JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 701 OF 2016

BETWEEN:
SUZGO CHIRAMBO.....PLAINTIFF
AND
MANICA MALAWI..... 1st DEFENDANT
REUNION INSURNACE CO. LIMITED.....2ND DEFENDANT

CORAM: **K. BANDA, ASSISTANT REGISTRAR**
Mr. M. Msuku, Counsel for the plaintiff
Mr. Nazombe, Counsel for the defendant
Ms. D. Nkangala - Court Clerk

ORDER

This is this courts order on an application by the claimant for an order to strike out the defendants defence and enter summary judgment. The application was made under Order 5 rule 10 and Order 12 rule 23 of the Courts (High Court) (Civil Procedure Rules), 2017 and under Courts Inherent Jurisdiction. The application is premised on the ground that the action herein is frivolous, an abuse of the court process and *res judicata*. The claimant filed a sworn statement and skeleton arguments in support of his position.

The defendant opposes the application. They have filed a sworn statement and skeleton arguments in support of their position.

Briefly the facts of the case are that the claimant commenced an action claiming damages for personal injuries due to the defendant's negligence. This was by filing his statement of claim with the High Court on 5th September, 2016. The same was issued by the court on 26th September, 2016. And according to paragraph 4 of the statement of claim, the plaintiff stated that on or about the 8th of July,2016, he was a lawful pillion passenger on a motor cycle travelling between Monkey Bay and Cape Maclear road when whilst at Cape Maclear escarpment, the Defendants insured, servant or agent so negligently drove the motor vehicle, registration number BQ8164, Mitsubishi Twin Cab L200, with the resultant effect that it hit the plaintiffs motor bike, resulting into the plaintiff suffering serious person injuries.

As the matter in the High Court was going through all the required stages towards trial. The rider mentioned in the statement of claim of the claimant there had also commenced another action in the lower court at Blantyre on the same facts as those in the High Court.

On 22nd October, 2017, that is before the matter in the High Court (the subject of the proceedings herein) was set down for trial, Senior Resident Magistrate Peter M E Kandulu, sitting at Blantyre pronounced a finding of negligence on the part of the defendant, to be precise Reunion Insurance Company Limited. For purposes of cross reference, the matter in the lower court was registered as Wyson George and Reunion Insurance Company Limited, Personal Injury Cause Number 3045 of 2016.

One thing that needs mention before going further is that surprisingly, though both claimants in the court below and herein were represented by the same legal house and also that the defendant was represented by the same legal house in both courts, it is clear on record that neither of the parties counsel tried to consolidate the two actions into one. I fail to establish the motive but find the act by officers of the court not helpful.

That said, when the matter came for hearing of this application, the defendant raised a number of issues amongst which were the following: (a) That the facts on the issue of negligence were disputed. (b) That there was a long delay in bringing the action after the claimant had filed defence. (c) That the defendant was not constrained by the order of the lower court as it was not binding on him (doctrine of precedence). (d) That payment on the basis of the Judgment by the lower court did not constitute admission of wrong doing. (e) That again the matter in the high court be let to go to trial as there is pending appeal against the decision of the lower court.

Though not very relevant in our view to consider these I would still do so just to clear any mists surrounding. I will not be orderly but will touch on all points raised. Firstly the issue of delay in bringing the action was already dealt with by the claimant explanation to the effect that at the time of pursuing the matter herein, there was no standing judgment of either of the court to necessitate such action. On thorough perusal of the court files I agree with this response. I dismissed the defendants argument.

Secondly on the issue of precedence, I equally agree with the claimant that the matter herein is not bordering on bindery nature of decisions of higher courts over lower courts. The issue here is on whether one competent court can allow re-litigation of a matter already decided by another competent court on the same facts as were before that other competent court. This is more pronounced herein where the lower courts decision has not even been appealed against. I therefore find that the Defendants argument is misguided on this point and I equally dismiss it.

Thirdly I find it not prudent to deal with points (d) and (e) as they are essentially empty. The defendant alleged there was pending appeal but nothing of that sought was manifest in the affidavits and neither did it on the hearing of the application herein. I therefore dismissed this argument as baseless.

Fourthly and lastly was his argument that the facts on negligence are in dispute. I find this point again baseless as the claimant is clear in his affidavit evidence presented before me, that by a judgment dated 22nd October, 2017 and exhibited in his sworn statement as **"MM4"**at the hearing, the lower court had determined that the accident was caused by the driver of the motor vehicle and dismissed the defendants defence which faulted the rider for negligence. And that further by another exhibit **"MM5"**, the defendants in compliance with the lower court's judgment duly paid the award for the lower court.

Having cleared the mist, I must state that I do not lose sight that as alluded earlier, this application is premised on ***order 5 rule 10 and order 12 rule 23 of the Courts (High Court)(Civil Procedure Rules),2017*** and Courts Inherent Jurisdiction.

The said ***Order 5 rule 10*** simply states that ***rules 11,12 and 13*** shall apply if a document that is filed in the court appears to the court on its face to be an abuse of the process of the court, or to be frivolous or vexatious. Rule 11 states that the Registrar may reject a document or refer the document to a Judge for directions about how to deal with it. ***Rule 12*** states that the Judge may direct the Registrar to accept or reject the document. ***Rule 13*** states what happens when a court rejects the document filed.

And ***order 12 rule 23*** allows the applicant to apply for summary judgment where the defendant has filed defence but the claimant believes that the defendants does not have any real prospects of defending the claim. And if the court is so satisfied that a : (a) the defendant has no arguable defence to the claim or part of the claim as presented in the application ; and (b) there is no need for a trial of the application or part of it, it shall (i) give judgment for the applicant for the application or part of it; and (ii) make any other order the court may deem appropriate.

Further ***order 12 rule 26*** states that the court shall not enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or arguable question of law.

I have examined the pleadings, and I must state that it is my view that the defendant has no arguable defence to the claim. In other words the defence is empty. I state so because as earlier observed and alluded the defendants herein already had their day in a competent court of law(the court below) and were given a chance to examine the facts as presented by the claimant in the lower court which facts are the same before the High Court. As observed earlier, the claimant in the lower court is actually the rider of the motor cycle to which the claimant herein, then a pillion passenger refers in his statement of claim. And it is this same rider, answering to the name of Wyson George who the lower court after full trial found not to have been negligent. Essentially therefore allowing the matter herein to go to full trial, will in effect be allowing the defendant to re-litigate the matter after failing to appeal against the decision of the lower court which in our view is not only a competent court of law but as regards matters herein also with jurisdiction to handle such matters. It does not matter in my view that the parties are different. To me what is prime is that as far as the same facts were presented and argued to exhaustion in the lower court and a decision obtained, the other party

cannot bring the same before another competent court unless it is on appeal which in this case is not. This can only be defined better as abuse of the court process. Similar scenerios have occurred in other jurisdiction to which we have strong links on the law and it would be prudent to examine one such case.

In that regard perhaps a look a Lord Dennings obita in ***Mc Ilkenney vs Chief Constable of West Midlands Police Force and another {1980}2 ALL ER 227 @*** **237-238** can be illustrative on the point. The eminent and able jurist, Lord Denning had this to say:

> *"A previous decision in a civil case against a man operates as an estoppel preventing him from challenging it in subsequent proceedings unless he can show that it was obtained by fraud or collusion, or he can adduce fresh evidence (which he could not have obtained by reasonable diligence before) to show conclusively that the previous decision was wrong. To illustrate my view of the present law, I would take this example. Suppose there is a road accident in which a lorry driver runs down a group of people on the pavement waiting for a bus. One of the injured persons sues the lorry driver for negligence and succeeds. Suppose now that another of the injured persons sues the lorry driver for damages also. Has he to prove the negligence all over again? Can the lorry driver (against whom the previous decision went) dispute his liability to the other injured person? It seems to me that the lorry driver (with the backing of his employer) has had a full and fair opportunity of contesting the issue of negligence in the first action; he should be estopped from disputing it in the second action. He was a party to the first action and should be bound by the result of it. Not only the bus driver but also his employer should be estopped from disputing the issue of negligence in a second action, on the ground that the employer was in privity with the lorry driver."*

See also ***North West Water Ltd vs Binnie and Partners (a firm) {1991}3 ALL ER 547.***

From the foregoing, I find the Claimants argument that this action is frivolous and abuse of court process and res judicata valid. I consequently dismiss the defendant's argument in its entirety and grant the claimant's application as prayed for. The claimant should file notice of assessment with the court for purpose of completion of the matter.

The Defendants are also condemned in costs.

Ordered in Chambers this 17th day of August, 2018 here at Blantyre in the Republic.

K BANDA

ASSISTANT REGISTRAR