

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 274 OF 1989



BETWEEN:

BERITA BINALI PLAINTIFF

AND

THE PORTLAND CEMENT COMPANY (1974)
LIMITED DEFENDANT

CORAM: UNYOLO, J.

Mrs. Msosa, Counsel for the Plaintiff
Msisha, Counsel for the Defendant
Kholowa, Court Clerk

JUDGMENT

This is an appeal by the plaintiff against the order of the Deputy Registrar made on 4th April, 1990 striking out the plaintiff's action in this case.

The pertinent facts can be stated shortly. By her writ of summons and statement of claim served therewith and dated 4th April, 1989 the plaintiff claimed damages from the defendant for loss of dependency on the sudden demise of her husband who died on 5th April, 1986 following a road accident the previous day, alleging that the accident occurred as a result of negligent driving on the part of the defendant's servant. The court stamp shows that the said writ was actually presented to the Court on the same date, 4th April, 1989. However, it was only on 7th April, 1989, some three days later that the Deputy Registrar signed the writ. Service was effected on the defendant's legal practitioners who before long brought an application per summons for an order that the plaintiff's action should be struck out for disclosing no reasonable cause of action as the writ was issued after the period of limitation had expired. The application came before the learned Deputy Registrar who at the end of the day allowed the application and ordered that the plaintiff's action be struck out accordingly. It is from that decision the plaintiff appeals to this Court.

As a general matter, it is to be observed that an appeal of this nature is dealt with by way of an actual rehearing and although I would properly give the learned Deputy Registrar's decision the weight it may deserve I am however not bound by it in any way.

I have indicated that the plaintiff's husband died on 5th April, 1986. The cause of action therefore arose on that date. And in terms of Section 4 of the Limitation Act, the period of limitation for bringing an action in such a case is



three years. The limitation period in the present case therefore expired on 5th April, 1989. It will however be recalled that the plaintiff signed the writ herein and had it filed with the court on 4th April, 1989, clearly within the period of limitation. It was only the actual signing or issuing of the same by the court that came belatedly, some three days after the said period of limitation.

Pausing there, it is to be noted that in terms of O5/2 Rules of Supreme Court civil proceedings in tort, other than trespass to land, must be begun by writ as was done in the instant case. Such writ must of course be issued by the Court before it is served upon the defendant and O6/7 of Rules of Supreme Court provides that the issue of a writ takes effect at the moment when it is duly sealed by the court. Section 3 of the Courts Act is also pertinent. The section stipulates that any process, whether civil or criminal, issued by the High Court must be signed by the Registrar. The issuing and signing of a writ are therefore not one and the same thing. Ordinarily, the writ is issued (Sealed) first and then signed by the appropriate officer, namely the Registrar and this, by definition per section 2 of the Act herein includes a Deputy Registrar or an Assistant Registrar. While the writ in the present case was admittedly sealed, the precise date when that was done is not known. We know however the date the writ was filed and the date it was signed. As to the word "filing" the learned authors of Words and Phrases Judicially Defined, Vol.II, put it thus -

"the word 'filing', in reference to matters of practice, is very commonly used to express the duty of bringing to the proper office writs, pleadings, affidavits and other such matters for safe custody or enrolment".

And according to the Strouds Judicial Dictionary, a document is "filed" when delivered to the proper office to be filed. Jowitt's Dictionary of English Law adds: "with the necessary stamps" i.e. fee.

Counsel for the defendant has argued that the action is statute-barred, the writ having been signed only on 7th April, 1989 while as in terms of Section 4, abovementioned, the statutory period of limitation in this case expired on 5th April, 1989. Pausing here, it is, I think, useful to examine the words of the section the relevant part provides:-

"(1) the following actions shall not be brought after the expiration of six years from the date on which the cause of action arose, that is to say -

- (a) actions founded on contract or on tort;"
- (The underlining is supplied).

There is then a proviso to the effect that in the case of actions for damages for negligence, nuisance or breach of duty where the damages claimed include damages in respect of

personal injury to any person the limitation period is three years and not six years. The present case falls in this category and it had therefore to be brought by the 5th April, 1989.

I have reminded myself that the golden rule in the interpretation of statutes is that the words of a statute, if unambiguous, must prima facie be given their ordinary meaning. See Nokes v. Doncaster Amal Colliers Ltd. (1940) 3 All ER 549. Section 4 herein is in my view clear and unambiguous. The requirement there is for the plaintiff's action must be brought before the expiration of the three year limitation period and when the word "brought" is given its ordinary meaning the state of facts envisaged in my view is simply that the plaintiff must deliver his writ to the court within the statutory period of limitation. To my mind it could not have been the intention of Parliament that a plaintiff must in addition be required to see to it that the writ, after it was so delivered, was thereafter sealed and/or signed by the proper officer. To use legal jargon what the plaintiff is required to do is to "file" the writ in court before the statutory period of limitation expires and as we have seen earlier the word "filing" is used to express the duty of bringing to the proper office of the court writs, pleadings and kindred documents for processing.

Counsel on both sides in this case made comments on the statement appearing in O6/7/1 of Rules of Supreme Court to the effect that the issue of a writ of summons is not a judicial act, but the act of a party. Well, this statement should not be read in isolation. What the rule says there, read as a whole, is that except in the few cases where leave of the court is required before a writ may be issued, generally the issue of a writ cannot be refused by the court.

Indeed it is not without significance that the statute gives a plaintiff time up to which he must bring his action. Like in the present case the plaintiff had until the 5th April, 1989 to bring her action. As already indicated she delivered the writ and the fee payable thereon and the proper office actually received the writ on 4th, clearly within time. As I see it, if there is anyone to blame for the belated sealing, if at all, and signing of the writ, it can only be the officers of the court, and not the plaintiff. In my view it would be unconscionable, unjust and wrong to penalise the plaintiff for what happened here.

In spite of my extensive research I have not been able to find any decided case quite on point. However, the case of United Transport (Malawi) Ltd. v. Mynthali, Civil Appeal No.3 of 1974 (unreported) is of some guidance. In that case the respondent brought an action in the Resident Magistrate's Court, Blantyre, claiming damages against the appellant for negligence. The trial court found for the respondent and the appellant appealed to the High Court. The notice of appeal was prepared on 30th November, 1972 and was received by the Court, together with the fees thereon, on the same date. Incidentally that was also the last day the appeal had to be

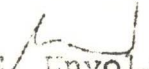
lodged in terms of Order 33 of the Subordinate Courts Rules which provides that a notice of appeal shall be filed within 14 days from the date of the judgment. Although the documents were received by the court on 30th November, 1972 it was only on 5th December, 1972 that the cheque was brought on charge and a receipt issued. Thereafter the documents were processed and transmitted to the High Court in the normal manner. Counsel for the respondent argued that since the notice of appeal was processed on 5th December, 1972 outside the limitation period the same was statute-barred and incompetent. The Judge rejected this argument, holding that the issuing of the receipt was an administrative matter and could not affect the date of receipt of the notice of appeal. With respect I agree fully with this decision and I think that the broad principle stated there can be extended to the situation obtaining in the present case. For these reasons I must reject the contention that the plaintiff's action in this case was statute-barred.

That resolves the matter really, but I would go further. As I have indicated already the defendant's argument before the learned Deputy Registrar was that the plaintiff's statement of claim disclosed no "reasonable cause of action" on the basis that the action was statute-barred. Fortunately the phrase "reasonable cause of action" has been defined in a number of previous cases. In Drummond-Jackson v. British Medical Association (1970) 1 All ER 1094, Lord Pearson described a reasonable cause of action as a cause of action with some chance of success when only the allegations in the pleadings are considered. And in Wenlock v. Moloney (1965) 2 All ER 871 it was held that so long as the statement of claim or the particulars disclose some cause of action or raise some question fit to be decided by the court, the mere fact that the case is weak, and not likely to succeed, is no ground for striking it out. Another pertinent case is Price v. Phillips (1894) W.N. 213. It was there held that where it appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, the statement of claim would nevertheless not be struck out (unless the case was one to which the Real Property Limitation Acts applied), the rationale being that in such a case it cannot be said that no reasonable cause of action was disclosed since a defence under the Limitation Acts bars only the remedy and not the claim. The courts have held that if the defendant in such a case pleads a defence under the Limitation Act, he can seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the ground that it is frivolous, vexatious and an abuse of the process of the court. See Ronnex Properties Ltd. v. John Laing Construction Ltd. (1982) 3 All ER 961.

In the premises, the appeal succeeds. The learned Deputy Registrar's decision is set aside and the defendant's application to strike out the plaintiff's action stands dismissed with costs both here and below.

Let me say this in closing, for the guidance of the officers of the court. Documents brought to the court must be processed immediately they are received. It is noted that each document received by the court whether by hand or post is date-stamped on receipt and I think that in order to avoid confusion the Registrar must be deemed to sign the particular document on the date the same was so received and stamped. This means therefore that the date of the Registrar's signature should correspond with the date document was received by the court.

DELIVERED in Chamber this 17th day of July, 1990 at Blantyre.


L.E. Unyolo
JUDGE