



IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE No. 1550 OF 2000

Between:

MAPANGA FURNITURE LIMITED
AND
W. N SHABA (male)
PRIME INSURANCE COMPANY

PLAINTIFF

1ST DEFENDANT
2ND DEFENDANT

JUDGMENT

The plaintiff commenced this civil action by way of writ of summons claiming the sum of K489,540.00 by way of subrogation for the benefit of the insurer, being the value of the plaintiff's motor vehicle at insurance policy and the plaintiff's compulsory policy excess sum following the loss and damage sustained by the plaintiff due to the negligence of the 1st defendant's servant or agent. In terms of the pleadings the statement of claim shows that on or about the 26th day of January 1999 at or about 13:00 hours the plaintiff's servant and/or agent Mr. Robert Nangoma was lawfully driving motor vehicle Isuzu Truck index number MJ 5064 along the Zomba road from the direction of Zomba towards Limbe and the 1st defendant's servant Mr. Fly White Nkhwazi was driving the 1st defendant's motor vehicle Nissan Lorry index registration number ZA 5559 on the said road from the direction of Blantyre towards Zomba when near or at Gologota the 1st defendant's said servant negligently drove the car and it swerved into the opposite lane and blocked the plaintiff's motor vehicle's carriage way causing a collision. Due to this the plaintiff's car was damaged and was rendered a write-off and the plaintiff suffered loss and damage as particularized in the statement of claim. The plaintiff pleads that its insurers indemnified it the sum of K480,000.00 and that the compulsory policy excess sum of K9,540.00 was borne by the plaintiff itself.

The defendants' defence is a general denial of the plaintiff's allegations and of being negligent and denies the damages claimed.

The trial was before the late Honourable Justice Manyungwa and I was assigned to prepare and pronounce the judgment following the sudden demise of His Lordship.

The plaintiff called two witnesses, Mr. Simon Nangoma and Mr. Blessings Matemba who testified on its behalf while the defendant elected not to call any witness. Mr. Simon Nangoma, the first witness, stated that he was the plaintiff's driver and much of his evidence is contained in his witness statement which he adopted during trial as part of his evidence in chief. Mr. Nangoma states that as he was travelling from Zomba to Blantyre and that as he was approaching a place called Golgota he saw a motor vehicle Nissan lorry registration number ZA 5559 travelling at an excessive speed and he was surprised that this motor vehicle suddenly collided with his motor vehicle in his left lane. He states that the motor vehicle he was driving was extremely damaged with the front of it including the engine sustaining massive damage resulting in it being written off. The witness tendered in evidence the police report of the accident which was received in evidence and marked exhibit P1. The witness also tendered a letter from Olympia Motors Limited which was marked exhibit P2, advising the plaintiff that the said motor vehicle was beyond repair and was written off. In cross examination Mr. Nangoma stated that there was no motor vehicle driving immediately behind him just before the accident and that there was no sign or warning that a presidential convoy was approaching. The witness stated that since he was trapped in the damaged motor vehicle he was rescued by people on the presidential convoy that arrived at the scene of the accident some 15 minutes from the moment of the accident. It was the view of the witness that when a presidential convoy is driving past, motorists are supposed to stop, but he did not stop because the presidential convoy was not yet there. The plaintiff further stated that at the time of the accident it was raining which sometimes renders the ground slippery. In re-examination the witness told the court that the 1st defendant's driver skidded because he was cruising on a straight and fine road.

The second witness was Mr. Christopher Matemba, an underwriter at United General Insurance Company Limited, who also adopted his witness statement as part of his evidence in chief. The witness exhibited a motor vehicle claim form which was submitted to the insurance company by the plaintiff who was seeking indemnity under a comprehensive insurance policy for loss suffered as a result of an accident involving the plaintiff's motor vehicle and it was marked exhibit P3. The witness also tendered in evidence a payment voucher marked exhibit P4, showing payment

in the sum of K480,000 from UGI to the plaintiff. Mr. Matemba further exhibited a payment voucher, exhibit marked P5, in the sum of K9,4540.00 from the insurance company to the claim assessors. This witness was not cross examined and his testimony marked the close of the case.

The plaintiff in their submissions note that insurer who has indemnified his insured has a right to step into the shoes of the insured and in his name pursue any right of action available to the insured which may diminish the loss insured against. And that the insurers are entitled to be subrogated only to those claims which diminish the loss in fact paid for.

The defence analysis of the plaintiff's evidence is that Mr. Nangoma was not consistent on whether the road was straight or curved and that his evidence left out the relevant fact that there was bad weather due to heavy rainfall. This court is of the view that these issues were clarified by the witness in the process of cross examination and reexamination. The defendant also argues that the police report, exhibit P1 is hearsay and inadmissible if the object is to show the truth of the statement therein contained. This court finds that all documentary evidence for which the authors were not called are only admissible to support the process but their contents are inadmissible. It is the argument of the defence that causation was not proved to the satisfaction of the reasonable man therefore the defendant submits that the driver's negligence has not been proved as it could have been the defendants' driver, the plaintiff's driver, the bad weather or the presidential motorcade which caused the accident. It is the defendant's prayer that the claim for negligence should be dismissed.

The defendant's in their submissions contend that the plaintiff has no right to bring this action along the lines of subrogation. The defendants contend that it is an insurer who has indemnified an insured who can substitute himself in the place of the insured and pursue, recoup or defend an action vis-à-vis a third party. According to the defence it would have made sense if Messrs UGI Ltd were bringing the present subrogation action against the defendant and claiming only the excess K9,540.00 paid to the insured under the policy. Otherwise holding otherwise would lead to the absurd and unjust result that the plaintiff will have to be compensated twice in respect of the same claim which would be both illegal and inequitable. The defence submits that since the subrogation proceedings were not brought by the proper party, the action cannot stand and must be dismissed with costs. However, it submits that

assuming that the right parties were before the court, the party on whom the burden of proving negligence lies did not discharge that burden and the action should be dismissed with costs. The defendants rely on the case of *Hillington c F. Hewthorn & Co. Ltd* [1943] 2 ALL ER 35.

The evidence of the first witness shows that the accident really took place and his testimony proves that the 1st defendant was driving negligently at very high speed in rainy weather and he ended up skidding and colliding with the plaintiff's car, causing the accident and great damage to the plaintiff's motor vehicle. There is sufficient proof of negligence on the part of the 1st defendant, for instance, the fact that the 1st defendant's motor vehicle left its lane and collided into the plaintiff's motor vehicle in the other lane. As has been argued by the plaintiff's the defendants elected not to give any explanation in this regard to exonerate the 1st defendant's driver and therefore the defendants' from liability. This court finds that it is proved that the 1st defendant's driver breached his duty of care to the plaintiff's driver which breach caused damage and loss to the plaintiff, and this court find him liable in negligence.

In regard to the damages this court finds that claim for sum of K480,000.00 by way of subrogation is not payable as the plaintiff was already indemnified and is the wrong party for this claim. The insurer should have brought subrogation action which would have made sense. Since subrogation was not brought by the proper party, this claim cannot stand and must be dismissed in order to avoid the plaintiff from getting compensation twice for the same subject matter.

The claim for the sum of K9,540.00 being the compulsory policy excess which was borne by the plaintiff itself is allowed.

The claim for interest at the ruling bank rate is dismissed.

The plaintiff is awarded costs for successful claim to be taxed by the Registrar.
Delivered in open court this 26th day of September 2018 at Chichiri, Blantyre.


Dorothy nyKaunda Kamanga
JUDGE

Case Information:

The late Hon Justice Manyungwa
Mr. Tandwe,
Mr. Mpaka,
Mr. Nsomba/ Ms. Million,

Trial Judge.
Counsel for the Plaintiff.
Counsel for the Defendants.
Court Clerks.