

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 116 OF 2001**

BETWEEN:

W SITIMA MARKO PLAINTIFF

AND

ACE AAGENCIES LTD 1ST DEFENDANT

ROYAL INSURANCE CO. LTD..... 2ND DEFENDANT

CORAM: POTANI, REGISTRAR

Katsala – Counsel for the Plaintiff

Jumbe – Counsel for the Defendant

RULING

The plaintiff's action against the defendants is for damages for loss of motor vehicle due to the negligence of the 1st defendant's driver in driving motor vehicle insured by the 2nd defendant.

Pursuant to Order 14A rule 1 of the Rules of the Supreme Court, the plaintiff took out the present application seeking a determination as to whether or not the release form executed by the plaintiff in favour of the 2nd defendant also releases and discharges the 1st defendant from its liability to the plaintiff in this action as pleaded by the 1st defendant in its defence. The application is supported by the affidavit of John Nelson Katsala, of counsel the plaintiff. There is also an affidavit of Violet Jumbe, representing for the defendant. It comes out clearly from the contents of the two affidavits and counsel's respective argument that the task before the court is the construction of the release form executed by the plaintiff and exhibited to the affidavit in support as 'JNK3'.

Looking at the pleadings exchanged by the parties, especially the gist of the 1st defendant's defence and the facts as borne out in the two affidavits filed herein, I am satisfied that in terms of Order 14A rule 1 (1)(a) and (b), the issue at stake is suitable for determination without a full trial of the action and such determination will finally

determine the claim to which it relates. It should also be mentioned that since both parties presented arguments to the court on the matter, the requirements laid down in Order 14 r1(3) have been met.

There can be no doubt that the starting point would have to be to look at the wording of the release itself. Where such wording is clear unambiguous the task becomes easy. I have had occasion to read the release herein over and over again. I have had quite some difficulties in ascertaining as to whether it is intended to release only the 2nd defendant Royal Insurance Company of Malawi Limited to the exclusion of the 1st defendant Ace Agencies or both. The difficulty comes about because the release makes reference to both defendants. Such being the position, I am of the view that I am perfectly entitled to take recourse to all other relevant facts in order to arrive at a proper construction of the release.

It should be observed that in the affidavit filed on behalf of the defendants, it is clearly conceded that the matters deposed to in paragraphs 2 to 5 of the affidavit in support are correct. What is curious to note is that paragraphs 2 to 5 of the affidavit in support clearly demonstrate that all along the negotiations leading to the execution of the release, the plaintiff intended to discharge only the 2nd defendant. This is clearly evident from the undisputed fact that the plaintiff actually returned, unexecuted, a release form that had the import of also discharging the 1st defendant. I consequently find that the release does not discharge the 1st defendant, Ace Agencies Ltd, from its liability with regard to uninsured losses. That said, the 1st defendant's defence falls away thereby entitling the plaintiff to judgment.

Made in Chambers this day of January 27, 2002, at BLANTYRE.

H S B Potani
REGISTRAR