consideration.

On the evidence, the appellant was under a disability up to the time he knew of the contents of the medical report. He could reasonably be said to have been under equal disability while he negotiated with the Attorney- General. I would allow the appeal, set aside the order of the High Court, give leave to the appellant to file his case against the respondents at any time before the end of six years from the 16th October 1981 (section 22 of the Act).

I would make no order as to costs of this appeal.

Hancox JA. I agree with the judgment of Nyarangi JA. The appeal will be allowed with the orders proposed by him.

Platt Ag JA (Dissenting). The appellant appealed against the dismissal of his application, which he had taken under section 28 of the Limitation of Actions Act (cap 22), seeking leave to commence on action in tort for damages on account of the negligence of his employers, in failing to provide a safe system of work. Having had the advantage of studying the opinion of Nyarangi JA it seems to me that the High court was technically right, and it remains to be seen whether the appellant has any other avenue open for claiming redress.

It is the kind of dispute which requires a cool appreciation of the whole situation. Nyarangi JA has drawn attention to the appellant's plight – he is permanently blind in both eyes. He has been reduced from a science teacher of considerable qualifications to a helpless person who is totally blind. On the other hand, the state has not entirely ignored the appellant's injuries. He has received workmen's compensation, and an ex-gratia payments from the State. They are both small sums compared with the present level of damages for total blindness. But then no facts are as yet before the Court, as to whether there was any fault or contributory negligence when the appellant performed the experiment, which brought him into contact with the dangerous gases which in turn ruined his optic nerves. But for the purposes of the argument, let the premise stand, that the appellant would wish to try to convince the Court, that he is entitled to far greater damages than the compensation which he has so far received of around Shs 61,750/=.

Let it also be borne in mind, what the limits of the application were. Section 28(1) of the Act (cap 22) permits an *ex parte* application to be made. Sec. 28(2) provides:

"(2) Where such an application is made before the commencement of a relevant action, the court shall grant leave in respect of any cause of action to which the application relates; if, but only if, on evidence adduced by or on behalf of the plaintiff, it appears to the court that, if such an action were brought forthwith and the like evidence were adduced in that action, that evidence would in the absence of any evidence to the contrary, be sufficient:

(a) to establish that cause of action, apart from any defence under sec 4 (2) of this Act: and

(b) to fulfil the requirements of Sec 27(2) of this Act in relation to that cause of action."

The position here is that no action has been commenced as yet. Hence, the appellant must show by evidence that he could establish the case of action he espouses, and he must fulfil the requirements of Sec 27(2) of the Act. It is pertinent to note that the section is in reinforced mandatory terms; it is only if, the evidence adduced on these matters is satisfactory that the court may grant him leave. It is clear that Parliament was at pains to emphasise that it was not prepared for the limitation period to be extended, unless there is clearly set out evidence which would establish the cause of action, and fulfil Sec 27(2) of the Act. The section is adamant.

It is not clear to me exactly what occurred at the time of the accident in May 1970. The appellant apparently handled poisonous materials in performing an experiment in the school laboratory. Something very unusual must have happened. The essence of experiments in a school laboratory is that they are clearly and safely conducted. It is difficult to apply the rule *res ipsa loquitur*, as meaning that the schools' procedures were obviously at fault, without a great deal more knowledge; and if of course one dares to

put he rule to the test the other way, it may well have been negligence on that part of the appellant. It was for the appellant to show the court why, in the circumstances of his case, the school's procedures failed to safeguard him, no doubt having in mind his experience, and what steps were taken with regard to the usual precautions when apparently demonstrating this particularly experiment to the class of students he was teaching. After all the students had to be taught how to do the experiment themselves by a safe method.

But the case is much stronger on the second limb. Under sec 27(2) of the Act the material facts relating to the cause of action must include facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff, until a date, which either was after the period of limitation prescribed had passed or not earlier than one year before that period ended, and the obscure provision in (b) "the operation of any law which, apart from this before the date on which the action was brought."

It has been accepted for the purposes of the argument, that the appellant finally knew of his plight in 1977 when the medical opinion was received confirming his total blindness. Unless that evidence were challenged at the trial, that would be evidence which would go to prove the appellant's final, and so actual, state of knowledge of his injury, a material fact referred to in Section 30 (1) (b) of the Act.

From the 31st December, 1977, even supposing the best for the appellant, the appellant had to bring his case by 31st December, 1980. He brought his application in October 1981. The application cannot be saved on this part of the argument. He knew or claimed:

(a) that his personal injuries resulted from the negligence of the school in not providing a safe method of work;

(b) the nature and extent of this injuries;

(c) that these injuries he claimed were attributable to the negligence claimed.

That completes the list in section 30 of material facts, which might arise in Sec 27 (2) of the Act. It is only if there is favourable evidence on these material facts, that the court can operate under Section 28 of the Act and so give leave. (Compare *Davis v Ministry of Defence* times Law Report 7th August 1985).

The appellant however, claims disability under sec 22. It is not possible to find evidence of disability, in the sense of his state being one where the appellant was deprived of the ability to bring his suit. He was always *compos mentis,* because he was negotiating his ex gratia award. So of course he could have brought his suit. There is no case of disability under Sec 22.

But the aspect of these proceedings which has greatly disturbed the Court, is the appellant's statement that:

"Since 1977 I have been negotiating with the office of the Attorney-General for payment of damages in respect of total loss of my eye-sight, but their promise has not materialized up to date."

Perhaps one way to conceptualise this statement may be to consider it under equitable estoppel. It cannot be said of course, whether there are sufficient facts for one of the various aspects of estoppel to arise, either as a sword or a shield. But great store is placed on the flexibility of this doctrine in recent times in England. (see generally Hanbury Maudsley "*Modern Equity*" 12th Ed. 859, 860). Take for instance the statement to that effect of Lord Denning MR in *Amalgamated Investment and Property Co*

Ltd (in liquidation) v Texas Commerce International Bank Ltd. [1982] QB at p 122. If it were proper to raise estoppel on the supposition that some “promise” was made, it might take effect either in Equity or under the Statute. The negligent party represented by the Attorney General may waive the defence of limitation. If they did thus forbear, and the appellant acted to his detriment in reliance upon that promise, an estoppel might arise. In that case, section 39 of the Act (Cap 22) might also prevail. If there were a contract not to plead limitation, the person attempting to plead limitation would be estopped from so doing, as sec 39 states. In that event again, sec 27(3) of the Act would come into effect, because sec 27(1) and (2) would not affect this defence. Hence whether the application now before the Court was or was not dismissed, would be quite immaterial, and the appellant would not be prevented from bringing his suit, so long as that could be done within the period of the contract not to plead limitation. It is important to be aware of the fact that the Attorney-General’s Department is not usually an advisory body. It depends on the facts, what action it has taken.

For these reasons, I regret to say that I would dismiss the appeal with costs, and uphold the High Court in the stand it took.

April 16, 1986

HANCOX, NYARANGI JJA & PLATT Ag JA