



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.270 OF 2017

BETWEEN

Emmanuel Fole (*suing on his own behalf and as an administrator of the Estate of Falesi Patisi on behalf of the Estate and Dependants of the Deceased*) Plaintiff

AND

Steven Ngomwa.....1st Defendant

Prime Insurance Company LTD.....2nd Defendant

CORAM:	<i>Mudalitso Khoswe Chimwaza,</i>	<i>Assistant Registrar</i>
	<i>Silungwe,</i>	<i>Counsel for the plaintiff</i>
	<i>C.Makoko</i>	<i>Counsel for the Defendant</i>
	<i>Mpandaguta</i>	<i>Court Clerk</i>

RULING ON SUMMONS FOR SUMMARY JUDGMENT

The plaintiff commenced action suing on his own behalf and as an administrator of the Estate of Falesi Patisi on behalf of the Estate and Dependants of the deceased. He has filed summons for summary judgment on the grounds that the defendants defence to the claims are general denials which do not warrant a full trial. The summons is heavily opposed by the defendants.

Brief Facts

According to the statement of claim, the plaintiff claims that it was on or about the 21st day of August 2016 at around 21:30hours, the 1st defendant was driving motor vehicle Scania Truck Registration number DZ 4259 from the direction of Chitseka going towards six miles along Mitundu road in Lilongwe. The plaintiff was driving motor vehicle Toyota Ipsum registration number MZ 8903 from the opposite direction in his left lane with the deceased as a passenger. Upon arrival at Pondamali near Uncle Joe's Pub, the 1st defendant negligently drove the motor vehicle that he left his lane and hit the plaintiff's motor vehicle in the other lane.

In the statement of claim the plaintiff claims that as a result of the 1st defendant negligence by failing to keep to his near side/lane, failure to keep a proper look out and failure to manage and or control the vehicle so as to avoid the accident the plaintiff sustained the following injuries; heamothorax, contusion

of the ribs, soft tissue injury on the left shoulder and right hip, injury to left ear leaving it deformed, injury to the head with loss of hair and deformity.

The plaintiff is therefore seeking damages for pain and suffering, loss of amenities of life, disfigurement, loss of earnings and earning capacity, loss of motor vehicle Toyota Ipsum Registration number MZ 8903, cost of medical and police reports and on behalf of the estate of the deceased he is claiming damages for loss of expectation of life and costs of death report and on behalf of the dependants he is claiming loss of dependency.

The defendant's defence and affidavit in opposition deny any liability for negligence as alleged by the plaintiff in paragraphs 4 and 5 of the statement of claim and demands strict proof by the plaintiff. The defendants allege that the accident was due to the negligence of the driver of motor vehicle MZ 8903 Toyota Ipsum.

Issue for Determination

The issues for determination by the court are:

- (i) Whether the plaintiff has proved the claim and therefore entitled to summary judgment or whether the defendant has raised a bona fide defense to the plaintiff's claim to warrant a trial.
- (ii) Whether the plaintiff has legal capacity to sue on behalf of the Estate and Dependents of the deceased.

The Law and Analysis

A plaintiff is entitled to obtain summary judgment under Order 14 of the Rules of the Supreme Court if he can clearly establish his claim and the defendant is unable to set up a *bona fide* defense or raise an issue (s) against the claim which ought to be tried (See *Roberts v Plaintiff* [1985] 1BB 597; *Bowsprit Trading (Pty) Ltd v Namalunga Enterprises Ltd* [1992] 15 MLR 33).

Order 14 rule 1 provides as follows;

"where in an action to which this applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defense to a claim included in the writ, or to a particular part of such a claim, or has no defense as to the amount of any damages claimed, apply to the court for judgement against that defendant."

The law allows a defendant to file and serve an affidavit in opposition to the summons. The defendant is entitled to show cause as to why summary judgment should not be entered. The defendant's affidavit must dwell upon particulars and should as far as possible, deal specifically with the plaintiff's claim and state clearly and concisely what the defense is, and what facts are relied on to support it. It should also state whether the defense goes to the whole or part of the claim, and in the latter case it should specify the part: **Practice note 14/4/5.**

This court is aware that summary judgment is an exception to the norm and that it has to be exercised with caution. It is established principle of law that matters must be decided on merit and that is after hearing both parties. Therefore the court should not shut out defendant by entering summary judgment.

However, in the case of *Pereira vs Ndeule t/a Cenda Building Contractors* [1993] 16(2) MLR 712, in which Chipeta JA, sitting as Deputy Registrar made a distinction between an application for summary judgment under O.14 RSC, and application to set aside a default judgment where the rules allows the

presiding officer in a summary judgment application to delve into questions of merits in order to decide whether any proposed defense is valid or only a sham.

In the present matter this court has looked at the defense, but it is lacking substance. The defendant deny liability and demand strict proof of the claims by the plaintiff. They attribute the accident to the negligence of the driver of MZ 8903 who is the plaintiff now but do not give the details of the negligence what he did not do or fail to do that caused the accident. They have not given any facts to challenge the allegation that the defendant left his lane and hit the plaintiff on his lane. With these observations, this court finds that the plaintiff has managed to satisfy this court that the defendant has no defense worth taking the matter to trial. The defense is a general denial without supporting facts which they are relying upon.

This court is mindful of the fact that **Order 14 RSC** is not intended to shut out a defendant from presenting his defense, but in this case the defense cannot withstand the test of trial therefore the court finds that the plaintiff have made out their case to be entitled to summary judgment.

Whether the plaintiff has legal capacity to sue on behalf of the Estate and Dependents of the deceased

The next question to be determined is, whether the plaintiff is entitled to summary judgment on all claims or not. This court has looked at the file and there is no evidence that the plaintiff herein was granted letters of administration to entitle him sue for loss of expectation of life for the estate as well as on behalf of the dependants of the deceased for loss of dependency.

In view of this irregularity, unless evidence to the contrary is provided, this court will not grant summary judgement for loss of expectation of life, costs for death report and loss of dependency. A fresh action may be taken out by an appropriate person with legal capacity to sue on behalf of the estate and dependants.

Therefore summary judgment is granted to the plaintiff in his own capacity on the following claims: damages for pain and suffering, loss of amenities of life, disfigurement, loss of earnings and earning capacity, loss of motor vehicle Toyota Ipsum Registration number MZ 8903, cost of medical and police reports and costs of the action.

Made in Chambers this 11th day of December, 2017



Madalitso Chimwaza (Mrs)

ASSISTANT REGISTRAR