

**IN THE HIGH COURT FOR ZAMBIA
AT THE DISTRICT REGISTRY
AT KABWE**

2011/HB/49

PETER MUTALE	PLAINTIFF
AND	
AGRO FUEL INVESTMENT	1ST DEFENDANT
MADISON GENERAL INSURANCE	
CORPORATION LIMITED	2ND DEFENDANT
MILANI SAMBOKO MBOZI	3RD DEFENDANT

Before the Honourable Madam Justice M.S. Mulenga in chambers on the 18th day of August, 2011 at 09.00 hours in the forenoon.

For the Plaintiff	:	Mr. T.S. Ngulube of Messrs Nanguzgambo and Associates
For the 1st and 3rd Defendants:		Mr. D. M. Chakoleka of Messrs Mulenga Mundashi & Co.
For the 2nd Defendant	:	No appearance

RULING

CASES CITED:

1. CITY EXPRESS LIMITED V. SOUTHERN CROSS MOTORS (FORMERLY MARUNOUCHI MOTORS LIMITED SCZ NO. 8/262/2006
2. BERNSTEIN V. JACKSON (1982) 2 ALL ER 806 CA
3. CHAPPELL V. COOPER (1980) 2 ALL ER 463 CA

LEGISLATIONS:

1. THE RULES OF THE SUPREME COURT, (WHITEBOOK) 1999 EDITION, ORDER 14A AND ORDER 6 RULE 8
2. HIGH COURT ACT CAP 27, RULE 9 HIGH COURT RULES
3. THE LAW REFORM (LIMITATION OF ACTIONS) ACT, CAP 72 OF THE LAWS OF ZAMBIA, SECTION 4.

OTHER WORKS

1. HALSBURY'S LAWS OF ENGLAND, 4TH EDITION, VOLUME 28

This is a matter for the determination of a point of law pursuant to Order 14A of the Rules of the Supreme Court 1999 Edition raised by the 1st and 3rd Defendants.

The parties filed in and relied on their respective affidavits in support, opposition and reply and the Defendant further relied on their written submissions filed on 17th July, 2011. At the hearing, both counsel further made brief viva voce submissions.

The brief facts of the case are that the Plaintiff issued a Writ of Summons on 9th March 2006 under Cause No. 2006/HB/18 claiming for K100 million as damages under the Fatal Accidents Acts 1846-1908 and other damages for loss of life, loss of expectation of life, negligence, exemplary and aggravated damages, funeral expenses, interest and costs. This arose from the fatal accident which occurred on 21st September 2004 involving the 3rd Defendant as the servant/employee of the 1st Defendant and the Deceased Micheal Mutale. However, this writ was never served on the Defendants but was later re-issued in 2008 under Cause No. 2008/HB/38b. A fresh writ was then issued on 29th October, 2010 under cause No. 2010/HB/70 and on 9th May 2011, the 2008 re-issued writ was further re-issued but which was later given the current cause number of 2011/HB/49. In between the first writ and the last one, there was some correspondence between the Plaintiff and the 1st Defendant with both exhibiting the correspondence of June and August 2009. The 2010 and 2011 writs were served on

the defendants and the matter was at the stage where the orders for directions were issued when the current application for the determination of the matter on a point of law was made.

The Defendants submission was that the 2006 writ was neither served nor renewed within the required period of one year and was not renewed yearly up to 2011. Further that the fresh writ which was issued in 2010 and re-issued in 2011 was statute barred as it was over three (3) years after the cause of action arose 21st September 2004 and not 9th March 2006 as alleged by the Plaintiff. Mr. Chakoleka also cited the case of **City Express Limited v. Southern Cross Motors SCZ No. 8/262/2006** and the Halsbury's Laws of England, 4th Edition Volume 28 in support of his case. I will consider these in due course.

The Plaintiff's counsel Mr. Ngulube, on the other hand argued that the cause of action arose on 9th March, 2006 but did not produce any evidence in support of this assertion. He further urged the court to order that all the subsequent cause numbers should be ignored and the original Cause No. of 2006/HB/18 retained. He submitted that the 2010 writ could only be issued after one (1) year and could thus not have been re-issued in 2011 and therefore the 2011 cause number was a mistake by the Registry.

In the light of the stated facts and the submissions by the parties, I acknowledge that there were some mistakes that were made by the Registry in allocating different cause numbers to the writs that were being re-issued but these mistakes were not fundamental as they could be easily rectified. I also find that most of the proceedings on record are under cause 2008/HB/38B and Cause No. 2011/HB/49 was only superimposed on the 2008 cause number apparently by the Registry staff.

The main issue that required determination is whether this matter as it now stands is statute barred. The Law Reform (Limitation of Actions) Act Cap 72 of the Laws of Zambia provides in Section 4 that actions under the Fatal Accidents Act must be

instituted within a period of three years of the cause of action. In this case I find for a fact that the cause of action arose on 21st September, 2004 when the accident occurred resulting in the instant death of the deceased as the persons to sue and be sued were known and ascertained and all relevant facts available. I concur with the defence submission that the cause of action accrued on that date and not the date when a claim is rejected as stated in the **City Express Ltd case**. I therefore dismiss the unsubstantiated argument by the Plaintiff that the cause of action arose on 9th March, 2006. The three year period therefore elapsed on 20th September, 2007. The first writ under Cause No. 2006/HB/18 was thus issued within time on 9th March, 2006 but was undisputedly not served within the 12 months of issue as required by Order IX (9) of the High Court Rules. This order on renewal of writs states as follows in part:

Order 9 Rule 1. *"No original writ of summons shall be in force, for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith the Plaintiff may, before the expiration of the twelve months, apply to the court or a Judge for leave to renew the writ and the court or Judge if satisfied that reasonable efforts have been made to serve such defendant, or for other good reasons, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive,....."*

The rule further states that the writ may thereafter be renewed from the time to time and the Plaintiff or his lawyer is then required to produce Form 12 (Praecipe of Renewed writ of summons) for the appropriate officer to seal the renewed writ. Once a writ is properly renewed as provided, it effectively works against the statute bar as it ensures that the date of the original writ remains valid. Rule 2 of Order 9 further provides that where a writ is purportedly marked as renewed with the seal of the court, that is sufficient evidence of its renewal.

Order 6 Rule 8 of the Rules of the Supreme Court (White Book) 1999 Edition also deals with the validity and renewal of writs which is similar to the above provisions in the High Court Act Cap 27 but with differences on periods of validity. Under note 6/8/3 quoting the case of **Bernstein v. Jackson (1982) 2 ALL ER 806 CA** it is stated that "*..... an irregularity in procedure caused by failure to renew a writ under this rule is such a fundamental defect in the proceedings that the wide powers of the court..... ought not to be exercised.*"..... (that is, to validate a writ that has become invalid). It is therefore incumbent upon the Plaintiff to promptly serve the writ while it is still valid because he will not be entitled to sympathy if he does not do so and ends up in problems. This rule further provides that renewal of a writ is not as a matter of right but one must show good reason either that he had clearly agreed with the Defendant to defer the service of the writ or that he has found it difficult to serve on the Defendant by reason of evading service. This application must be within the appropriate period of the first expiry.

However, the fact that negotiations are still progressing is not regarded as a good reason for requesting for renewal. The Defendants have rightly relied on the quoted passage in **Halsbury's Laws of England 4th Edition Volume 28 at paragraph 807** that:-

"The mere fact that negotiations have taken place between a claimant and a person against whom a claim is made does not debar the Defendant from pleading a statute of limitation, even though the negotiations may have led to delay and caused the claimant not to bring his action until the statutory period has passed." Further, the Plaintiff has not shown that he had an agreement with the Defendant not to prosecute his claim. The letter from the 1st Defendant dated 5th August 2009 cannot assist the Plaintiff as it was years both after the matter became statute barred on 20th September 2007 and after the original writ lapsed on 8th March, 2007.

The clear requirement is that the writ must be renewed in the first instance before the 12 months elapse and the renewals are only valid for periods of 6 months at each

instance. Was this requirement fulfilled by the Plaintiff in this case? The Plaintiff issued the writ under cause No. 2006/HB/18 on 9th March 2006 and the twelve months elapsed on 8th March, 2007 but the same was purportedly first renewed on an unascertained date in 2008 as the 2008 writ on record bears the date 19th May, 2011. Therefore, notwithstanding the provision of Order 9 Rule 2 above that when a writ is marked as renewed then that is sufficient evidence of renewal, the Plaintiff in this case still has to show that the first renewal was validly done in the prescribed manner on or before 8th March, 2007 or with special leave after this date. This is required in the absence of any proof on record and in light of the Plaintiff conceding that the first renewal was done in 2008, long after the original writ had lapsed and outside the three year time limit. The Plaintiff has not proved that the 2006 writ was validly re-issued and hence the purported renewal in 2008 is invalid and if it is to be considered as a fresh commencement of action, then it was out of time and statute barred.

This finding is in line with the decision of the Court of Appeal in the case of **Chappell v. Cooper (1980) 2 ALL ER 463 CA** where a writ was issued within acceptable time but not served and an application made to renew it after the action was statute barred and it was held as a matter of principle that a court had no discretion to override the limitation period in such a case if the second action is brought outside the limitation period regardless of what caused the Plaintiff or his lawyers not to proceed with the first action or fail to serve the first writ. The Plaintiff therefore takes the blame for his earlier failure to act.

This is an unfortunate case for the Plaintiff but the law and principles are clear that where one neglects to serve a properly issued writ within the prescribed period of 12 months and then purports to renew it after it has lapsed for over a year and is outside the limitation period of 3 years from the cause of action, then his matter cannot be entertained by the courts.

Consequent to my findings above that the matter is statute barred and the original writ was not validly renewed, I hereby dismiss the Plaintiff's proceedings under the 2008, 2010 and 2011 cause numbers as being misconceived, incompetent and invalid.

Due to the issues raised in the proceedings and considering that the Plaintiff originally had a just cause, I order that each party bears its own costs. I further urge the Defendants to consider, outside the court process, some form of compensation to the Plaintiff for the unfortunate incident.

M.S. Mulenga

JUDGE