

THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.988 OF 2013
BETWEEN

T.K Kaunda..... 1st Plaintiff
and
Emmanuel Jere..... 1st Defendant
Mr. Mumba t/a MULA Civil Engineering.....2nd Defendant
PRIME INSURANCE Co. Ltd.....3RD Defendant

CORAM:	<i>Madalitso Khoswe Chimwaza</i>	<i>Assistant Registrar</i>
	<i>Mhone</i>	<i>Counsel for the plaintiffs</i>
	<i>A. Kaonga</i>	<i>Counsel for 3rd Defendant</i>
	<i>Mpandaguta</i>	<i>Court Clerk</i>

RULING ON SUMMONS FOR SUMMARY JUDGMENT

This is a ruling on a summons for summary judgment filed by plaintiff supported by an affidavit. The application is opposed.

Brief Facts

The plaintiff in his affidavit in support state that on or about 16th May, 2013 the 1st defendant so negligently drove a motor vehicle registration No. RU 2767 Fuso Fighter from the direction of Ekwendeni heading towards Mzuzu . Upon arrival at a place near Lupaso the 1st defendant caused the motor vehicle to leave its lane and swerved into the offside lane where it collided head on with motor vehicle registration MN1741 Toyota Hiace which was at all material times owned by the plaintiff. The motor vehicle RU2767 Fuso Fighter was owned by the 2nd defendant and was insured by the 3rd defendant. As a result the plaintiff vehicle was extensively damaged beyond repair. The plaintiff is now claiming cost of replacement of the motor vehicle, damages for loss of use of the said vehicle and profits, special damages for police report and costs of this action.

The plaintiff prays that summary judgment should be entered on the basis that the defence of 1st and 2nd defendants about the accident are general denials. The plaintiff claims that the 3rd defendant as insurer

of the motor vehicle Fuso Fighter has compensated other claimants for personal injury arising from the same accident and tendered exhibits "CK5a", CK5b, CK5c, CK5d as evidence of payment to the other claimants. Plaintiff went to state that the basis for paying these claimants was obviously on an indemnity basis for 1st and 2nd defendants liability.

The 3rd defendants defence, pleads in the alternative, that if the insured is found liable then its liability is limited to the amount in the policy of insurance and any excess will be paid by the other defendants.

The issues for determination by the court are twofold:

- (i) Whether the plaintiff has proved their claim and therefore entitled to summary judgment
- (ii) Whether the defendant has raised a bona fide defense to the plaintiff's claim.

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.

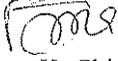
This court has noted that the if the defendants had a valid defence on merit that should come for trial, they could have brought facts to condensend on their defence. The 1st and 2nd defendants did not dispute or challenge the act of negligence that was pleaded by the plaintiff that the 1st defendant left his lane and swerved into the offside lane and collided head on with the plaintiffs vehicle. The 3rd defendants act of paying the claimants for personal injury claims on the liability of the 1st and 2nd defendants speaks volumes. The defence is a general denial intended to delay the wheels of Justice.

This court is satisfied that the plaintiff have made out their case for summary judgement and the three defendants are jointly and severally liable.

This court grants summary judgment in favour of the plaintiff on all claims as stipulated in the statement claim against all the three defendants and costs of this action.

Either party aggrieved by this ruling has the right to appeal.

Made in chambers this 8th day of December, 2017



Madalitso K. Chimwaza

ASSISTANT REGISTRAR