



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO 903 OF 2016

BETWEEN:

CLEMENCE BITONI.....PLAINTIFF

AND

MAKANDI TEA AND COFEE ESTATES LIMITED.....DEFENDANT

CORAM

Mrs T. Soko : ASSISTANT REGISTRAR

Plaintiff : absent

Mr Ng'omba : Counsel for the defendant

Chikwati : Court Clerk

RULING

BACKGROUND

On 30th January 2017 the defendants herein brought summons to dismiss the action on point of law. The application was brought under Order 14A of the Rules of the Supreme Court and it was supported by an affidavit sworn by Counsel Ng'omba. Hearing of the application took place on 20th February 2018 and now the matter is coming for a ruling on whether to dismiss the action on point of law.

EVIDENCE

The affidavit which was adopted by Counsel Ng'omba states that the plaintiff commenced the action by way of writ of summons claiming damages for pain and suffering, loss of amenities of life, special damages and costs for the action. The writ of summons was served on the defendant on 28th November 2016. Counsel produced the said writ of summons and statement of claim which he exhibited. Counsel continued to state that the defendants filed and served its defence on 21st December 2016. Counsel produced the defence which he exhibited. Counsel said that however the action emanated from a 2013 accident that occurred when the plaintiff was in the course of employment even though paragraph of 3 of the statement of claim stated that the accident occurred in 2016. Counsel stated that this being a personal injuries matter commencement was supposed to be done within three years from the date the cause of action arose and the said action occurred on 25th November 2016 three years after.

Counsel prayed that the Court should order dismissing the action on a point of law in that the action is a statute barred.

THE LAW

Order 14A of the Rules of the Supreme Court provides that:

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that -

(a) such question is suitable for determination without a full trial of the action, and

(b) such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have either -

(a) had an opportunity of being heard on the question, or

(b) consented to an order or judgment on such determination.

Section (4) (1) (a) of the Limitation Act provides that:

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;*

Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under any written law or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.

In Berita Binali vs The Portland Cement Company (1974) Limited Civil Cause Number 274 of 1989 the plaintiff claimed damages from the defendant for loss of dependency of the sudden demise of her husband who died on 5th April 1986 following a road accident the previous day. The plaintiff alleged that the accident occurred as a result of negligent driving on the part of the defendant's servant. Justice Unyolo indicated that the cause of action arose on 5th April 1986 and according to section 4 of the Limitation Act, the period of limitation from bringing an action in such a case was three years. He stated that the requirement in Section 4 is for the plaintiff's action to be brought before the expiration of 3 years limitation period and the word brought simply means that the plaintiff must deliver his writ to the Court within the statutory period of limitation. Justice Unyolo J. also stated that what the plaintiff is required to do is to file the writ in the Court before the statutory period of limitation expires and the word filing is used to express the duty of bringing to the proper officer of the Court writs, pleading and kindred documents for processing.

DETERMINATION

In the present matter, after going through the health passport of the plaintiff which was marked EXHP3 it shows that the plaintiff sustained the injuries on 15th November 2013. It means the cause of action arose on that date. The plaintiff had the right to bring the action against the defendants from 15th November 2013 to 15th November 2016. The writ of summons shows that the plaintiff through his Legal Practitioners signed the writ of summons on 17th November 2016 and the same were brought or filed to the Court on 25th November

2016. The time when the writ of summons were filed to the Court three years required for bringing this action had already lapsed. On that basis the Court finds that the plaintiff brought this action out of time therefore it is statute barred.

It is a requirement under Order 14A that both parties have to be heard on the question before making the determination of the application. However, the plaintiff did not appear on the date of hearing of this application despite being served with summons on 31st March 2017 and the notice of hearing on 6th February 2018. Order 32 r.5 (1) and (2) of the Rules of the Supreme Court clearly stipulates that the Court may proceed to hear the application in the absence of the party to the summons where such party fails to attend on the hearing provided that the summons and the notice of the appointed time were duly served to the party. In that regard, it would be unfair to dismiss this application on the ground that the plaintiff was not heard when he did not give any reasons to his absence.

On the foregoing reasons the Court finds that the writ of summons were brought to the Court after the expiry of three years. Therefore the Court allows the application and dismisses the plaintiff's action with costs to the defendant.

Pronounced in Chamber on this 16th day of March 2018



T. SOKO

ASSISTANT REGISTRAR