



**THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO.1052 OF 2016  
BETWEEN**

Teleza William Chiphankhwani..... Plaintiff

and

United General Insurance Co. Ltd.....Defendant

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<b>CORAM:</b>	<i>Madalitso Khoswe Chimwaza</i>	<i>Assistant Registrar</i>
	<i>E.D. Salima</i>	<i>Counsel for the plaintiff</i>
	<i>S. Kagundu</i>	<i>Counsel for defendants</i>
	<i>Mpandaguta</i>	<i>Court Clerk</i>

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**RULING ON SUMMONS FOR SUMMARY JUDGMENT**

**Introduction**

This is a summons for summary judgment filed by the plaintiff pursuant to Order 14 RSC. It is supported by an affidavit sworn by Counsel Salima and skeleton arguments. The brief facts are that the plaintiff was a pedestrian along the M1 Mponela –Lilongwe road in Dowa on 20<sup>th</sup> June 2016. As the plaintiff was crossing the road at Chimwaza Trading centre, he was suddenly hit by a motor vehicle which was being driven by Sydney Chiwere Toyota Land Cruiser Reg. No. BR 7841. As a result of the accident the plaintiff sustained multiple injuries. She commenced action claiming damages for pain and suffering, loss of amenities of life, permanent incapacity, special damages and costs of the action.

The defendants filed a defence in which they deny liability for the particulars of negligence stated in the statement of claim and claim that the accident was wholly caused or largely caused by the plaintiff. They plead contributory negligence. They also deny being the insurers of the said motor vehicle BR 7814 Toyota Land Cruiser.

The defendants filed an affidavit in opposition to the summons for summary judgment and counsel raised the issue of the affidavit in support of the summons as being inadmissible evidence since it was sworn by Counsel Salima as if this was an interlocutory application. Further the defendants argue that their defence raises a triable issue of contributory negligence which cannot be determined by affidavit only.

### Issue for Determination

Whether the plaintiff have proved their case warranting summary judgment

Whether the defendants defence has raised triable issues to warrant trial

### Reasoned Analysis of Law and Facts

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.**

Counsel for the plaintiff cited 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 the defendants have raised facts challenging the plea of negligence as pleaded by the plaintiff. The defendants are disputing that the said motor vehicle was insured by them. They are also disputing that the driver of the said vehicle was wholly responsible for the accident alleging that the plaintiff contributed to the same by crossing the road without being on the look out for his own safety. The reading of the defense reveals that it has some merit as regard to the facts of the defense of contributory negligence.

This court is aware that the summary jurisdiction conferred by Order 14 ought to be used with great care. It is an exception to the general rule that all matters have to be decided on merit after hearing both parties. Therefore a defendant should not be shut out from defending unless it is clear indeed that he has no cause in the action under discussion. See *City of Mzuzu vs Chisa Enterprises* [1997] MLR 289 and in *Sheppard & Company vs Wilkinson* [1889] TLR 13.

Further this court would like to concur with counsel for the defendant that summary judgment proceedings are final in-terms of determining liability, they are not interlocutory proceedings in which counsel is allowed to swear affidavits. Therefore such liability cannot be determined on affidavit evidence sworn by counsel especially where he is alluding to facts in the police report and medical report, that happened in his absence and he cannot be a competent witness to be called to a witness stand for cross examination on the same.

### **Conclusion**

This court finds that the plaintiff has not made out their case and the defendants have raised a bona fide defense, triable issues of contributory negligence and not being the insurers of the said vehicle and these are worthy allowing the matter to proceed to trial. The application is not granted and it is ordered that matter will proceed to full trial before a judge in open court .Costs are in the cause.

Either party has the right to appeal.

**Made in Chambers this 21<sup>st</sup> day of November, 2017**



Madalitso K. Chimwaza

**ASSISTANT REGISTRAR**