IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 834 OF 1996

BETWEEN:

CATOUCHEA BASTON.....PLAINTIFF
(as Personal Representative of the
Estate of Robert Baston)

- and -

S.A. BAKALI.....1ST DEFENDANT

-and-

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: **TEMBO, J.**
Hara, of Counsel for the Plaintiff
Kasambara, of Counsel for the Defendant
Katunga (Mrs) Official Interpreter

RULING

Tembo, J. Robert Baston, the deceased, on 1st May, 1995, at night had driven a Toyota Saloon Registration BJ 6861 along Kaunda Road in the direction of Area 49 within the

City of Lilongwe. Whilst doing so, and by the alleged negligence of the 1st defendant's servant or agent, the deceased collided with the 1st defendant's Ford Lorry, Registration CA 3469. The deceased suffered injuries from which he died on the same day. Mrs. Catouchea Batson has instituted proceedings for the benefit of the family of the deceased by writ dated 29th May, 1996, pursuant to the provisions of the Statute Law (Miscellaneous Provisions) Act.

At the commencement of the trial and in the absence of the defendants and their counsel, on 21st October, 1999, the plaintiff obtained leave of the court to amend the writ of summons and the statement of claim, pursuant to Ord. 20 r 5 paragraphs (5) of the Rules of the Supreme Court (RSC). Leave to amend was granted subject to the rights of the defendants, under Ord. 25 r. 2 of the RSC, to apply to the Court to have it set aside. In the main, the amendment sought to introduce, and it introduced, a claim for damages for loss of expectation of life.

This is, therefore, an application by the defendants to have the leave and amendment in question set aside on account of the fact that the date on which the same were granted was after the expiry of the limitation period prescribed under Section 4 (1) of the Limitation Act; and that the amendment is for a new cause of action. In that regard, Mr Kasambara has urged the Court to hold the view that the cases of **Ingolosi -v- Mahomed and Nyaude** (1971-72) ALR Mal. 335 and **Mbaisa -v- Ibrahim Ismail Brothers** (1971-72) ALR Mal. 321 were the authorities for the proposition that an amendment which seeks to introduce a new cause of action after limitation period is not admissible.

On his part, Mr. Hara, Counsel for the plaintiff has argued that the court ought to uphold the amendment in that the cases cited by Mr. Kasambara are irrelevant to the instant case. To Mr. Hara the relevant provision for the consideration of the Court, in the determination of the instant application, is Ord. 20 r 5 paras (2) and (5) of the RSC, in the 1995 or 1999 edition. That this provision is in fact a rule of practice and not a provision of statutory law, as contended by Mr. Kasambara. Further that the practice, in question, dates as far back as 1966. In that regard, it is evidenced by identical provisions in the Annual Practice 1966 Vol. 1 at page 452. In that respect, and to the contrary, it is Mr. Kasambara's argument that in the United Kingdom, unlike here in Malawi, courts now tend to be lax in their consideration of such applications in that after the year 1980, courts do have statutory powers to extend the limitation period.

It is expedient that Ord. 20 r 5 (2) (5) be set out herein. It is as follows-

"(2) where an application to the court for leave to make amendment mentioned in paragraph (3) (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the court may nevertheless grant such leave in the

circumstances mentioned in that paragraph if it thinks just to do so.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts, or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment."

The cases cited and relied upon by Mr. Kasambara, in particular the case of **Ingolosi,** was decided on the basis that the adding of the new party would defeat a limitation period. The limitation period had run out. Besides, the party who had purported to institute the proceedings, similar to those in the instant case, within the prescribed period had no **locus standi**. The proceedings, therefore, were not validly instituted within the prescribed period for commencing proceedings in respect of damages for personal injuries resulting in the death of the deceased, in the case. After the period had expired, Ingolosi further purported to add a party who, but for the fact that the limitation period had run out, would have had **locus standi** in the case. In such circumstances, Skinner C.J., rightly in my view, held that the damages claimed against the defendant were for negligence, thus, they were for loss the plaintiffs had suffered arising from the personal injuries to the deceased. Further, that an action by the intended plaintiffs was then barred and it would have been wrong for the court then to make the order granting that a new party be added after the period of limitation had run out. Thus at the time of the application, and determination of the same by the Court after the period of limitation had run out, there were not in progress before the Court validly instituted proceedings by the plaintiff, then applicant seeking to add a new party to the action. In other words, it would appear that the party to be added would have be on the one to validly institute the proceedings at that time, but by then he could not be allowed to do so as the defendant would rightly waive the legal defence that the limitation period had run out.

It is important that I must expressly state that such is not the kind of the case envisaged under Ord. 20 r. 5 paras. (2) and (5) of RSC, under which, in the instant case, leave to amend was sought and granted. Besides, and first of all, let me accept as correct the submission by Mr Hara that the Order in question establishes a rule of practice and that the same has been in force as far back as 1966. The case it addresses is quite different from that of **Ingolosi**, herein relied upon by Mr Kasambara.

The most important aspect to note is that the rule allows the court, in such circumstances, to add a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. Such was not the case in **Ingolosi**.. Referring to, and quoting from, page 455 under the paragraph on Power to Amend After Expiry of Limitation Period in The Annual Practice 1966 Vol.1 -

"The provisions of Rule 5 empower the court to grant leave to amend the writ or pleading in the particular circumstances mentioned in para (5), even though the application for such amendment is made after the expiry of any relevant period of limitation current at the date of the issue of the writ. These powers in no way affect or prejudice the substantive rights of the parties under relevant Statute of Limitations; nor do they affect or alter the practice in cases outside the scope of the circumstances mentioned in para. (5) .... In principle underlying the new powers of the court under Rule 5 is that if the proceedings had been, from the beginning, properly formulated or constituted in the respect specified in para. (5), the defence of the Statute of Limitations would not have been available to the defendant; and accordingly, if in its discretion, the court thinks just to grant leave to amend defects in the writ or pleading within the scope of the circumstances specified in para. (5) so that such defects in the proceedings are treated as having been cured **ab nitio**, the defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place."

The foregoing passage is also available in paragraph 20/5 - 8/7 on page 372 of The Supreme Court Practice 1995, Vol. 1.

In the Osborn's Concise Law Dictionary sixty ed. By John Burke at page 67, the expression "cause of action" is defined to mean "the fact or combination of facts which give rise to a right of action". Using that definition and applying the provisions of Ord. 20 r 5 para. (5), in particular the qualification expressly noted above, it is the considered view of the court that it must now uphold the amendment in that it adds a new cause of action, being one, which arises out of the same facts as the cause of action in respect of which relief has already been claimed in the action by the plaintiff who is now seeking leave to make the amendment. It is so ordered.

Costs are for the plaintiff.

MADE in Chambers this Wednesday, 9th May, 2001 at Blantyre.

A.K. Tembo

JUDGE