JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURIES CAUSE NO. 680 OF 2015

BETWEEN

ESTHER MAWEJA (Suing on her own behalf and on behalf of Wilson Mawenja, Desire Mawenja & Steven Mawenja, minors) ..... 1st CLAIMANT

FLORA CHAMBO (Suing on her own behalf and on behalf of ANORLD CHAMBO, minor) ..... 2ND CLAIMANT

KONDWANI MASEYA (Minor, suing through MILLIWARD MASEYA, NEXT FRIEND ..... 3RD CLAIMANT

-AND-

PAUL CHAFWALA ..... 1ST DEFENDANT

MACDONALD CHAFWALA ..... 2ND DEFENDANT

UNITED GENERAL INSURANCE COMPANY LIMITED ..... 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Mipande, of counsel, for the Claimants
Mr. Suzi Banda, of Counsel, for the 1st and Defendants
Mr. Kumwenda, of Counsel, for the 3rd Defendant
Mr. Jessie Chilimapunga, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on an application by the Plaintiffs for an adjournment of the hearing of the case to another date. The Defendants strongly oppose the application.

The background to the application is as follows. The Plaintiffs commenced an action on 4th August 2015 against the Defendants claiming damages for personal injuries sustained due to a road traffic accident allegedly negligently caused by the driver of the motor vehicle registration no. CZ 4980 Toyota Hiace (motor vehicle). The Defendant filed a defence and hearing was set for 1st November 2016.

On the set hearing date, Counsel Ng'omba, appearing on brief, sought an adjournment on the ground that Mr. Mipande was the one who was seised of the case on behalf of the Plaintiffs but he had travelled to the Republic of South Africa on business to do with his post graduate studies. The hearing of the case was adjourned 30th November 2016 and the Defendants were awarded costs for that day's attendance.

On 30th November 2016, the parties raised a number of matters, including the issue of exhaustion of the 3rd Defendant's maximum payment limits under the policy in relation to the motor vehicle. At the end of it all, Counsel Mipande sought an adjournment so that he could apply for a summary judgement. The adjournment was granted.

On 18th December 2016, the Plaintiffs filed with the Court summons for summary judgement. The Defendants filed affidavits in opposition to the summons. The Plaintiffs withdrew the summons for summary judgement on 16th March 2017.

Hearing of the case was scheduled for 19th December 2017 but it failed to take place because Counsel Banda was unwell. As a result, the case was adjourned to 13th February 2018.

When the case was called for hearing on 13th February 2017, Counsel Mipande addressed the Court as follows:

> *"We have one witness, Flora Chambo, but she has failed to come to court. I thus seek an adjournment to a date to be fixed. We will make an offer of costs to the Defendants for this inconvenience. We are prepared to pay these costs before the next hearing date."*

Counsel Banda objected to the prayer for adjournment He took the view that the number of adjournments granted by the Court at the request of the Plaintiffs showed that the Plaintiffs were not ready to prosecute the action. He invited the Court to note that no reason had been given by Counsel Mipande for the absence of the witness. He lamented the fact that huge sums of money were being wasted on a rather straight forward personal injury claim. Counsel Banda concluded his submissions by asking the Court to dismiss the case.

In his reply, Counsel Mipande contended that the Defendants are attempting to make a mountain out of a molehill. He stated that even if the Plaintiffs' witness has been available the case was bound to be adjourned in that the Defendants had not taken steps to be in line with the requirements of the Courts (High Court) (Civil Procedure) Rules. Counsel Mipande further argued that if the Defendants insisted on their objection to the prayer for adjournment, the Plaintiffs would have no option but to also insist on having the respective defences struck out.

It is commonplace that the decision to grant an adjournment is discretionary. A party's concerns are not the be all and end all of the application. The guiding principle for the exercise of the discretion is that a court should not refuse an application for an adjournment, where to do so would cause injustice to the party making the application, unless the grant of the adjournment would occasion irreparable prejudice to the other side, such prejudice not being capable of being remedied by an appropriate order as to costs or otherwise. Thus, an application for adjournment should only be refused if that is the only way that justice can be done to the other party.

In determining whether to grant an adjournment, a court is entitled to take into account, as a relevant circumstance, the exigencies of case management. However, that consideration should not be permitted to prevail over the rights of the parties before the court, and in particular it should not predominate over the right of a particular party to be able to present its case properly to the court. The exercise by the court of its discretion in such a case is not the occasion to punish a party, or its practitioners, for oversight, mistake or tardiness. Rather, the overriding requirement is that the court must do justice between the parties.

Justice is the paramount consideration in determining an application such as the one in question. Save insofar as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties. In taking an opposite view, the primary judge was, in our view, in error in the exercise of her discretion."

Having considered all the circumstances of the case, I am not satisfied that this case calls for striking-out the case. Such a measure would be too drastic bearing in mind that the previous adjournments were all premised in good grounds. I am

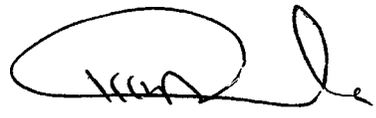
fortified in my view by the decision of the Supreme Court of Appeal in **Eveness Nkhalamba v. Alex Nkhalamba, MSCA Civil Appeal No. 32 of 2016 (unreported)** which stands for the proposition that striking-out a case must be a penalty of last resort:

> *"In the premises we think that there was perhaps another way of dealing with the matter. It could have made an order for costs for instance. It could have issued new directions for dealing with the matter complete with time lines and sanctions in case of breaches. ... we are of the view that it did not proceed in the best way possible. It failed to pay sufficient regard to the demands of justice in this case."*

On the basis of the foregoing, the case is adjourned to 2nd July 2018 at 9 o'clock in the forenoon subject to the Plaintiffs paying the Defendants costs for the hearing that failed to take place on 13th February 2018. The costs to be paid before the set hearing date of 2nd July 2018.

For the record, the only parties to this case are now the Plaintiffs, the 1st and 2nd Defendants. This follows an application by the 3rd Defendant to be taken out of the case on the ground that the policy limit in respect of the accident had been exhausted. The application went unopposed. The application is, accordingly, granted.

Pronounced in Chambers this 7th day of June 2018 at Blantyre in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE