

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 825 OF 1990

BETWEEN

J.J. MANYUNGWA

PLAINTIFF

- and -

STAGECOACH(MW) LIMITED

DEFENDANT

CORAM: D.F. MWAUNGULU, J

Chirwa, for the plaintiff
Msaka, for the defendant
Selemani, Official Interpreter

Mwaungulu, J

JUDGMENT

This is an application by the defendant to strike the plaintiff's action. The application is based on Order 18, rule 19. The defendant contends that the plaintiff's action is frivolous, vexatious and an abuse of the process of the court. The basis of the application is the Limitation Act. The summons is not supported by affidavit. There is, therefore, no evidence on which to consider the application.

The action was taken out on the 6th September, 1990. The action was for personal injuries suffered by the plaintiff on 21st May, 1985. The defendants have put in a defence which, among other things, pleads the Limitation Act. The action, from the plaintiff's pleadings, is clearly outside the time under the Limitation Act. Order 18, rule 19 provides as follows:

“(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in



any pleading or indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court;

and may order the action be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1) (a)."

The defendant, properly in my view, is not contending that the statement of claim does not disclose a reasonable cause of action. The Limitation Act does not bar the action; it bars the remedy. The plaintiff would succeed if the defendant does not plead the Act. Where the defendant has pleaded the Act, he has several options. He could apply to the Court to have trial of a preliminary issue. Alternatively, in a clear case, he could have the action dismissed as frivolous, vexatious and an abuse of the process of the court. (Riches V. Director of Public Prosecution [1973] 2 All E.R. 935; Ronex Properties Ltd V. John Laing Construction Ltd [1983] Q.B. 398. In the latter case Donaldson, L.J., said:

"Where it is thought to be clear that there is a defence under the Limitation Acts, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstance can he seek to strike out on the ground that no cause of action is disclosed."

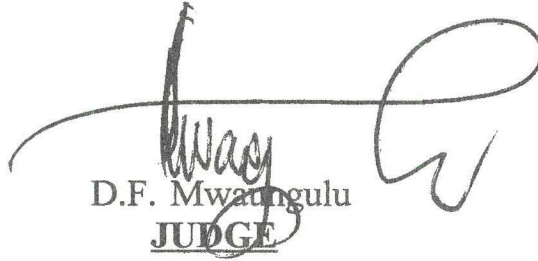
There is no mandatory requirement that in relation to applications on the other grounds the applicant should lead evidence. The application could be

granted without. Usually the court exercises its discretion on such evidence. On an application based on the Limitation Act upon the ground that the statement of claim is frivolous, vexatious and an abuse of the process of the court it may be necessary to lead evidence. The defendant could show that the claim is out of time. The plaintiff could then lead evidence of acknowledgment. The court could then in a proper case dismiss the action. This is what Stephenson, L.J., said:

“There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for the defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute-barred. Then the plaintiff and the court know that the Statute of Limitations will be pleaded; the defendant can, if necessary, file evidence to that effect; the plaintiff can file evidence of an acknowledgment or concealed fraud or any matter which may show the court that his claim is not vexatious or an abuse of the process; and the court will be able to ...strike out the claim and dismiss the action.”

The defendant has not laid any evidence, as he is entitled. The application was not supported by affidavit. The plaintiff did not file an affidavit either. His point is that the reason why he did not act in the stipulated time is that the parties were negotiating. It is not clear whether there was acknowledgment of the claim in terms of the Act. It is extremely difficult for me to decide the matter without evidence from the plaintiff and the defendant on the matters necessitated by the consideration of the Act. The application is therefore dismissed because the question whether the action is statute-barred should, without evidence from the plaintiff and the defendant, be decided after a proper analysis of the damage suffered and full argument as to the law, both of which cannot occur without a trial.

Made in Chambers this 13th August, 1997.



D.F. Mwaungulu
JUDGE