IN THE HIGH COURT OF MALAWI

ZOMBA DISTRICT REGISTRY

CIVIL CAUSE NO 124 OF 2015

BETWEEN

ENELESI LISTON.....PLAINTIFF

-AND-

GENERAL ALLIANCE INSURANCE LIMITED.....DEFENDANT

CORAM

H/H B. CHITSAKAMILE, ASSISTANT REGISTRAR

Mr Prosper Chaponda for the Applicant

Mr Anwar Mussa for the Respondent

Mr Alexander Tepeka, Official Interpreter

RULING

Introduction

The plaintiff took out the present summons to strike out defence under Order 18 Rule 19(1) Rules of the Supreme Court arguing that the filed defence was frivolous, vexatious and embarrassing.

The plaintiff argued that the defence filed makes general denials without stating facts on which it is based. The said defence among others denies the fact of insuring the motor vehicle, it denies the alleged negligence on the part of its

the part of its alleged insured, it further alleges contributory negligence on the part of the minor involved in the accident.

Counsel for the plaintiff argued that the defence is contradictory as in one breath it denies the occurrence of the accident and in another alleges contributory negligence. Further, he argued that there cannot be any denial of the defendant having insured the vehicle as the plaintiff actually indicated the insurance certificate number in the pleadings, Furthermore, he indicated that there was attached to the statement of claim, a Police Report that faults the defendant's insured to have caused the accident. He stated again that a defence of contributory negligence cannot be raised with respect to a minor as a matter of settled law. He declined that the fact that the application was made late meant it was being made in bad faith to cover for their procrastination in prosecuting the matter.

The defence stood by their defence stating that it raises triable issues to be decided at trial. He disagreed that the issue of contributory negligence was not applicable to minors. He further declined that the other issues raised in the defence were just general denials. He insisted that the issues raised required determination at trial. He again faulted the plaintiff for taking too long to make the application, pleadings in the matter having been closed long ago.

Applicable Law

Order 18 rule 19 of the Rules of Supreme Court is germane to the issue herein. The said Order 18 rule19 states:-

> **"The Court may at any stage of the proceedings order to be struck out...any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –**
>
> **(1)(a).....**
>
> **(b)it is scandalous, frivolous or vexatious..."**

The Court has therefore a general jurisdiction to expunge scandalous matter in any record or proceeding. See; **Re Miller (1884) 54 LJ Ch 205**.

Further, **Selbourne LC** in **Christie v. Christie (1873) LR 8 Ch Ap 499** at **503** said the following, which is illuminating:-

"The sole question is whether the matter alleged to be scandalous would be admissible in evidence to show the truth of any allegation in the pleading which is material with reference to the relief prayed"

In the same way the court has jurisdiction under Ord.18 r.19(1)(b) to strike out frivolous or vexatious process. Order18/19/16 of the Rules of Supreme Court states that by these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable. See; **Attn Gen of Duchy Of Lancaster v. L & N.W Ry [1892] 3 Ch. 274** at **277**

Lord Pearson in **Drummond-Jackson v. British Medical Association [1970] 1 All E.R. 1094 C.A.** defined a reasonable cause of action as one with some chance of success when only the allegations in the pleading are considered. Similarly, a reasonable defence is one with some chance of success when only the allegations in the pleading are considered. It is enough if the pleading raises some question fit to be decided by a Judge or jury. See **Davey v. Bentinck [1893] 1Q.B. 185.**

Paragraph 18/19/4 of the RSC states that although the rule expressly states that the order may be made at any stage of the proceedings, still the application should always be made promptly and as a rule before the close of proceedings. Where the defence or other subsequent pleading is being attacked, the application should be made as soon as practicable after the service of such defence or pleading. The application may be made even after the pleadings are closed (per Brett M.R. in **Tucker v. Collinson (1886) 34 W.R. 354** or the trial set down (**Goymer v. Central Wheelbase Ltd., The Times April 1, 1993, C.A.** though it should not be heard at the opening of the trial save in exceptional circumstances (**Halliday v. Shoesmith [1993] 1 W.L.R. 1, C.A.)**

The underlying principle from the reading of the above is that the

application needs to be made promptly.

Determination

In the matter at hand the plaintiff alleges that the defendant's defence is frivoulos, vexatious and embarrassing. Amongst other bases, the plaintiff argued that the plaintiff's allegation that the defendant insured the vehicle in issue was without reply, the defendant having quoted the insurance certificate number. He further argued that the Police Report attached to the statement was clear. Furthermore, he attacked the defence of contributory negligence stating that the same was not applicable in the case of minors.

In the court's view, the defendant has joined issue with the very allegations that the plaintiff feels are glaringly and notoriously true. The defendant wants the plaintiff to prove that the certificate of insurance whose number is quoted was indeed issued by them. Furthermore, the assertion by the plaintiff for the court to take the contents of a Police Report as part of the basis of allowing the application is misplaced. A Police Report is not a document that courts just take judicial notice of and admits its truth. The same will have to be scrutinised at trial.

Then the plaintiff faulted the defence of contributory negligence herein as wrong at law as the same does not apply to minors. With due respect to counsel, I do not find this accurate.

Of course very young children do not owe anyone a duty of care in their actions. See; **Carmathanshire v. Lewis [1955] AC 549**.

However, that is not to say any minor is free from liability in negligence. In **Gough v. Thorne [1966] 1 WLR 1387** at **1390. Lord Denning said** ;

"a judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety"

It was stated that the standard where a child's behaviour is under scrutiny for negligence is that of **"an ordinarily prudent and reasonable child"** of the same age and that it is not of "**a paragon of prudence**" or a **"scatterbrained child". Salmon J,** in **Gough v. Thorne.**

In the present matter therefore, it should be up to a judge to determine after trial whether the 10 year old child herein could be liable in contributory negligence and if so to apportion liability accordingly.

In the main, it is the court's view that the defence herein is not a sham as alleged and raises triable issues.

Lastly, pleadings in this matter were closed in 2015 and the plaintiff obtained an order for directions on 17th August 2015.Surely, the plaintiff ought to have made the application immediately after the defence was served and/or soon after mediation and not to wait for almost two years before making the application. This delay is surely inordinate.

Disposal

The short of it is that I find the plaintiff's application to be without merit. It is accordingly dismissed with costs

Pronounced in chambers this 10th day of July 2017

Benedictus Chitsakamile

ASSISTANT REGISTRAR