

## Introduction

[2] Miscellaneous Application No. 0025 of 2023 was brought by Chamber Summons supported by an affidavit deposed by **Jonathan Kiwana**, an advocate working with the law firm representing the Applicant. Briefly, the grounds of the application are that the Respondent instituted Civil Suit No. 069 of 2021 against the Applicant as 1<sup>st</sup> Defendant, jointly and severally with two other defendants, for general and exemplary damages founded on negligence and product liability. The deponent stated that the Respondent averred in the main suit that he was born on 10<sup>th</sup> October 1960 with serious birth defects which he claims arose from administering thalidomide as a morning sickness

drug by his mother. It is further stated in the plaint that the Respondent wrote to the Applicant in 2016 seeking redress for his thalidomide related injuries whereupon he was referred to and approached the Contergan Foundation seeking compensation as a thalidomide victim.

[3] The deponent states that the Respondent's claims are barred by the Limitation Act which requires claims for negligence to be brought within three years from either the date of accrual of the cause of action or injury or when the claimant ceases to be under disability. The deponent states that the cause of action in this case arose at the birth of the Respondent in 1960 and he was under disability being a minor until 10<sup>th</sup> October 1978 when he attained majority age. He avers that the Respondent ought to have instituted the suit by 10<sup>th</sup> October 1981 which is three years from the time he ceased being under disability. The deponent further states that in the alternative, even if ignorance was a disability (which it is not), the Respondent by 2016 had enough knowledge to lead to a real possibility that his injuries were thalidomide related; and, in that case, the Respondent ought to have instituted his suit by 2019, three years from the date he would have ceased being under the "ignorance disability". He concluded that it was in the interest of justice that the suit be struck out for being barred by time limitation.

[4] Miscellaneous Application No. 0559 of 2022 was supported by an affidavit deposed by **Paul Mbuga**, an advocate in the firm representing the Applicant in the matter. Briefly, the grounds of the application are that the Respondent filed Civil Suit No. 069 of 2021 against the Applicants and one other defendant for recovery of general damages founded in negligence and product liability. The deponent stated that the suit is barred by limitation on account that it was instituted 43 years after the Respondent attaining majority age and was outside the three-year limitation period for an action in negligence since the personal injuries were allegedly caused by Thalidomide, which was supplied to

pregnant mothers at the time of the Respondent's birth in 1960. The deponent also stated that the summons in Civil Suit No. 069 of 2021 are invalid and had not been properly served upon the Applicants. The Applicants further challenged the suit on basis of lack of a cause of action against the Applicants. The deponent prayed that the Court strikes out and dismisses the suit with costs.

[5] Both applications were opposed through an affidavit in reply deposed by **Kiwunda Mathew**, an advocate working with the firm representing the Respondent, in which the deponent stated that the Respondent was born with malformed limbs and found out through his research that it was as a result of Thalidomide that was marketed by the Applicants as a safe drug for pregnant women until it was withdrawn from the market in 1961. The deponent stated that the Respondent underwent a series of medical examinations by experts from Mulago Hospital whose report dated 4<sup>th</sup> December 2019 established that his condition was caused by Thalidomide. He asserted that the cause of action arose on 4<sup>th</sup> December 2019 and the suit was filed on 2<sup>nd</sup> March 2021 within the limitation period.

[6] The Applicants in M.A No. 0559 of 2022 deposed to a supplementary affidavit in support of the application to which the Respondent filed a supplementary affidavit in reply. The Applicants also filed an affidavit in rejoinder whose contents I have taken into consideration.

### **Representation and Hearing**

[7] At the hearing, the Applicant in M.A No. 025 of 2023 was represented by **Mr. Brian Kalule** from M/s AF Mpanga Advocates; the Applicants in M.A No. 559 of 2022 were represented by **Mr. Michael Mafabi** and **Mr. Allan Waniale** from M/s S&L Advocates while the Respondent was represented by **Ms. Caroline Kintu** and **Ms. Gloria Nagami** from M/s Muwema & Co. Advocates.

The Court directed that the hearing proceeds by way of written submissions which were duly filed and have been taken into consideration in the determination of the matter before Court.

### **Issues for Determination by the Court**

[8] Four issues have been raised for determination by the Court, namely;

- a) Whether HCCS No. 069 of 2021 is barred by time limitation?
- b) Whether there was effective service of summons against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants?
- c) Whether HCCS No. 069 of 2021 discloses a cause of action against the 1<sup>st</sup> and 2<sup>nd</sup> Applicants?
- d) What remedies are available to the parties?

### **Resolution of the Issues**

#### **Issue 1: Whether HCCS No. 069 of 2021 is barred by time limitation?**

##### **Submissions by Counsel for the Applicants**

[9] Counsel for the Applicants cited the provisions of section 3(1) of the Limitation Act and the case of *James Mundeley Sunday v Pearl of Africa Tours and Travel*, HCCS No. 89 of 2011 to the effect that an action founded on tort for recovery of damages in respect of personal injuries cannot be brought after the expiration of three years from the date on which the cause of action arose. Counsel submitted that the main suit which is founded on the tort of negligence and product liability seeks to recover damages in respect of personal injuries allegedly suffered by the Respondent at birth in 1960. Counsel stated that since the Respondent was an infant until the year 1978, which is considered a disability, the period of limitation began to run in 1978 and lapsed 3 years later in 1981. Counsel reasoned that the main suit which was filed in March 2021, a period of 43 years after the expiration of the limitation period, is barred by limitation.

[10] Counsel further cited the decision of the House of Lords in *Cartledge v Jopling* [1963] AC 758 to the effect that a cause of action arises when the injury is done and is not postponed until such time as there is knowledge of the occurrence of the injury. Counsel disputed the Respondent's claim that he did not know that his injuries were Thalidomide related until 2019. Counsel further argued that the allegation of lack of medical proof is not a disability and does not fall under the disability exception. Counsel relied on the case of *Departed Asians Custodian Board v Dr. J.M. Masambu*, CACA No. 4 of 2004 to the effect that the two categories of disability under the Limitation Act are infancy and unsoundness of mind.

### **Submissions by Counsel for the Respondent**

[11] In reply, it was submitted by Counsel for the Respondent that the main suit is not barred by limitation on account that the Respondent underwent a series of examinations by experts and only got a conclusive report that his condition was caused by Thalidomide on 4<sup>th</sup> December 2019. Counsel relied on the case of *Amin Aroga v Haji Muhammad Anule* [2018] UGHCLD 24 to the effect that section 21(1) of the Limitation Act allows persons who suffer from disability subsequent to the time when they are entitled to institute a suit to institute it within six years after the disability has ceased and argued that the period for the Respondent to commence the suit against the Applicants accordingly started on 4<sup>th</sup> December 2019 when he received the report. Counsel submitted that the Respondent was under disability first as a minor and that when he attained majority age, he lacked medical/expert proof that his injuries were caused by Thalidomide until 2017. Counsel prayed to the Court to find that the Respondent's claim in the main suit is not barred by time limitation.

## **Determination by the Court**

[12] The position of the law is that once a claim is caught up by time limitation, the same is barred by law and cannot be entertained by the Court except where the party seeking to institute the claim can take advantage of any of the exceptions set out by the limitation statute. In such a case, the party has to bring an action itself and plead that they are relying on a particular exception. The provision under Order 7 rule 6 of the CPR is clear to that effect. It provides as follows;

### ***“Grounds of exemption from limitation***

*When a suit is instituted after the expiration of the period prescribed by the law of limitation, the plaintiff shall show grounds upon which exemption from such law is claimed”.*

[13] It follows, therefore, that where the plaintiff has grounds for bringing the suit after expiration of the period of limitation, he or she must show sufficient cause in the pleadings themselves. The period of limitation in the present case is set out under Section 3(1)(a) of the Limitation Act Cap 80. Section 3(1) of the Act provides as follows;

### ***“Limitation of actions of contract and tort and certain actions***

*(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose-*

- (a) actions founded on contract or tort;*
- (b) actions to enforce a recognizance;*
- (c) actions to enforce an award;*
- (d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture, except that in 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 an enactment independently of any such contract or any such*

provision) where the damages claimed by the plaintiff for negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have the effect as if for the reference to six years there were substituted a reference to three years.”

[Emphasis added]

[14] Section 21 of the Act (Cap 80) provides for exceptions to the foregoing limitation. Under that section, a party gets excepted to the application of section 3 above if he or she can prove that they were prevented from bringing the suit within time on grounds of disability. Section 21(2)(b) of the Act goes further to indicate that for the exception on basis of disability to apply, the plaintiff has to prove that at the time when the cause of action accrued to him or her, he or she was not in custody of a member of his or her family. This envisages that if he/she was in custody of a family member, the suit ought to have been brought by such a family member in case of a disability on the part of the plaintiff. In my view, this is testimony to how serious the law treats the question of time limitation.

[15] Section 1(3) of the Limitation Act provides that; *“For the purposes of this Act, a person shall be deemed to be under a disability while he or she is an infant or of unsound mind”*. In *Gastapo Co. Ltd v AG*, HCCS No. 030 of 2021, the Court held that a plaintiff is under disability for the purposes of the Civil Procedure and Limitation (Miscellaneous Provisions) Act if he or she is a minor under the age of eighteen years, declared mentally incompetent or under other legal disability rendering him or her incapable of the management of his or her affairs due to the impairment of his or her physical condition or because of disease or other impairment of his or her mental condition.

[16] It is settled law that unless the particular statute states so expressly, the court has no residual power to extend time set by an Act of Parliament. It is

further the position of the law that a limitation statute is strict in nature and inflexible and is not concerned with the merits of the case. Non-compliance with the limitation period renders the suit a nullity. See: *Hilton v Sutton Steam Laundry* [1956]1 KB 73 cited with approval in *Madhvani International SA v AG*, SCCA No. 23 of 2010. In *Hilton v Sutton Steam Laundry* (supra), **Lord Greene M.R at p.81** stated thus;

*“But the statute of limitation is not concerned with merits, once the axe falls, it falls, and a defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled, of course, to insist on his strict rights”.*

[17] In this case, the suit was brought way after the prescribed period of three years under the Act. The Respondent (plaintiff) relies on the fact of infancy and lack of medical proof as disabilities upon which the exemption is sought. The Respondent set out in paragraph 6 of the plaint that the suit was not brought earlier because he only confirmed in 2019 following a series of medical examinations that his injuries were caused by thalidomide. This was in line with Order 7 rule 6 of the CPR that requires the disability to be pleaded. Although disability based on the fact of infancy was not specifically pleaded in the plaint, the Respondent would still be in position to rely on the same. Nevertheless, the Respondent attained majority age in 1978 and the three years’ extension under Section 21(2)(a) of the Limitation Act expired in 1981. Secondly, the provisions under Section 21(2)(b) of the Act imposes a requirement upon the plaintiff to prove that he was not in the custody of a family member when the cause of action arose. This has not been shown or alluded to by the plaintiff in the pleadings before court.

[18] Regarding the claim for disability based on lack of medical proof, I agree with Counsel for the Applicants that the claim cannot constitute disability within the meaning of the Limitation Act whichever way the term disability could be stretched. In my view, this is all the more reason the law envisaged



that if a plaintiff was in custody of a family member, his or her needs would have been adequately catered for and cannot rely on the ground of disability. Lastly, even if the period was to be stretched to when the Respondent first understood and related his plight to the thalidomide tragedy, (which position is not based on any provision of the law), there is evidence that by the year 2016, the Respondent had reason to believe in the occurrence and take action. Even at this latest, the Respondent would still be time barred having brought the action in 2021.

[19] In the premises, it has been established by the Applicants in the consolidated applications that Civil Suit No. 069 of 2021 is barred by law on account of time limitation. Since time limitation is a complete bar to legal proceedings, the other matters raised in the applications become inconsequential. The consolidated applications against the Respondent thus succeed with the result that Civil Suit No. 069 of 2021 is accordingly dismissed. In accordance with Section 27 of the Civil Procedure Act Cap 71, the Applicants are entitled to the costs of this application and of the main suit and the same are accordingly awarded to the Applicants against the Respondent.

It is so ordered.

***Dated, signed and delivered by email this 26<sup>th</sup> day of February, 2024.***



**Boniface Wamala**

**JUDGE**