



2017  
DO. BOX 30244  
LILONGWE

**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURIES CAUSE NO 684 OF 2017**

**BETWEEN**

**CHIKONDI MKWAPATIRA ..... CLAIMANT**

**AND**

**MR WENXING JIANG ..... 1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Mwabungulu, of Counsel, for the Claimant

Mr. Chikaonda, of Counsel, for the Defendants

Mrs. Doreen Nkangala, Court Clerk

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**RULING**

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*Kenyatta Nyirenda, J.*

This is my ruling on the Claimant's application for an order that the Defendants' defence be struck out for non-compliance with Order 7, r.6, and Order 5, r.8, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The background to the application is of the simplest. On 18<sup>th</sup> December 2017, the Claimant issued a summons against the Defendants and the Statement of Case reads as follows:

- "1. **AT ALL MATERIAL TIMES** the 2<sup>nd</sup> defendant was the insurer of motor vehicle Registration number BT 2305 Hino Van which at all material times being driven by the 1<sup>st</sup> defendant herein.
2. **ON OR ABOUT** the 20<sup>th</sup> August, 2017 the 1<sup>st</sup> defendant was driven the motor vehicle aforesaid from the direction of Limbe heading towards Makhetha on

*Limbe – Machinjiri Road when at or near Peletia Bus stage the 1<sup>st</sup> defendant so negligently drove the motor vehicle aforesaid that he caused or permitted the same to hit the claimant who was on the nearside dirty verge of the road.*

3. **THE ACCIDENT OCCURRED** due to the negligence of the 1<sup>st</sup> defendant in driving managing and controlling of the said motor vehicle.

***Particulars of the negligence***

- a. *Driving too fast under the circumstances/over speeding;*
  - b. *Failing to stop or in any other way so to manage or control of the motor vehicle or to avoid the accident;*
  - c. *Failing to exercise or maintain proper of effective control of the motor vehicle;*
  - d. *Failing to see the claimant in sufficient time to avoid colliding with him;*
  - e. *Colliding with the claimant*
  - f. *Driving without due care and regard to the presence of the pedestrians on the said road;*
  - g. *Failing to stop, slow down or in any other way to manage or control or to avoid the accident.*
  - h. *Res Ipsa Loquitor*
4. **BY REASON** of the matters aforesaid, the claimant sustained injuries and thereby suffered loss and damage.

***Particulars of the injuries***

- a. *Fracture of the left shoulder*
- b. *Dislocation of the left shoulder*
- c. *Blunt chest trauma*
- d. *Abrasions*

***Particulars of Special damage***

- a. *MK3,000.00 cost of police report*
- b. *MK10,346.00cost of medical report*

5. *THE CLAIMANT pleads that the 2<sup>nd</sup> defendant is liable to compensate the claimant for the negligence of the 1<sup>st</sup> defendant on indemnity basis as insurer of the motor vehicle.*

**AND THE CLAIMANT claims;**

- a. *Damages for pain, suffering and loss of amenities of life;*
- b. *Damages for deformity and disfigurement;*
- c. *MK3,000.00 cost of police report;*
- d. *MK10,436.00 cost of medical report;*
- e. *Cost of the action."*

On 6<sup>th</sup> February 2018, the Defendants filed the following Defence:

- "1. *Paragraph 1 of the Statement of Case is admitted in as far as the 2<sup>nd</sup> Defendant being insurers.*
- 2. *The particulars of negligence, injuries and special damages contained in paragraph 2, 3, 4 and 5 of the Statement of Case are denied and the Defendants put the Claimant to strict proof of the same.*
- 3. *The 2<sup>nd</sup> Defendant pleads that its liability, if at all, would be subject to owner of the motor vehicle herein being found liable for the Claimant's injuries resulting from the use of the said motor vehicle and that such liability if any would be subject to limit under the law and policy.*
- 4. *SAVE as hereinbefore admitted, the Defendants deny each and every allegation of fact contained in the statement of claim as if the same were set out herein and traversed seriatim."*

The application is supported by a sworn statement by Mr. Tusume James Mwabungulu wherein he deposes that (a) the Defence consists of general denials contrary to Order 7, r.6, of CPR and (b) the Defendants did not file a sworn statement verifying their list of documents contrary to Order 5, r.8(a) of CPR.

Order 7, rr. 5, 6, 7, 8 and 9 of CPR deals with how a defendant should address allegations contained in the claim and these rules provide as follows:

- "5. *Where the defendant intends to contest the claim, the defendant shall file and serve a defence on the claimant within the period required by Order 5 Rule 7 (2) (b).*

6. A defendant shall deal with each fact in the claim and shall not deny a claim generally.
7. Where the defendant does not agree with a fact that the claimant has stated in the claim, the defendant shall file and serve a defence that denies the fact and states what the defendant alleges happened.
8. *Where the defendant does not deny a particular fact, the defendant shall be taken to agree with that fact.*
9. Where the defendant does not know about a particular fact and cannot reasonably find out about it, the defendant shall say so in the defence.”– Emphasis by underlining supplied

Order 5, r. 8, of the CPR states that a defendant shall serve the defence together with a list of documents verified by a sworn statement and have copies of the document on the list.

The Defendants filed neither a sworn statement nor skeleton arguments in opposition to the application. Counsel Chikaonda conceded that the Defence contains general denials but stated that this was done to put in place a “*holding defence*” as he was still waiting to get particulars from the Defendants regarding the accident. Counsel Chikaonda also admitted that the Defendant omitted to file a sworn statement verifying the list of documents. Counsel Chikaonda concluded his submissions by seeking permission to amend the Defence and to file a sworn statement with respect to the list of documents.

I am not persuaded by the reasons advanced by the Defendants for their opposition to the application herein. The filing of the so called “*holding defences*” is no more than a time-wasting practice which has hitherto belaboured the Courts and seriously hindered the efficient delivery of justice. Such a practice can no longer be tolerated under CPR: it has to be eliminated.

In terms of Order 5 of the CPR, a defendant intending to contest the proceedings has a maximum period of (a) 14 days from the date of service of the summons on him or her within which to file a response and (b) 28 days from the date of service of the summons on him or her within which to file a defence. To my mind, 28 days is more than enough time for a defendant to file and serve a defence, more so for a straight forward personal injury case like the one before this Court. In any case, a defendant who wishes to be given more time has to make an application for that purposes before the expiry of the time periods stipulated by Order 5 of the CPR.

In the present case, the summons was served on the Defendants on 24<sup>th</sup> January 2018. This means the time limited for filing and serving a defence expired on or about 28<sup>th</sup> February 2018. I, therefore, do not understand why the Defendant chose to still hold onto the “holding defence” for another four months (hearing of the application took place on 18<sup>th</sup> June 2018).

By reason of the foregoing, the Claimant’s application is allowed. Accordingly, the Defendants’ defence is struck out and judgement is entered in favour of the Claimant. It is so ordered.

Pronounced in Court this 22<sup>nd</sup> day of May 2018 at Blantyre in the Republic of Malawi.

A handwritten signature in black ink, consisting of a large, stylized 'K' followed by a series of loops and a long horizontal stroke.

**Kenyatta Nyirenda**  
**JUDGE**