

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 4 OF 1988



BETWEEN:

MOSES NDIWO ..... APPELLANT

- AND -

MANOBEC ..... RESPONDENT

CORAM: MAKUTA, CJ

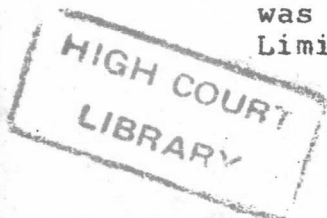
Ndiwo, Appellant  
Jussabu of Counsel for the Respondent  
Kadyakale, Official Interpreter  
Gausi (Mrs), Court Reporter

---

J U D G E M E N T

This is an appeal against the learned Limbe/  
Midima Road Resident Magistrate's ruling which he made  
on 4th July, 1988, in which he allowed the respondent's  
application to set aside judgement by default.

The facts of the case appear to be these. By  
summons dated 25th January, 1988, the appellant claimed  
against the respondent the sum of K200 being debt on the  
services the appellant made to the respondent during the  
months of October/November, 1977. Judgement in default  
was signed on 10th February, 1988, and this was followed  
by a warrant of execution which was signed on 12th  
February, 1988. Then on 6th April, 1988, the respondent's  
legal representative filed an application to set aside  
judgement on behalf of their client. The application was  
heard on 13th May, 1988. Mr Msaka, who appeared on  
behalf of the respondent, argued, as appeared in the  
affidavit in support of the application thereof, that  
the present Managing Director of the respondent, was  
never served with any demand letter concerning appellant's  
claim, nor had any of his servant or agents. The business  
had been brought as a going concern by the respondent  
only five years earlier and since the appellant's  
claim related to the transactions that took place eleven  
years earlier, then the appellant's claim ought to be  
lodged with the previous management. It was also submit-  
ted by Mr Msaka that since the transactions out of which  
the present case arose took place in 1977, the appellant  
was debarred from proceeding with his claim by the  
Limitation Act (Cap 6.02) after the expiry of six years.



In reply to Mr. Msaka's submission, the appellant stated that so far as demand letter was concerned there was a lot of correspondence involving this issue between himself and the respondent. The correspondence goes back to 1985. The appellant further submitted that the respondent had even refused to sign the summons.

When arguing his appeal before this Court the appellant stated that when the lower court met on 13th May, 1988, the purpose was to find out whether it was right for the case to be dismissed. Another date, according to the appellant, was going to be communicated to the parties later. He informed this Court that he was not given a chance to explain his case. He was then surprised when he got judgment that the respondent had succeeded. He further submitted that this matter was started in the Traditional Court and it took that court some years before it was disclosed why that court could not hear it. He then changed court. He therefore saw no reason why the learned Resident Magistrate could not consider the time spent with the Traditional Court. The Statute of Limitation therefore was not relevant in this case and cannot apply to him because he kept the case on.

I have examined the record and I have no doubt in my mind that the purpose of the proceedings on 13th May, 1988, were made clear. It was an application to set aside judgement. In fact before starting his submissions Mr. Msaka wanted to know if the appellant was objecting to the judgement being set aside and the respondent being allowed to file a defence. I do not find anywhere in the court record an intention that another date for hearing of the application would be set down.

So far as proceedings in the Traditional Court are concerned it must be mentioned that that is a distinct Court, different from the Magistrate's Court and time taken in processing a case there cannot be taken into account here. Cases started in Traditional Court organisation are disposed of in that court.

I now turn to the Limitation Act. This case was started on 25th January, 1988. Eleven years after the cause of action arose. Section 4(a) of the Limitation Act provides that actions founded on contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action arose. This action was founded on contract and it therefore falls within the limitation period. This is a defence provided by law and it is available to the respondent.

In the circumstances of this case I see no basis for interfering with the finding of the learned Resident Magistrate. The appeal is dismissed with costs.

PRONOUNCED in open Court this 18th day of July,  
1990, at Blantyre.

*F. L. Makuta*  
F. L. Makuta  
CHIEF JUSTICE