

Civil Procedure - Application to set aside default judgment
Constitutional Law - The Limitation Act
National Compensation Tribunal
IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NUMBER 1684 OF 1994

BETWEEN

S.K. KUWALI
PLAINTIFF

AND

THE ATTORNEY GENERAL
DEFENDANT

CORAM: D.F. MWAUNGULU, J
Nyirenda, for the plaintiff
Chigawa, for the defendant
Chigaru, Official Interpreter

Mwaungulu, J

ORDER

On this summons the defendant is applying to set aside a judgment in default of defense. The plaintiff entered the judgment on 7th March, 1994. In the action the plaintiff was claiming damages for wrongful suspension, dismissal and false imprisonment. The plaintiff who was employed at the time was detained by police. He was detained without any charge for fourteen months from 11th March, 1985 to May 1986. Consequently the employer, the Government, dismissed him. The plaintiff contends that the detention was wrongful. So was the dismissal.

The defendant has filed an affidavit in which he raises two lines of defense. The first is that the action is caught by section 4(1) of the Limitation Act. The action was commenced by the plaintiff on 7th March, 1994. The second line of defense is that the defendant's detention was lawful in that it was under the Preservation of Public Security Act. I do not think that there is any merit in the second line of thought. A lawful imprisonment may turn unlawful. It will be unlawful if it is beyond what is reasonable for the purposes for which it is invoked. The defendant has not raised any reason for such protracted

detention of the plaintiff. In my judgment fourteen months detention was unlawful anyway. The defendant cannot succeed on that pretext. That defense cannot likely succeed at the trial.

The second line of thought is that the action is caught by section 4(1) of the Limitation Act. The action is clearly out of time. The plaintiff however contends that the defendant has acknowledged liability in that the Constitution in Chapter XIII concedes the liability of the government. This argument, although ingenuous must fail. First, the Limitation Act must be read subject to the Constitution; the Constitution cannot be subject to the Limitation Act. The Constitution is the fundamental law, then a source of all statutory law. The Constitution in Chapter XIII has overridden the Limitation Act in so far as these claims are concerned. The Constitution has also provided a manner in which such claims must be dealt with. If the effect of Chapter XIII is acknowledgment as the plaintiff contends one has also to acknowledge the procedure set down by the Constitution to deal with the matter. In the procedure set the tribunal has not to deal with the Limitation Act as this court would have to. The appropriate forum is the National Compensation Tribunal created under section 37 of the Constitution because there the Limitation Act does not apply.

The National Compensation Tribunal was set up to entertain claims with respect to alleged criminal and civil liability of the Government of Malawi which was in power before the appointed day. The National Compensation Tribunal has powers and functions conferred on it by the Constitution or by an Act of Parliament. Under the Constitution ordinary courts can only handle such claims as have been remitted to them by the National Compensation Tribunal under section 138(3) of the Constitution. Section 138(1) of the Constitution provides as follows:

“No person shall institute proceedings against any Government in power after the commencement of this Constitution in respect of any alleged criminal or civil liability of the government of Malawi in power the commencement of this Constitution arising from abuse of power or office, save by application first to the National Compensation Tribunal, which shall hear cases initiated by persons with sufficient interest.”

In so far as this action is in relation to malpractice of the previous Government, it is in the purview of the National Compensation Tribunal. Ordinary Courts have no jurisdiction at this stage. That however assumes, as the plaintiff

contends, that the creation of the National Compensation Tribunal Is an acknowledgment of liability.

This action was not commenced after the commencement of the Constitution. The Constitution was effective on 18th May, 1994. This action was taken out on 2nd December, 1993. The Constitution only proscribes actions commenced before the 18th May, 1994. This Court has jurisdiction on the matter. This Court in relation to such actions has to apply the limitation Act.

Acknowledgment and payment are provided in Part III of the Limitation Act. The relevant provision is section 22(4):

"Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest therein, and the person liable and accountable therefor acknowledges the claim or makes any payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment..."(emphasis supplied).

The plaintiff's claim does not fall in any of the categories. The plaintiff's claim is for general damages. There cannot be an acknowledgment of such a claim.

The affidavit of the defendant raises a matter which should render trial necessary. The judgment is set aside with costs to the plaintiff.

Made in Chambers this 16th September, 1997



D.F. Mwaungulu.

JUDGE