

IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 216 OF 2013

BETWEEN

JACK CHIKAPA-----PLAINTIFF

AND

GROUP ONE ARMED AND

ARMOURED SECURITY-----1ST DEFENDANT

GENERAL ALLIANCE INSURANCE LIMITED-----2ND DEFENDANT

CORAM: HON. JUSTICE M.C.C. MKANDAWIRE

Chilenga, for the Plaintiff

Kaliwo, for the Defendant

Itai, Court Interpreter

RULING

This is an appeal against the Order of the Learned Senior Deputy Registrar made on the 12th of June 2015 on the hearing of Notice of Assessment of Damages whereby the Learned Senior Deputy Registrar awarded the plaintiff the sum of MK11, 157, 330.00 as damages for the loss of use of a motor vehicle. The appellants have raised only one issue with the Order of assessment, namely, that the Senior Deputy Registrar erred in law in failing to take into account the issue of mitigation on damages by the plaintiff in the circumstances. In arguing the appeal,

counsel Kaliwo for the appellant said that in the instant case, the plaintiff was content that the defendant having admitted liability, he was content not to put the vehicle on the road in order to mitigate the damages. Counsel invited the court to take note of the fact that there is a distinction between loss of use and physical injury. The plaintiff therefore should have taken reasonable steps. It is thus the prayer of the appellants that the award for 630 days should be set aside and reasonable amount to be awarded and deducted.

On their side, the plaintiff's counsel argued that the issue of liability in this case was through a consent Order of January 2014 and the duration was 630 days. In order to show that there was mitigation since payment by the defendant was not made immediately that period was not taken into account. Counsel also reminded the court that the discharge herein was signed by the insurer on 27th November 2012, but payment was made in January 2014.

This court is aware that appeals of this nature are by way of rehearing and I shall therefore delve into all the facts and case law that were submitted by both parties. The fundamental issue for my consideration here relates to mitigation of damages by the plaintiff.

At common law, damages are awarded up to the earliest point in time when a claimant acting reasonably and prosecuting his claim with due expedition should have claimed such damages. This ensures that the paying party is not placed in a situation where he is paying for the neglect or actions of the receiving party. The claimant is thus put under a duty to mitigate loss/damage. See *British Westinghouse Electric & Manufacturing Co. v Underground Electric Co. of London*. (1912) ac 673.

The plaintiff is therefore supposed to take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong. If he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided. See *Seventh Day Adventist and Another vs. Coombes* 1997 1 MLR 379 (SCA) and *Adden Jannat Mbowani vs Shabani Kadango* Civil Cause No 379 of 2004 (HC) (Unrep).

The plaintiff is supposed to act reasonably and this is a question of fact in the circumstances of each particular case. It is however important to note that the onus of proof on the issue of mitigation is on the defendant. If he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure of damages will apply.

In the instant case, the accident occurred in 2012. The defendant admitted liability and this is confirmed by a consent order. After the admission of liability, the plaintiff was waiting for payment from the defendants. That payment took ages to come. The plaintiff had managed to obtain quotations for repair of his vehicle in June and July 2012. The quotations for repair were higher than the amount to be paid to him. Later, it was clear that the repair amount had escalated from Mk2.3 million to Mk3.5 million. Thus even if the money from the defendant was paid to him on time, the plaintiff still required a substantial amount to have the car repaired and put back on the road for his business. There is evidence from the plaintiff that he had handed over the matter to his lawyers to pursue the issue against the defendants and that his legal counsel took some time following up the matter with the insurer. Certainly, the blame cannot be put on the plaintiff for such legal mechanism is beyond the plaintiff's control. The plaintiff had told the Registrar during assessment of damages that his business venture makes a profit of MK1.6 million per month. That per se however did not mean that all that money is free money.

Having looked at the entire evidence and the surrounding circumstances of this case, I take it that the defendants have themselves to blame. Had they made the payment in good time and before the escalation of the cost of repairs, they could have been justified today in raising the issue of mitigation. I therefore totally agree with the finding and assessment of the Learned Senior Deputy Registrar.

I therefore dismiss this appeal with costs.

DELIVERED THIS 28TH DAY OF JANUARY 2016 AT LILONGWE

M.C.C. MKANDAWIRE

JUDGE