

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

PERSONAL INJURY CAUSE NUMBER 255 OF 2020

BETWEEN:

TONGWE NGWENYAMA AND HENRY NGWENYAMA
(Joint administrators on their own behalf and on behalf of the
Dependents of the estate of GIFT NGWENYAMA CLAIMANTS

AND

COLLINS MKHAYA 1st DEFENDANT
REUNION INSURANCE COMPANY LIMITED 2nd DEFENDANT

CORAM: JUSTICE M.A. TEMBO

Imaan, Counsel for the Claimants
Katuya, Counsel for the 2nd Defendant
Mankhambera, Official Court Interpreter

ORDER

1. This is this Court's order on the 2nd defendant's application for an order striking out the claimants' claim herein for being statute barred and therefore frivolous, vexatious and abuse of the Court process in that the claim for loss of expectation of life and dependency herein, based on negligence, was commenced outside the three-year limitation period as provided under the Limitation Act. The application is made under Order 10 of the Civil Procedure Rules.

2. The claimants opposed the application on two grounds, namely, that it was made without citing the rule of procedure under which it was made and that the claimants were under a disability to commence the action herein until they had to obtain letters of administration over the deceased estate which necessitates an extension to the limitation period.
3. There is no dispute that the matter herein was commenced after the three-year limitation period set for actions based on negligence. The cause of action arose on 20th February, 2017 when the deceased died in a collision which is the basis of the present action. The period of three years lapsed on 19th February, 2020. The claimants filed the summons to commence the present action after the 19th February, 2020, namely, on 16th March, 2020.
4. As correctly submitted by the 2nd defendant, for actions for personal injuries based on negligence the limitation period is three years. See proviso to Section 4 (1) Limitation Act.
5. The 2nd defendant contends that the action herein was commenced after the three-year limitation period and is therefore statute barred hence it must be dismissed for being frivolous, vexatious and an abuse of the court process.
6. Both parties correctly indicate that where a defence of limitation is sought to be relied on then it must be pleaded and then proved. See *Mudaliar v Kayisi* 3 ALR (Mal) 103.
7. The 2nd defendant then correctly contended that where it is clear that the matter is statute barred then it is open to the 2nd defendant to apply to strike out the claim for being an abuse of process by reason of the limitation. See *Ronnex Properties Limited v John Laing Construction Limited and others* [1953] 1 Q.B. 398.
8. This Court is satisfied that the action herein was commenced after three years and ought to be statute barred unless if it falls under the exception of disability as contended by the claimants.
9. The claimants indicated that they were under a disability, and could not commence the action within the limitation period allowed, because they were making efforts to obtain letters of administration to the deceased estate that would have entitled them to commence the action.
10. As correctly submitted by the 2nd defendant, the disability envisaged under the Limitation Act, which allows extension of the limitation period, does not include the lack of letters of administration as posited by the claimants. It is actually expected that the claimants would obtain letters of administration within the limitation period and commence the action

within the same period. The lack of capacity envisaged under the Limitation Act includes things like being of unsound mind or being a minor which is not the case with the claimants. The objection by the claimants on the basis of incapacity herein therefore fails.

11. The 2nd defendant indicated that the action against the 2nd defendant is also statute barred on account of having been sued as insurer directly outside the two-year period allowed under section 148 of the Road Traffic Act for such a direct suit. The 2nd defendant's view is that when an insurance company is sued together with the insured tortfeasor then the insurance company is sued directly as is the case when only the insured is sued without joining the insured tortfeasor.
12. This Court does not agree. Suing an insurer directly is taken by this Court to mean that the claimant has sued the insurer alone without indicating the insured tortfeasor on the summons. The details of the insured tortfeasor will however appear in the body of the statement of case to form the basis for the direct action against the insurance company as insurer.
13. In the present matter, the insurance company was not sued directly but jointly with the insured tortfeasor and therefore the limitation period under section 148 of the Road Traffic Act does not apply.
14. The claimants then argued that the 2nd defendant made the application under Order 10 of the Civil Procedure Rules which are non-existent rules. And also that the 2nd defendant did not indicate the rule under which the application was made and therefore that the application is incompetent. They correctly emphasized the importance of citing the rule under which an application is made for the guidance of the opposing party and the court. See *Kamoto v The Liquidator of Finace Bank of Malawi and others* civil cause number 269 of 2010 (High Court) (unreported).
15. This Court has considered that it is imperative that indeed relevant rules under which an application is made must be specifically indicated. However, this Court notes that, as contended by the 2nd defendant during oral argument, Order 10 of the Courts (High Court) (Civil Procedure) Rules allows for making of applications in proceedings.
16. The view of this Court is that there is need for formality and proper reference to the rules of procedure as the 'Courts (High Court) (Civil Procedure) Rules', on the form of the application. The 2nd defendant casually referred to the rules as the 'Civil Procedure Rules' on the face of its application. That should be discouraged. However, in the circumstances

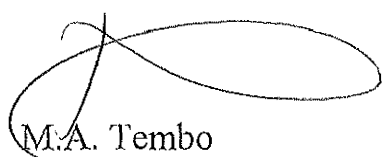
of this case, such a reference is not fatal given that there is no indication that the claimants have been misled as to the Order 10 of the relevant rules under which the 2nd defendant's application is made. They ably responded to the application and this Court had no difficulty to deal with the issues as well. This is against a background that this Court has inherent power to prevent abuse of its process.

17. In the foregoing premises, the claimants action against the 2nd defendant is dismissed for being frivolous, vexatious and abuse of the court process for having been commenced outside the limitation period.

18. There was reference to the 1st defendant in relation to the instant application but this Court will not refer to such arguments given that the present application pertains to the 2nd defendant.

19. Costs are for the 2nd defendant.

Made in chambers at Blantyre this 19th March 2021.


M.A. Tembo
JUDGE