

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

APPEAL NO. 187 of 2019

BETWEEN:

JOHN SEPISO T/A SEPISO TRANSPORT

APPELLANT

AND

KALALUKA AMUKENA (*Suing as Administrator
of the estate of the late Patricia Amukena*)
and 18 Others

1st RESPONDENT

KOBS INVESTMENTS LIMITED

2ND RESPONDENT

Coram: *Kondolo, SC, Chishimba and Sichinga, JJA*
On 11th November, 2020 and 19th November, 2020

For the Appellant: No appearance

*For the 1st Respondent: Mr. A. Siwila, Messrs Mambwe, Siwila, and Lisimba
Advocates*

For the 2nd Respondent: No appearance

JUDGMENT

Sichinga, JA delivered the judgment of the Court.

Cases referred to:

1. *Kamouth v. Associated Industries International Limited* (1980) QB 199
2. *BP Zambia Plc v. Zambia Competition Commission and Others* (2011) Vol 3



3. *Royal Trading v. Zambia Revenue Authority (2000) ZR 86*
4. *Arthur Ndhlovu and Dr. Jacob Mumbi Mwanza v. Al Shams Building Materials Company Limited and Jayesh Shah (2002) ZR 48*
5. *Attorney General v. E.B. Machinists Limited (2000) ZR 114*

Legislation referred to:

1. *Fatal Accidents Act, 1846 (U.K), 9 & 10 Vic. C93*
2. *Law Reform (Limitation of Actions, Etc) Act Chapter 72 of the Laws of Zambia*
3. *Limitation Act, 1939 ((U.K.) 2 & 3 Geo. VI c21)*
4. *British Acts Extension Act, Chapter 10 of the Laws of Zambia*

1.0 Introduction

1.1 This appeal lies against a Ruling of the High Court (Zulu J) rendered on 19th June, 2019 wherein the lower court found that the plaintiffs, Kalaluka Amukena and others (now 1st respondents) commenced the action within the statutory time limit and accordingly dismissed the 2nd defendant's (now appellant) appeal for lack of merit.

2.0 Background

2.1 The facts of the case are simple. The summary of the background forming the basis of the appellant's appeal are as

set out hereunder. In October, 2009 the plaintiffs acting through Katondwe Girls Secondary Parent Teachers Association allegedly contracted Kobs Investments Limited, 1st defendant to provide transportation to the plaintiffs to and from Katondwe Girls Secondary School in Luangwa. In turn it was alleged that the 1st defendant subcontracted John Sepiso T/A Sepiso Transport, the 2nd defendant to provide the said transportation service.

2.2 In pursuance of the contract between the 1st and 2nd defendants, the 2nd defendant did provide a Volvo bus, registration no. AAX 5639 to the plaintiffs to enable them travel to Katondwe Girls Secondary School in Luangwa. On or about 10th October, 2009, whilst the bus, driven by the 2nd defendant's driver, was transporting the plaintiffs, lost control and was involved in a tragic road traffic accident along Great East Road, near Luangwa Bridge. As a result there were six fatalities and the rest of the plaintiffs suffered serious and slight body injuries.

- 2.3 On 9th August, 2011, the plaintiffs commenced this action by way of writ of summons claiming damages under the ***Fatal Accidents Acts (1546 and 1908)*** for the deceased, and damages under various heads for the injured.
- 2.4 Kobs Investment Limited, the 1st defendant entered conditional appearance, and later made an application for misjoinder. The application was refused by the learned Registrar in a ruling dated 2nd November, 2011. The 1st defendant proceeded to file its defence on 15th November, 2011 in which it denied liability for the accident and denied that it was an agent of the 2nd defendant.
- 2.5 John Sepiso, the 2nd defendant did not enter appearance nor file a defence. On 21st March, 2013 the plaintiffs obtained a judgment in default of appearance and defence against the 2nd defendant.
- 2.6 In the meantime trial of the matter between the plaintiffs and the 1st defendant commenced on 8th October, 2014. However, before the trial was conducted, these parties executed a Consent Judgment on 21st April, 2015. The effect of the

consent judgment was that the matter was resolved in favour of plaintiffs with damages to be assessed in default of agreement.

2.7 On 29th September, 2017, the 2nd defendant filed a notice of motion to raise a preliminary issue on a point of law that the matter was statute barred on the ground that the plaintiffs should have commenced their action within twelve (12) months from the date of the accident. The 2nd defendant's contention was that the plaintiffs' action expired on 9th October, 2010.

2.8 In his ruling dated 7th August, 2018, the Registrar found that the cause of action arose on 10th October, 2009 and that the matter commenced on 9th August, 2011. He found that the action was commenced after the statutory limitation period of twelve (12) months as provided under the **Fatal Accidents Act¹**. He, however held that the 2nd defendant had delayed in raising the issue in light of the Consent Judgment entered between the plaintiffs and the 1st defendant, and the judgment in default of appearance and defence as entered between the

plaintiffs and the 2nd defendant, which had not been set aside. The preliminary issue was dismissed.

3.0 Decision of the court below

3.1 Following the dismissal of the preliminary issue, the 2nd defendant appealed to a judge in chambers. The learned judge's ruling delivered on 19th June, 2019 is the subject of this appeal. The learned judge considered **section 3** of the **Fatal Accidents Act, 1846¹** and **section 4** of the **Law Reform (Limitation of Actions, E.T.C) Act²**. He opined that the twelve calendar months limitation period for commencing action under the **Fatal Accidents Act, 1846**, in so far as that *Act* applies to Zambia was amended to a limitation period of three years. He found that the action was not statute barred at the time it was commenced as it was within the three year statutory period for commencing actions under that *Act*. He accordingly dismissed the 2nd defendant's appeal as it lacked merit.

4.0 Ground of appeal

4.1 It is against the said ruling that the appellant now appeals to this Court on the sole ground that ***the learned trial judge erred both at law and in fact when he held that the matter was not statute barred.***

5.0 Appellant's submission

5.1 The appellant filed heads of argument dated 14th October, 2019. They commenced with a brief history of the case which we will not belabor as we have hereinbefore given the background.

5.2 It was submitted that this action was predicated on ***section 3*** of the ***Fatal Accidents Act, 1846*** which provides for the bringing of actions within 3 years. It was contended that ***section 4*** of the ***Law Reform (Limitation of Actions, ETC)*** *supra* amended ***section 3*** of the ***Fatal Accidents Act, 1846***, the effect of which the limitation period for commencing an action under the said ***Fatal Accidents Act, 1846*** is no longer 3 years but 12 calendar months or one year.

5.3 It was submitted that since the cause of action in this matter was occasioned on 10th October, 2009 and the matter was only commenced 22 calendar months later, the action collapsed on 10th October, 2010. Reference was made to the case of ***Kamouth v. Associated Industries International Limited***⁽¹⁾ in which the court held *inter alia* that:

“The court cannot enlarge a time limit which a statute has specified.”

5.4 Our attention was also drawn to the case of ***BP Zambia Competition Commission and Others***⁽²⁾ in which the Supreme Court held that:

“The time in a statute is a requirement of a statute and the court cannot enlarge the time limit which a statute has specified. Courts have to apply a statute in a manner in which the statute can be held to have been contemplated and if the words in the statute are clear, then, those words must be followed even though they lead to manifest absurdity.”

5.5 It was argued that the words in **section 4** of the ***Law Reform (Limited of Actions ETC) Act*** are couched in very clear and unambiguous terms and their meaning require no disquisition. Reference was made to the case of ***Royal***

Trading v. Zambia Revenue Authority⁽³⁾ and the holding that:

“.....it does not give the court any discretion to extend time within which such action shall be commenced.”

5.6 Counsel submitted that the court has no jurisdiction to hear a matter that has been barred by a statute.

5.7 On the issue as to whether a plea of limitation of action could be raised whether there is a default judgment, it was submitted that the issue *in limine* on statute bar was preceded by an application by the appellant to set aside the default judgment. Yet the learned Registrar ignored the application to set aside the default judgment and only pronounced himself on the said issue *in limine*. That the position of the law is as was espoused in the case of ***Arthur Ndhlovu and Dr. Jacob Mumbi Mwanza v. Al Shams Building Materials Company Limited and Jayesh Shah***⁽⁴⁾ where the Supreme Court held that:

“The position at law is clear. There can be no estoppel against a statute. A litigant can plead the benefit of a statute at any stage even if raised belatedly.”

5.8 Further, the case of **Attorney General v. E.B. Machinists Limited**⁽⁵⁾ was referred to where it states:

“The doctrine of estoppel may not be invoked to render valid a transaction which the legislature has on grounds of general public policy enacted is to be invalid or to give the court a jurisdiction which is denied to it by statute or to oust the court’s statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions.”

5.9 It was submitted that the court cannot assume jurisdiction which statute has not granted it.

5.10 In conclusion, the appellant’s contention was that no claim can issue from a defective and irregular writ of summons. That a cause of action cannot remain in perpetuity. It was submitted that if a matter is statute barred, it is fatal as it goes to the root of the case.

6.0 1st respondent’s submissions

6.1 The 1st respondent filed heads of argument on 8th November, 2019 which counsel entirely relied upon. In responding to the sole ground of appeal, it was submitted that **section 3** of the

Fatal Accidents Act 1848 of the United Kingdom allowed a personal representative of a deceased person who was involved in a fatal accident to bring an action for damages within twelve calendar months. However, **section 4 of the Law Reform (Limitation of Actions, Etc) Act** *supra* amended **section 3** of the **Fatal Accidents Act 1848** where the words “*twelve calendar months*” were substituted by the words “*three years.*” That this meant that the personal representatives of a person who died in a fatal accident could commence action within three years from the occurrence of death. It was submitted that the cause of action in this matter was not statute barred as the action was commenced within the stipulated three year period.

6.2 Counsel submitted that **section 4** of the **Law Reform (Limitation of Actions, Etc) Act** only applied to personal representatives of deceased persons who were involved in a fatal accident of whom desired to commence legal action pertaining to the death of the deceased person. That in other words, the survivors of fatal road traffic accidents are not

affected by the provisions of **section 4** of the **Law Reform (Limitation of Actions, Etc) Act**.

6.3 In sum, counsel endorsed the interpretation of the court below and urged us to dismiss the appeal with costs.

7.0 Decision of the court on appeal

7.1 We have considered the appeal together with the record and the submissions by the learned counsel for the parties. We have earlier in this judgment set out the material facts and the various stages of this matter which have led to the current appeal.

7.2 The main statute of limitation of actions in Zambia is the **Limitation Act, 1939**, a British statute whose application is extended to the Zambian jurisdiction by virtue of the provisions of **section 2** of the **British Acts Extension Act Chapter 10 of the Laws of Zambia**⁽⁴⁾. **Section 2** of the **Act** provides that:

“2. The Acts of the Parliament of the United Kingdom set forth in the schedule shall be deemed to be of full force and effect within Zambia.”

7.3 The said schedule to **section 2** of the **British Acts Extension Act** lists *inter alia* the **Limitation Act, 1939** as applicable to Zambia for the purposes of determining causes with respect to limitation. However, the **Limitation Act, 1939** is in itself subject to amendments by Zambian legislation termed the **Law Reform (Limitation of Actions, Etc) Act supra**. In its preamble, the **Law Reform (Limitation of Actions, Etc) Act** states as follows:

“An Act to assimilate in certain respects the law applicable to proceedings against public authorities (including the Republic) and persons acting in pursuance or execution or intended execution of enactments to that applicable in other cases; to amend the law as to the time limited for bringing legal proceedings and as to the survival of causes of action against the estates of deceased persons; and to provide for purposes connected with the matters aforesaid.”

7.4 The **Fatal Accidents Act, 1846** applies to this jurisdiction by way of the **Law Reform (Limitation of Actions, Etc) Act**. It provides for fatal accident claims brought for lost support by the dependents of a deceased person. It provides in **section 3** as follows:

“Provided always, and be it enacted, that not more than one action shall lie for and in respect of the same subject matter of complaint, and that every such action shall be commenced within twelve calendar months after the death of such deceased person.” (emphasis is ours)

7.5 By the time the ***Fatal Accidents Act, 1848*** was adopted into this jurisdiction, the limitation provision had been amended by the ***Law Reform (Limitation of Actions, Etc) Act supra***.

Section 4 sets out as follows:

“In its application to the Republic, section 3 of the Fatal Accidents Act, 1846, of the United Kingdom, is hereby amended by the substitution of the words “three years” for the words “twelve calendar months.” (emphasis is ours).

7.6 On this appeal, the appellant advanced an interpretation which did not find favour with the learned judge. The learned judge held that the cause of action arose on 10th October, 2009 and the action was commenced on 9th August, 2011. That it was not statute barred at the time it was commenced as it was within the three year statutory period for commencing actions under the ***Fatal Accidents Act***.

7.7 We cannot fault the learned trial judge. Whilst the wording of the **Fatal Accidents Acts, 1846** provides a limitation of twelve (12) calendar months, recourse to the **Law Reform (Limitation of Actions, Etc) Act** reveals that it is inconceivable that Parliament intended that twelve (12) calendar months should apply as a limitation period in this jurisdiction.

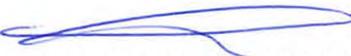
7.8 The appellant's counsel had distinctly argued that **section 4** of the **Law Reform (Limitation of Actions, Etc) Act** amended **section 3 of the Fatal Accidents Act 1846** by limiting the period for commencing an action under **Fatal Accidents Act, 1846** from three (3) years to twelve (12) calendar months. The wording of **section 3** of the **Fatal Accidents Act, 1848** has remained the same since it was first enacted as we have set out above. In our view, the submissions by the appellant's counsel are misconceived.

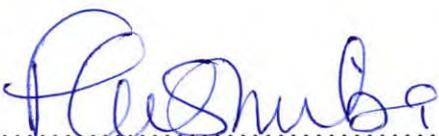
7.9 If Parliament had intended to give the full legislative effect of the **Fatal Accidents Act, 1846** it would not have enacted the amendment to **section 3** by way of **section 4** of the **Law**

Reform (Limitation of Actions, Etc) Act. The fact of the matter is that the effect of the amendment substituted the wording “*twelve calendar months,*” with the wording “*three years.*”

We accordingly accept the submissions of the 1st respondent’s counsel and uphold the decision of the lower court.

7.10 The appeal must therefore fail. We dismiss the appeal with costs to the 1st respondent to be taxed in default of agreement.


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M.M. Kondolo, SC
COURT OF APPEAL JUDGE


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F.M. Chishimba
COURT OF APPEAL JUDGE


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D.L.Y. Sickinga
COURT OF APPEAL JUDGE