JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 268 OF 2015

BETWEEN

BLAZIYO MUKAKAMA AND 41 OTHERS ..... PLAINTIFFS

AND

MOTA ENGIL ..... 1ST DEFENDANT

ROADS AUTHORITY ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Ulaya, of Counsel, for the Plaintiffs
Mr. Chagoma, of Counsel, for the 1st Defendant
Mr. Sitima, of Counsel, for the 2nd Defendant
Mrs. J. Chilimapunga, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

Introduction

The Plaintiffs in this case are claiming damages in form of repair costs. The claims are based on an allegation that in or around 2009, their respective houses were damaged as a result of road construction works that were carried out by the 1st Defendant with the authority of the 2nd Defendant. They allege that the damage to their houses was caused through negligence of the two Defendants.

The Defendants deny being negligent. The 2nd Defendant also seeks to rely on the Limitation Act. It is also the case of the 2nd Defendant that it cannot be held liable for the negligence, if any, of the 1st Defendant since the 1st Defendant was engaged as an independent contractor.

It might not be out of place to mention that this case was initially commenced in the Chief Resident Magistrate's Court sitting at Blantyre (lower court) in 2014

against the 1st Defendant only. On 31st July 2015, the case was transferred from the lower court to this Court. On 2nd February 2016, the Plaintiffs were granted an order adding the 2nd Defendant to the case.

Pleadings

The Statement of Claim was amended and then further amended. The Re-Amended Statement of Claim is couched in the following terms:

> *"1. The Plaintiffs are owners of residential houses along or near the Chiringa-Migowi-Chiradzulu road and Migowe-Phalombe Spur.*
>
> *2. The defendant is a Limited Company in the business of road construction*
>
> *3. The second defendant is a Highway Authority responsible for the construction, care and maintenance of public roads in Malawi.*
>
> *4. In or around the year 2009, the first defendant with the authority of the second defendant was carrying out a road construction project on the Chiringa-Migowi-Chiradzulu road and Migowi-Phalombe Spur, when the plaintiffs houses were damaged due to the use of heavy machinery that caused shaking of the ground and walls of the houses.*
>
> *5. The plaintiffs plead that the damage to their houses resulted from the negligence of the defendants.*
>
> ***PARTICULARS OF NEGLIGENCE***
>
> *a) Proceeding with the construction of the road without assessing the risk of damage to the plaintiffs' houses.*
>
> *b) Failing to have regard for the safety of the plaintiffs' houses.*
>
> *c) Res ipsa loquitor.*
>
> ***PARTICULARS OF DAMAGE***
>
> *a) The plaintiffs' houses developed cracks and other forms of damage.*
>
> *b) The Plaintiffs will provide pictures of the damaged houses during trial or at the request of the defendants.*
>
> *6. And the plaintiffs claim damages in form of repair costs to be assessed."*

By its Re-Amended Defence, the 1st Defendant denies liability. The Re-Amended Defence by the 1st Defendant provides as follows:

"1. The 1st defendant does not admit the contents of paragraph 1 of the Amended Statement of Claim.

2. The 1st Defendant admits paragraphs 2 and 3 of the Amended Statement of Claim.

3. The 1st defendant refers to paragraph 4 of the Amended Statement of Claim and:-

3.1 admits that the road construction or upgrading took place in 2009;

3.2 pleads that it upgraded the road as an agent or contractor, with authority and supervision, of the 2nd defendant as employer

3.3 pleads that the Chiringa-Migowi-Chiradzulu road and the Migowi-Phalombe spur it upgraded are secondary roads;

3.4 denies that the alleged damage was suffered in or around 2009 or at all;

3.5 denies that the machinery caused shaking of the ground walls of the plaintiffs' houses as alleged or at all and puts each of the plaintiffs to strict proof.

4. The 1st Defendant refers to paragraph 5(a) and (b) of the Amended Statement of Claim and denies that it was negligent as alleged and particularized therein or at all and puts each of the plaintiffs to strict proof thereof.

5. The 1st defendant pleads and shall at trial demonstrate that the alleged damage was wholly caused or substantially contributed to by negligence of each of the plaintiffs themselves.

Particulars of negligence

5.1 building residential houses within and/or extremely close to the road reserve when they knew or ought to have known that it is by law prohibited to do so;

5.2 building residential houses within and/or extremely near the road reserve in utter or wanton disregard of their personal proprietary safety;

5.3 employing poor workmanship, and/or comprised quality of building materials;

5.4 failure to maintain the houses or that the destruction was due to age.

6. The 1st defendant refers to paragraph 5 (c) of the Amended Statement of Claim and denies that the maxim ***res ipsa loquitur*** *is applicable to the facts and circumstances of the present case.*

7. The 1st Defendant denies that the Plaintiffs suffered damage or loss as alleged and particularized in paragraph 5(a) and (b) of the Amended Statement of Claim or at all and puts each of the plaintiffs to strict proof thereof.

8. *The 1st defendant denies that the plaintiffs are entitled to the relief they seek or claim in paragraph 6 of the Amended Statement of Claim or at all."*

On its part, the 2nd Defendant admits paragraphs 2 and 3 of the Re-Amended Statement of Claim. The 1st Defendant further admits that it was involved in the construction of the said roads but denies (a) that the Plaintiffs' houses were damaged as a result of the said construction, (b) being negligent in the manner particularized in paragraph 5 of the Re-Amended Statement of Claim and (c) that the maxim res ipsa loquitur is applicable to the facts of the present case.

The 2nd Defendant also pleads that the respective claims by the Plaintiffs are statute-barred in that they arose in 2009 but the Plaintiffs only commenced the present proceedings against the 2nd Defendant on 2nd February 2016. The 2nd Defendant further pleads that it engaged the 1st Defendant as an independent contractor and states that, on that account, the 2nd Defendant cannot be held liable for the negligence, which is not admitted, of the 1st Defendant.

Burden and Standard of Proof

The burden of proof lies upon the party who substantially asserts the affirmative of the issue. This burden of proof is fixed at the beginning of the trial by the state of the pleadings and it is settled as a question of law, remaining unchanged throughout the trial exactly where pleadings place it, and never shifting. The rule means that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on the said party: see Phipson on Evidence (16th Edition), 127, **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)** and **Milner v. Minister of Pensions [1974] 2 All E.R. 372.**

It is also well settled that the standard of proof in civil cases is on balance of probabilities. A balance of probabilities simply means that a Court is entitled to say that, based on the evidence led before it, it is of the view that *"it is more probable than not"* that the fact asserted is made out: see **Msachi v. Attorney General [1991] 14 MLR 287.**

Evidence

The Plaintiffs' side was represented by six witnesses, namely, Patrick Kamoto (PW1), Mirriam Makwinja (PW2), Fresh Maloti (PW3), Jonathan Goliati (PW4) Paul Tito (PW5) and Mary Wilson (PW6).

PW1 adopted his witness statement as his evidence in chief. The evidence was as follows:

"6. *I am one of the plaintiffs in this matter.*

7. *I reside in my own house at Phodogoma village, T/A Nazombe, Phalombe.*

8. *In or around the year, 2009, Mota Engil were constructing the Chiringa-Migowi-Chiradzulu road and Migowi-Phalombe spur.*

9. *The construction work involved the use of heavy machinery.*

10. *The use of heavy machinery was causing vibrations in the ground and also shaking of walls of my house and my neighbours.*

11. *Due to the constant shaking of the walls of my house and those of my neighbours, my house and those of my neighbours were damaged.*

12. *I attach a copy of the picture of my house showing the damage marked* ***MTM1****.*

13. *As a group we lodged a complaint to Mota-Engil who promised to compensate us for the damages caused to our houses.*

14. *Mota-engil officials on two occasions visited our area to assess the damage caused to our houses but has not paid us any compensation up to date.*

15. *I would like this court to order Mota-Engil to pay me and my group compensation in form of repair costs. I attach and exhibit hereto a copy of a quotation on the repair costs to my house that I got from a builder marked* ***MTM2****."*

PW2, PW3, PW4, PW5 and PW6 adopted their respective witness statements and each one of them tendered pictures of his or her damaged house and quotations for repair costs. It has to be mentioned upfront that the Defendants objected to the tendering of the photos and quotations as to the truth of their contents and the objection was sustained by the Court on the basis that the authors thereof were not called to testify on the documents. In short, the documents offended the rule against documentary hearsay.

A perusal of the witness statements of these witnesses shows that the evidence therein is in material respects very much similar to that of PW1. In the circumstances, I do not deem it prudent to regurgitate their respective evidence in chief.

In cross-examination, PW1 stated that he could not show the damage on the picture. He said the Plaintiffs lodged their complaint in 2012 but he could not recall the 1st Defendant's official to whom the complaint was lodged. He stated that officials from the 1st Defendant came to inspect the houses in 2012 and 2014. He

said the road construction project started in 2009. He could not recall the time the project ended.

PW1 also said that his house is situated between 10-15metres away from the road. PW1 further told the Court that they sued both Defendants. He said the complaint was lodged with the 1st Defendant because it was the one which was actually constructing the road and the 2nd Defendant was working with the 1st Defendant. He said the wrong committed by the 2nd Defendant was that it has not compensated them for the damage to their houses. PW1 conceded that from the picture which he tendered, cracks could not be seen. He stated that the pictures of his house were taken by Mr Banda.

There was no re-examination of PW1.

During her cross-examination, PW2 failed to identify the picture referred to in his witness statement. She also said that she did not know the person who took the picture of her house. She said that the Plaintiffs had complained to the District Commissioner only. She could not remember when the complaint was lodged. She said they sued those who destroyed their houses, those that constructed the road.

PW2 was not re-examined.

The testimony of the PW3 during cross-examination was as follows. He said the house in the picture was his. He pointed to the Court a crack on the house. He said the crack on the picture appears as a white line. He stated that his house is close to the road, about 15 metres from the road. He said that he lodged his complaint with the District Commissioner. He said he sued the 2nd Defendant because he had heard that if things are destroyed, the 2nd Defendant pays for them. He told the Court that he had heard this from officials that visited the Plaintiffs. The officials came from the 2nd Defendant, 1st Defendant and the District Commissioner. When asked why they did not sue the District Commissioner, she replied that the officials told them that compensation was to be made by the 2nd Defendant.

PW3 was not asked any question in re-examination.

In cross-examination of PW4, he said that the road construction project started in 2009 and it ended in 2011. He told the Court that his house was about 5 metres away from the road. He said that the Plaintiffs lodged their complaint in 2012. He stated that the pictures of his house were taken in 2013 by Mr. Banda. There was no re-examination of PW4.

PW5 stated that the mark appearing on the last page of the witness statement was his signature although the signature was not in his name. He said he had signed it on 26th October 2015. He told the Court that the witness statement had no attachment at the time he had signed it. He also told the Court that there was attachment to his witness statement when he signed it. PW5 was not re-examined.

PW6 stated the following during her cross-examination. Her house is 15-20 metres away from the road. Her house developed cracks due to the construction. The Plaintiffs complained to the 1st and 2nd Defendants in 2014. She confirmed that the contents of paragraph 15 of her witness statement were true. She said it was Mr. Banda who took the picture but she does not know where Mr. Banda works.

There was no re-examination of PW6.

The 1st Defendant had one witness by the name of David Chise (DW1). DW1 adopted his witness statement and the relevant part is in the following terms:

> *"5. ... I am a civil Engineer by profession. I am a Site Agent for Mota Engil, a civil engineering contractor. I have over 9 years experience in civil engineering work.*
>
> *6. I was a Measurement Engineer in 2009 when Mota Engil was carrying out the upgrading project of the Chringa-Migowi-Chiradzulo road and the Migowi-Phalombe spur ("the road").*
>
> *7. ... The works on the road were being carried out by Mota-Engil under the authority and supervision of the Roads Authority as employer.*
>
> *8. ... When bidding for the works, the assumption by Mota Engil was that all risks and environmental impact assessments in respect of the works had already been done by the Roads Authority since the practice in road construction industry is that such assessments are done by the Employers before awarding contracts.*
>
> *9. The works undertaken by Mota Engil as Contractor on the road included mass earthworks, pavement layers, surfacing, bridge and box culvert construction, pipe culvert installation, drainage embankment protection just to mention a few.*
>
> *10. The works on the road were based on standards or specifications set by the Roads Authority as Employer. It is the same standards that were used to determine the type of equipment that was to be used by Mota Engil as Contractor on the road works. In other words, Mota-Engil had used all the requisite equipment for the road works to the satisfaction of the employer's specifications. The equipment that we used included tipper trucks, graders, rollers and dozzers. The lateral effect of the vibration of the machinery used, especially the rollers, when achieving maximum required compaction is completely dissipated within the road reserves.*

11. The requirement in road construction industry is that buildings and/or residential houses should not be constructed very near or within any road reserve. It is the obligation of the Roads Authority to determine road reserves, set road reserve

marks and oversee that buildings or residential houses are not erected very close to or within road reserves.

12. For main (M) roads, the reserve area spuns to a region of 30 m on each side from the centreline of the (M) road. The road corridor for an M road is therefore 60 m. However, for secondary (D) roads, the reserve area stretches to 18m each side from the (S) road's centreline and the (S) road's corridor would be 36m. The Chiringa-Migowi-Charadzulo road and Migowi-Phalombe spur on which Mota-Engil carried out the road upgrading works are all secondary roads.

13. The works in respect of the road were completed in 2009. Mota Engil never received any complaint in relation to the 2009 road works from any member of the communities surrounding the road during the upgrading of the road or soon after its completion. This is why Mota Engil was surprised when the court summons was served on it in October 2014. It was soon after receiving a court summons in this matter, Mota Engil conducted its own investigations which established that most of the plaintiffs' houses are very close to and/or within the reserve area of the road.

14. I therefore believe that the damage, if at all caused by the equipments' vibrations, could not be anticipated by Mota-Engil since it had occupied the project site and carried out the works after the road reserve or working corridor had already been determined by the Roads Authority as its employer.

15. The 2008 Agreement or Contract (DC) states, among other things, that the risk of, or loss, or damage to property which are due to use or occupation of the site by the works for the purpose of the works, which is the unavoidable result of the works, are the Employer's risks. I, therefore believe that the claims in respect of damage to the plaintiffs' residential houses, if proved that they were caused by the equipment vibrations, would qualify as the unavoidable result of the works on the road.

16. I also believes the damage of the nature like those alleged by the plaintiffs' houses in communities similar to that of the Plaintiffs is usually experienced due to use of poor workmanship, compromised quality of building materials and or due to old age."

DW1 tendered the Contract Agreement and it was marked as Exhibit D1.

In cross-examination by Counsel Ulaya, DW1 agreed that the construction works involved use of heavy machinery and that heavy machinery causes vibrations to houses or buildings close to the machinery. He stated that there is a requirement for buildings not to be constructed within or near road reserves.

DW 1 stated that where houses are within the road reserve and have to be demolished, there is a due process of assessment and compensation. He agreed that the reason the houses are to be demolished is because they would be damaged if they remain there. He explained that if houses are found within the road reserve, they inform the client before proceeding with the construction.

DW1 insisted that that the 1st Defendant carried out investigations after it was served with summons. He confirmed that some houses had cracks which he believed had developed because the houses were within the road reserve. He also said that it was possible that the cracks came about due to other causes such as poor mixing of building materials, use of inferior building materials or old age.

DW1 concluded by stating that when commencing the road construction in 2009, the 1st Defendant assumed that the 2nd Defendant had carried out all the necessary risks assessment pertaining to the area.

During cross-examination by Counsel Sitima, DW1 stated that the 1st Defendant was a contractor and that the contract between Mota Engil and Roads Authority (Exhibit D1) was not an employment contract. He confirmed that road reserves are set by law and the Plaintiffs were breaking the law by building their houses within the road reserve.

Regarding vibrations, DW1 told the Court that effects of vibrations were completely dissipated within the road reserve. He said that in terms of clause 11 (a) of Exhibit D1, the 1st Defendant cannot be held liable for damage to houses of the Plaintiffs.

In re-examination by Counsel Chagoma, DW1 agreed that 1st Defendant encountered occasional obstructions and these were being reported to the 2nd Defendant during progress site meetings. He concluded by stating that based on Exhibit D1, the 1st Defendant could only stop the works on the road on instructions by the project manager.

The 2nd Defendant paraded one witness, namely, Andy Koloko (DW2). DW2 adopted his witness statement and the relevant part thereof provides as follows:

> "*1. I am an adult Malawian and I am a Civil Engineer by profession.*
>
> *2. I am currently working for Electricity Supply Corporation of Malawi but up to 25th July, 2014 I was working for the 2nd Defendant as a Construction Engineer.*

3. *Part of my duties were to oversee and supervise the construction of the Chiringa-Migowi-Chiradzulu Road which is designated as a Secondary Road.*

4. *Due to the construction of the said road, some properties near the road were to be demolished and these properties were earmarked and their owners duly compensated.*

5. *The purpose of the compensation was to enable the owners of the properties acquire similar properties away from the road.*

6. *Secondary roads have a road reserve of 30 metres, 15 metres from the centre of the road. The Contractor is instructed to carry out his works within that road reserve.*

7. *If the contractor goes beyond the road reserve or within the road reserve negligently carries out the works, and causes damage to others, that remains the responsibility of the contractor because he is an independent contractor.*

8. *If what the Plaintiffs are saying is true that their properties were damaged because of the negligence of the 1st Defendant, then the 2nd Defendant cannot be held liable for the negligence of the 1st defendant as he is an independent contractor who professed to be competent to carry out the works.*

9. *The Plaintiffs' claims were brought against the 2nd Defendant on 2nd February 2016 after the expiration of 6 years from the date they arose. I am informed by the 2nd Defendant's lawyers that the claims are statute barred."*

In cross-examination by Counsel Ulaya, DW2 testified that he was not aware that the 1st Defendant had reported to the 2nd Defendant of the presence of houses within the road reserve. He said if houses remained within the road reserve and got damaged, that would be the responsibility of the 1st Defendant since the 2nd Defendant set the working corridor and handed it over to the 1st Defendant as contractor. He also said that it is the 2nd Defendant that had carried out sensitization workshops, identification of houses to be demolished and paid compensation to owners of such houses. When asked whether the Plaintiff were paid compensation, he said that he was not aware as he had not verified.

During his cross-examination by Counsel Chagoma, DW2 stated that the 1st Defendant was employed by the 2nd Defendant and that the 1st Defendant carried out the works with the authority and under the supervision of the 2nd Defendant. He said that whenever the 2nd Defendant identified houses to be demolished, the demolition was done by the owners of the property. Malawi Government through the Roads Fund paid the compensation.

He said compensation was paid so that the owners of the houses to be demolished could acquire properties outside the road reserve. DW2 concluded by stating that he fails to understand why the Plaintiffs are still complaining when they were fully told the reasons why they were not paid compensation.

In re-examination by Counsel Sitima, DW2 stated that there were several reasons for rejection of claims and these included (a) the houses being not close to the road, (b) the alleged damage being not connected to the road works and (c) the fact that not all people who got compensation moved out. DW2 told the Court that despite paying compensation, the 2nd Defendant had a big challenge in moving people out of the road reserve. He said some people near or within the road reserve were affected and received compensation.

The Court posed some questions to DW2. He told the Court that all those persons whose complaints were merited received compensation. He said he did not have a list or file of the Plaintiffs on whether they were compensated or not. He said the vibrations could not be the sole cause as the cracks could have equally developed due to poor structural designs and specifications or poor building materials. He said there were some re-alignment made to the working corridor by the 2nd Defendant after the first assessment and it was possible that the presence of some houses within or near the road reserve was as a result of the re-alignments. He said the assessment was an on-going process during the road construction following which the re-alignments were done.

The Court gave all Counsel the option to ask DW2 questions regarding matters raised by the Court. In response to questions by Counsel Ulaya, DW stated that he cannot tell if the Plaintiffs were compensated. He further said that the 2nd Defendant could have brought evidence to show that the Plaintiffs were compensated.

Issues for Determination

The following are the issues for the court's determination in this matter:

(a) whether or not the Plaintiffs' action against the 2nd Defendant is statute-barred (Issue No.1)?

(b) whether or not the 1st Defendant was negligent as alleged or at all(Issue No.2)?

(c) Whether the 2nd Defendant can be held liable for the negligence of the 1st Defendant (Issue No.3)?

Whether or not the Plaintiffs' action against the 2nd Defendant is statute-barred (Issue No.1)?

It is the case of the 2nd Defendant that the Plaintiff's action against the 2nd Defendant ought to fail for being statute-barred. Counsel Salima referred the Court to section 4 (1)(a) of the Limitation Act which 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. Counsel Salima submitted that although the Limitation Act provides, in sections 21 to 25 of the Act, for several exceptions in which the limitation period might be extended the same are not applicable to the present case.

Having laid out the applicable law on limitation periods, Counsel Salima turned his attention to the pertinent parts of the pleadings and the relevant facts. This is to be found in paragraphs 3.1.5 of the 2nd Defendant's Final Submissions:

"3.1.5 The Re-Amended Statement of Claim and the evidence show that the Plaintiffs' causes of action arose on diverse dates in 2009. Thus even if the last cause of action arose on 31st December 2009, the last day for commencing these proceedings against the 2nd Defendant was on 21st December 2015.

3.1.6 The 2nd Defendant, however, was added to these proceedings on 2nd February 2016. Well after the expiration of six years from the date the causes of action arose.

3.1.7 In paragraph 5 of its Amended Defence, the 2nd Defendant pleads as follows ... (As quoted above).

3.1.8 The Plaintiffs did not file a reply denying the 2nd Defendant's contention that their claims are statute barred. In terms of Order 18 rule 13(1) of the Rules of Supreme Court which provides that "any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue...", the Plaintiffs are deemed to have admitted that their claims are statute barred and thus their claims against the 2nd Defendant must fail.

3.1.9 Furthermore, when a defendant has been added as a party to an existing action, the authorities hold that the case against him starts at the time when he is added."

Counsel Salima placed reliance on the English cases of **In Liff v. Peasley and Another [1980] 1 All ER 623** and **Kettemen and Others v. Hansel Properties Ltd [1988] 1 All ER 38.**

The Plaintiffs do not deny that the suit against the 2nd Defendant is statute-barred but assert that the 2nd Defendant waived its right to a remedy under the Limitation Act in that it acquiesced to the suit being brought after the expiration of the limitation period. It may not be out of place to quote in full the relevant part of the Plaintiffs' Final Submission:

- *In its defence, the 2nd defendant pleaded that the claim against it is statute barred.*

- *In paragraph 9 of the witness statement, DW2 stated that the plaintiffs' claims were brought against the 2nd defendant on 2nd February, 2016 after the expiration of 6 years from the date they arose.*

- *As the court file will show, the plaintiffs brought an ex parte application to add the 2nd defendant as a party to the proceedings. The order was granted on 2nd February, 2016. The order was duly served and the 2nd defendant's lawyers filed a notice of appointment of legal practitioners on 17th February,2016. On 23rd February, the plaintiffs and the 2nd defendant signed a consent order providing for directions for further conduct of the matter. On 22nd March, 2016, the 2nd defendant served its defence on the plaintiffs. On 20th April, 2017, the plaintiffs served a notice of hearing returnable on 10th May, 2017 on the 2nd defendant by post. The 2nd defendant did not attend the hearing and the court adjourned the matter to another date to permit the first and second defendant to file relevant documents for the trial. The court awarded the plaintiffs costs up to the hearing date stage to the plaintiffs in any event. The next hearing date was 19th June, 2017. At the hearing, the 2nd defendant paraded a witness who gave testimony contesting the plaintiffs' claim for negligence on merits but also on grounds that the claims are statute barred.*

- *The law is that, where the defendant has pleaded the limitation Act, he has the option of applying to court to have a trial of a preliminary issue or in a clear case, he could have the action dismissed as frivolous, vexatious and an abuse of the court process- See* ***Manyungwa v Stagecoach (Malawi) Ltd [1997]2 MLR 23***

- ***Snell's Principles of Equity (26 ed. Page 39 states as follows;***

  "The principles which equity applies to cases not covered by a statutory period have been thus stated: 'Now the doctrine of laches in courts of equity is not an arbitrary technical doctrine. Where it would be practically unjust to give a remedy either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, ***or where by his conduct or neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable***

to place him if the remedy were afterwards to be asserted, *in either of these cases lapse of time and delay are most material.*

- ***Section 28 of the Limitation Act*** *provides as follows;*
  Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.

- *If defendants improperly joined do not move without delay to be struck out, and take part in the defence, they may be held jointly liable with the other defendant for the costs of the action – **Order 15 r6 (15) RSC.** See also **Vallance v Birmingham Land Corporation (1876) 2 Ch.D.369**; or they may be deprived of costs if they have taken an active part in the litigation- **Burtler v Rice [1910] 2 Ch. 277***

- *From the foregoing, it is submitted that the 2nd defendant by not applying to be struck out as a party to the proceedings immediately they were added as a party or indeed applying to set aside the order which was obtained exparte or applying to have a trial of a preliminary issue before or at trial or to dismiss the action for being frivolus, vexatious and an abuse of court process and instead opting to file a defence, list of documents, trial bundle and parading a witness who contested the merits of the plaintiffs' claims waived its right to a remedy under the Limitation Act. In the words of the Limitation Act, the 2nd defendant should be deemed to have acquiesced to the plaintiffs' claims being brought after the expiration of the limitation period. Therefore, in exercise of its equitable jurisdiction, the court should not permit the 2nd defendant to assert the defence of limitation especially after trial was conducted and concluded."*

I have considered Issue No.1 and the submissions thereon by both Counsel. It is commonplace that the Plaintiffs do not deny that the suit against the 2nd Defendant is caught by the Limitation Act. In this regard, the case of **Liff v. Peasley and Another**, supra, is instructive.

In **Liff v. Peasley and Another,** supra, the plaintiff commenced an action against the 1st defendant within the limitation period. After the expiration of the limitation period, the plaintiff obtained, ex parte, an order adding the 2nd defendant to the action. The 2nd defendant challenged his joinder to the action on the basis that the plaintiff's action against him was statute-barred. The Court Appeal held that an action against a person joined as a defendant was deemed to have been commenced against him from the date on which the writ was amended, so that if the action was then time-barred, there was no useful purpose in allowing the joinder. In the apt observation by Stephenson LJ:

> *"it was by 1887 the settled rule of practice that amendments were not admissible when they prejudiced the rights of the opposite party as existing on the date of such amendments. So said Lord Esher MR in Weldon v Neal [*(1887) 19 QBD 394 at 398] *where this court ...affirmed a decision of the divisional court striking out paragraphs*

adding to a statement of claim fresh causes of action because the amendments would deprive the Defendant of the benefit of the statute of limitations.

In Mabro v Eagle Star and British Dominions Insurance Co. Ltd [[1932] 1 KB 485] *this court upheld a refusal to join a plaintiff on the same ground. Scrutton LJ, at page 487, restated that practice and that basis of it:*

> *'in my experience the court has always refused to allow a party or a cause of action to be added where, if it were allowed, the defence of the Statute of Limitations would be defeated. The Court has never treated it as just to deprive a defendant of a legal defence.'*

Where, as here, a direct action against a proposed defendant can be defeated by a plea of limitation, the plaintiff cannot escape the consequence by seeking to join the proposed defendant as a party in pre-existing proceedings...' – Emphasis by underlining supplied

Brandon LJ explained the basis for not allowing such a joinder in this way, at page 639:

"There are two alternative bases on which the rule of practice can be justified. The first basis is that, if the addition were allowed, it would relate back so that the action would be deemed to have begun as against the person added, not on the date of the amendment, but on the date of the original writ; that the effect of such relation back would be to deprive the person added of an accrued defence to the claim on the ground that it was statute barred; and that this would be unjust to that person....

The second alternative basis for the rule is that, where a person is added as defendant in an existing action, the action is only deemed to have begun as against him on the date of the amendment of the writ; that the defence that the claim is statute barred therefore remains available to him; and that, since such defence affords a complete answer to the claim, it would serve no useful purpose to allow the addition to be made.."

The dicta by Brandon LJ were approved by the House of Lords in **Kettemen and Others v Hansel Properties Ltd [1988] 1 All ER 38** in the following terms:

"A cause of action is necessarily a cause of action against a particular defendant, and the bringing of the action which is referred to must be the bringing of the action against that defendant in respect of that cause of action. The causes of action here against the local authority and the architects were separate and distinct from the cause of action against Hansel. In my opinion there are no good grounds in principle or in reason for the view that an action is brought against an additional defendant at any earlier time than the date on which that defendant is joined as a party in accordance with the rules of court."

In the present case, the action by the Plaintiffs against the 2nd Defendant was commenced on 2nd February 2016. At that point the limitation period had run out and the 2nd Defendant's joinder to these proceedings was improper.

I now turn to the assertion by the Plaintiffs that the 2nd Defendant waived its right to a remedy under the Limitation Act. Even though the assertion appears, on the face of it, attractive, it lacks merit for the simple reason that waiver or acquiesce was not pleaded by the Plaintiffs. It is a well settled principle that the court can only determine matters as pleaded by the parties, not venturing into issues not raised by the parties in their pleadings: see the cases of **Malawi Railways Limited v. P.T.K. Nyasulu MSCA Civil Appeal No. 13 of 1992** and **Martin Nyirenda v. Press Agriculture Limited, MSCA Civil Appeal No. 16 of 2006 unreported.**

The parties to an action as well as the court are bound by the pleadings. Thus, in the absence of an amendment to the pleadings, neither the Plaintiff nor the Defendants can introduce a new issue. Likewise, a court cannot decide on something that is not put before it through pleadings. In **Malawi Railways Limited v. P.T.K. Nyasulu** , supra, the Supreme Court of Appeal quoted with approval a passage from the (196)) Current Legal Problems entitled "The present importance of pleadings" by Sir Jack Jacob as follows:

> *"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties..."*

In so far as waiver or acquiesce was not pleaded by the Plaintiffs, the same cannot be smuggled in through the backdoor, that is, submissions by Counsel at the close of the case. In the circumstances, it is my finding that the Plaintiffs' action against the 2nd Defendant is statute-barred. Accordingly, the action against the 2nd Defendant is dismissed with costs.

Whether or not the 1st Defendant was negligent as alleged or at all? (Issue No.2)

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*

For an action in negligence to succeed, the plaintiff must show that (a) there was a duty of care owed to him or her, (b) the duty has been breached, and (c) as a result of that breach he or she has suffered loss and damage: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Chimasula Phiri J, in **Gaffar v. Press Bakeries Ltd and Another, HC/PR Civil Cause Number 2269 of 2002 (unreported)**:

> *"Liability in negligence arises when the act or omission results in damage to a person whether in form of personal injury or property damage. The tort of negligence is said to have three ingredients:*
>
> (a) *A legal duty on the part of the defendant towards the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty.*
>
> (b) *A breach of the duty.*
>
> *(c) Consequential damage to the plaintiff"*

Duty of care

It is a principle of common law that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would likely injure persons who are so closely and directly affected by one's act or omission that one ought to have them in contemplation as having been so affected when doing the act: see **Donoghue v. Stevenson**, supra.

The all important question to ask in the present case with regard to duty of care is whether or not the Plaintiffs were so closely and directly affected by the 1st Defendant's act or omission that the 1st Defendant ought to have had them in

contemplation as persons that would be so affected before doing the act or omission?

A perusal of the evidence before the Court shows that the houses of the Plaintiffs are within the reserve area of the roads in question. None of the Plaintiffs gave evidence to the effect that his or her house was outside the road reserve. I also make the following findings of fact:

(a) the construction works involved use of heavy machinery which caused vibrations to houses or buildings close to the machinery; and

(d) there was a risk of damage to the houses which were within and/ or very close to the road reserve owing to the vibrations.

On the basis of the foregoing, I am satisfied that the 1st Defendant owed the owners of the houses that were within the road reserve or close to the road reserve a duty of care not to subject their houses to a risk of damage since it was foreseeable, as was rightly conceded by DW1 during cross-examination, that the use of heavy machinery would cause damage to houses or buildings that were within the road reserve or close to the road reserve.

Breach of the duty

The Plaintiffs allege that their houses developed cracks as a result of the negligence of the 1st Defendant. The particulars of the alleged negligence are that the 1st Defendant (a) proceeded with the construction of the road without assessing the risk of damage to the Plaintiffs' houses, and (b) had failed to have regard for the safety of the Plaintiffs.

As already mentioned hereinbefore, the burden of proof lies upon the Plaintiffs to give evidence in support of the alleged negligence as particularized in the Re-Amended Statement of Claim. If the alleged facts are proved and the inferences which are drawn from those facts are consistent with negligence as set out in the Re-Amended Statement of Claim, negligence will be inferred upon the 1st Defendant. If at the end of the day, the evidence by the Plaintiffs leaves the case in balance, without satisfying the Court that the particularized negligence was occasioned by the 1st Defendant, the Plaintiffs would have failed in proving their action: see **Juma v. Mandala Motors Limited [1993] 16 (1) MLR 139.**

An analysis of the material parts of the respective testimonies of the Plaintiffs boils down to this: that "*the road construction works involved use of heavy machinery*

which caused vibrations and shaking of their houses as a result of which they were damaged". Absolutely no evidence was led to prove the alleged negligence, that is, that the road construction was done without assessing the risk of damage to the houses of the Plaintiffs.

In this regard, can it be said that the Plaintiffs, by this kind of evidence, have managed to prove negligence in the particular manner alleged in the Re-Amended Statement of Claim? Alternatively, can an inference drawn from these facts or evidence be consistent with the negligence alleged by the Plaintiffs? There is nothing in the evidence before the Court to suggest or signify that the 1st Defendant had carried out the road construction works without prior risk assessment of possible damage or that the defendants had failed to have regard to the safety of the Plaintiffs as alleged in the Statement of Claim.

To the contrary, there was ample evidence before the Court that owners of properties within the road reserve were compensated and that the compensation was paid so that the owners of the said properties could acquire alternative properties outside the road reserve. The Plaintiffs did not even attempt to advance any reason whatsoever to explain how it happened that they were not paid any compensation whatsoever when their houses were situated within the road reserve. In this regard, I am inclined to agree with the DW2 who confirmed that all owners of properties within the road reserve were paid compensation but not all of them moved out.

It will be recalled that the Plaintiffs also pleaded that they would seek to rely on the principle of res ipsa loquitur. This issue was not pursued in the Plaintiffs' Final Submissions or at all. In any case, for the principle to apply, a plaintiff has to prove 3 elements, namely, (a) the thing causing the damage was under the control and management of the defendant, (b) the occurrence could not have happened without negligence and (c) there is no evidence to show how the occurrence happened: see **Phekani v. Automotive Products Limited (1993) 16 (1) MLR 427 (HC)** and **Mugonya and Another v. Electricity Supply Commission of Malawi [1997] 1 MLR 295.**

In the present action, it was the case of the Plaintiffs that damage to their houses was caused by vibrations resulting from the 1st Defendant's construction works which involved use of heavy machinery. This fact is not in dispute. As such, the cause of the damage to the Plaintiffs' houses is known and, accordingly, the doctrine of res ipsa loquitor is not applicable in this case to prove the alleged negligence of the 1st Defendant. The cases of **Kalea v. Attorney General [1993] 16 (1) MLR 152** and **Selemani & another v. Advanx (Blantyre) Ltd [1995] 1**

MLR 262 are instructive. In both cases, the plaintiffs had respectively pleaded the principle of res ipsa loquitor but the Court held that the principle was not applicable because the Plaintiff knew the cause of the accident.

Whether the 2nd Defendant can be held liable for the negligence of the 1st Defendant (Issue No.3)?

Having held (a) under Issue No. 1, that the Plaintiffs' action against the 2nd Defendant is statute-barred, and (b) under Issue No.2, that the 1st Defendant was not negligent as alleged? Issue No. 3 has to fall by the wayside on account of been redundant.

Conclusion

The Plaintiffs have failed to prove their claim against the 1st Defendant to the requisite standard of proof. Further, the action against the 2nd Defendant is statute-barred by reason of the Limitation Act. In the premises, the action by the Plaintiffs is dismissed with costs.

Pronounced in Court this 23rd day of April 2018 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE