

Freetown
July 26,
1962

[COURT OF APPEAL]

Ames P.,
Dove-Edwin
J.A.,
Bankole Jones
J.

WAGIE FAWAZ AND ATALLAH ABESS *Appellants*
v.
JEANE WALDOCK *Respondent*

[Civil Appeal 8/62]

Practice and Procedure—Commencement of proceedings—Whether proceedings commenced in time—Whether application to Supreme Court for leave to serve writ of summons out of jurisdiction of court constitutes “proceedings”—Law Reform (Miscellaneous Provisions) Act (Cap. 19 of Laws of Sierra Leone).

On April 10, 1960, there was a motor vehicle accident in which respondent's husband was killed. On July 20, 1960, respondent and the other executors of her husband's will were granted probate. On September 9, 1960, appellants, through their solicitor, applied to the Supreme Court for leave to serve a writ of summons on the respondent in the United Kingdom. The writ for damages was filed on September 21, 1961, with the statement of claim. Respondent raised the defence that the claim was barred by section 2 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, which provided that “No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless . . . proceedings are taken in respect thereof not later than six months after his personal representative took out representation.” The trial judge held that proceedings had not been commenced within six months after respondent took out representation, and dismissed the claim.

Held, reversed. The application for leave to serve a writ of summons out of the jurisdiction constituted the taking of “proceedings” within the meaning of section 2 (3) (b) of the Law Reform (Miscellaneous Provisions) Act.

(Note that this section was amended in 1961.)

Case referred to: *The King (on the prosecution of John Whitome) v. Marchland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155.

Cyrus Rogers-Wright for the appellants.

Alfred H. C. Barlatt for the respondent.

DOVE-EDWIN J.A. On Sunday, April 10, 1960, there was a serious accident caused by two motor vehicles colliding. The driver of one died from injuries he received. Some others were injured.

The respondent is the widow of the driver of one of the cars and he died; respondent is now the administratrix of her husband's estate. The two appellants were in the other car and both claim that they were seriously wounded.

On July 20, 1960, the respondent and other executors of the deceased's will were granted probate.

On September 9, 1960, the appellants through their solicitor applied to the Supreme Court for leave to serve a writ of summons out of the jurisdiction of the court as the respondent was residing in the United Kingdom.

The writ for damages was filed on September 21, 1961, with the statement of claim, and on November 11, 1961, the defence was filed. In paragraph 7 of the statement of defence the respondent, through her solicitor, pleaded that the claim was statute-barred by section 2 (3) (b) of the Law Reform (Miscellaneous Provisions) Act, Cap. 19 of the Laws of Sierra Leone, 1960.

On February 18, 1962, the appellants by their solicitor joined issue with the respondent.

The motion came before the learned judge on March 20, 1962, for hearing of arguments, and on March 26, 1962, the learned judge upheld the defence that the claim was statute-barred and dismissed the appellants' claim. This appeal is against that decision.

The Law Reform (Miscellaneous Provisions) Act, s. 2 (3) (b), upon which the defence was based, reads as follows:

“(3) No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless . . .

(b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took representation.”

This section has now been repealed and substituted by section 11 of Ordinance No. 33/61.

The whole question for decision is this—what is the meaning of “proceedings” in the section? Was the application for leave to serve the writ out of the jurisdiction “proceedings” within section 2 (3) (b)?

Learned counsel for appellants says it is and that by applying for leave to serve the writ out of the jurisdiction he satisfied the section. He says that “proceedings taken in respect thereof” were taken and that they were well within the six months stipulated by the section.

Learned counsel for the respondent argued that they were not, and that since the writ of summons was filed only on September 21, 1961, about a year and five months after the respondent was granted probate, the writ was statute-barred as it was well outside the six months stipulated in the section under review.

In his judgment the learned trial judge had this to say:

“In this case what the plaintiffs obtained was leave to serve a writ on an intended defendant who is outside the jurisdiction of this court, and this step in my opinion could not be called proceedings within the contemplation of section 2 (3) (b) of Cap. 19 so as to give validity to a writ issued and served well outside the period of six months after the personal representatives have taken out a grant, in this case over a period of one year. The objection on point of law raised in the defence and argued succeeds. The claim is statute-barred and the writ is set aside.”

In my opinion, the application for leave to serve a writ of summons out of the jurisdiction taken on September 9, 1960, just short of two months after probate was granted, was a proceeding under section 2 (3) (b) of Cap. 19.

The respondent was in the United Kingdom and in order to take out a writ against her, that is, a writ that could be served on her, the first step to take was to get the order of the court for leave to serve a writ out of its jurisdiction, without which the writ would be useless.

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The fact that the actual writ was issued over a year after probate is, in my view, immaterial. The plaintiffs were still within time to sue for damages.

Of the authorities quoted by counsel in this case I find that of *The King (on the prosecution of John Whittome) v. Marchland Smeeth and Fen District Commissioners* [1920] 1 K.B. 155 helpful. In this case McCardie J. said, inter alia, at page 172:

“What is the commencement of the proceedings for the purpose of applying the Act of 1893 to the claim for damages? Upon the whole, I think that the true date to fix is the motion for the rule nisi. This is the juristic basis of the litigation in the course of which the claim for damages arises. Just as in the case of the Summary Jurisdictions Acts it has been held that the laying of the information is the commencement of the prosecution, so here I hold that the motion for the rule marks the initiation of all the proceedings before me.”

Similarly, it is my view that the application for leave to serve out of the jurisdiction of this court is the commencement of the proceedings under section 2 (3) (b) of Cap. 19.

I think the learned trial judge misdirected himself by putting the weight he seemed to have put on the fact that the writ was issued over a year after the personal representative had taken out a grant.

In my opinion, the appeal should be allowed and the judgment of the learned trial judge set aside and the case be sent back for trial on its merits.

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[COURT OF APPEAL]

MOHAMED T. A. TUNIS *Plaintiff/respondent*

v.

LYOUBI BROTHERS *Defendants/appellants*

[Civil Appeal 5/62]

Contract of Employment—Wrongful dismissal—Measure of damages—Whether judge correct in not allowing appellants to amend statement of defence to include plea of fraud.

Respondent was employed by appellants as a sales agent under an agreement in writing for a term of five years from January 1, 1960, at a salary of £15 per month for two months and thereafter at a salary of £30 per month. Respondent was wrongfully dismissed in June 1961, and thereupon brought suit against appellants. During the trial, appellants asked to be allowed to amend their statement of defence so as to include a plea of fraud. The judge denied this request and gave judgment for the respondent. In assessing damages, the judge awarded respondent, inter alia, £1,290, which was equivalent to £30 per month for 43 months—the amount of time remaining in the contract when respondent was dismissed.

Held, (1) that the trial judge was correct in not allowing appellants to amend their statement of defence by introducing an allegation of fraud; and

(2) That the judge was incorrect in awarding respondent £30 per month for 43 months, because this amount constituted special damages which had not been