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REPUBLIC OF MALAWI

MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISRTY

CIVIL DIVISION

PERSONAL INJURY CAUSE NO. 392 OF 2016

BETWEEN

ELLEN LEONARD (suing on her own behalf as wife of the deceased and on behalf of other dependants of

LEONARD MOFOLO (Deceased) ……………………………………………CLAIMANT

-AND-

GIBSON KAPENDA ……………………………………………1ST DEFENDANT

G 4 SECURICOR……………………………………………………2nd DEFENDANT

NICO GENERAL INSURANCE COMPANY LIMITED……. 3rd DEFENDANT

Coram: Honourable Mr. Justice J. M. Chirwa

Mr. Maele of the Counsel for the Claimant

Defendants and Counsel both absent

D. Mithi Official Court Interpreter

RULING

Introduction:

There is before this Court an application made by **Ellen Leonard** (the "Claimant") for the following orders:

(a) an order for final judgment against the Defendants on the grounds that (i) they do not have an arguable defence on the merits to her claim and (ii) there is no issue fit to go for trial; and/or

(b) an order entering judgment in favour of the Claimant in respect of the admission by the Defendants contained in their defence.

The application is supported by a sworn statement of **Fostino Yankho Maele**, of Counsel, and Skeleton Arguments.

The Notice of Adjournment for the application, though duly served on **Messrs Churchill & Norris**, the Defendant`s legal practitioners, on the 16th of April, 2019 there was however, no appearing on behalf of the Defendants on the date appointed for the hearing. There was however, a sworn statement in opposition to the application and Skeleton Arguments filed on their behalf.

Be that as it may, it is still the duty of this Court to determine the application on its merits.

Background:

The Claimant herein commenced these proceedings by a Specially Endorsed Writ of Summons issued on the 12th of January, 2016 claiming damages for loss of dependency and expectation of life, the total sum of K6,000.00, being the total cost for the Police and Medical Reports and costs of the action. The said Writ was duly served on the 2nd Defendant, G4 Securicor, on the 11th of May, 2017. An Acknowledgement of the said Writ on behalf of the Defendants was filed with the Court on the 23rd of May, 2017.

On the 29th of May, 2017 the Defendants filed their defence to the claim. The same was served on the Claimant`s legal practitioners on the 29th of May, 2017. It is on the basis of the contents of this defence that the Claimant has formed the view that the Defendants do not have any defence to her claim, hence the present application.

The Issue for Determination

The issue for determination is whether this is a proper case where a summary judgment and/or a judgment on admissions ought to be entered by this Court.

The law:

Order 12 Rules 23 to 27 deal with summary judgment. The relevant rules for the purposes of this application are reproduced as follows:

> "23 (1) *The Claimant may apply to the court for a summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have any real prospect of defending the claim.*
>
> *(2) Summary judgment shall not apply to a claim for libel, slander, false imprisonment, seduction or an Admiralty action in-rem".*
>
> "26 *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 any arguable question of law".*

On the other hand, Order 12 Rules 28 to 41 deal with judgment on admissions. For the purposes of determining the above issue this Court finds it not necessary to reproduce the said Rules.

Determination:

This Court finds it more convenient to consider the Claimant's application for a judgment on admissions before the application for summary judgment.

It is the case of the Claimant that in paragraph 2 of the defence the Defendants admit that at all material times the 1st Defendant was the driver, the 2nd Defendant was the owner and the 3rd Defendant the insurer of the motor vehicle Toyota Hilux BQ 5725. It is the contention of the Claimant that the admission under paragraphs 2 of the defence is one on which judgment on admission can be entered as it amounts to a clear and unequivocal admission that the 1st, the 2nd and the 3rd Defendants were the driver the owner and insurer, respectively, of the said motor vehicle.

With due respect to the Claimant, this Court does not subscribe to her contention that because the Defendants have admitted to being the driver the owner and the insurer of the said motor vehicle then a judgment on admissions ought to be entered on these facts. In an action founded in negligence it is trite that the claimant ought to prove that the driver of the said motor vehicle was negligent in driving the same before any judgment can be entered for such a claimant. The Claimant herein ought thus to prove that the same.

It is also trite that for a judgment on admissions to be entered the admissions may be express or implied, but they must be clear (see: **Ellis v Allen**, [1914] 1Ch. 904, page 909; **Ash v Hutchinson & Co. (Publishers)** [1936] Ch 489, page 503; **Technistudy v Kelland** [1976] 1W.L.R.1042. In the present action, there is no admission by the Defendants, express or implied, as to the negligent driving on the part of the 1st Defendant as the driver of the said motor vehicle.

In the premises, this Court finds no merit in the Claimant's application for a judgment on admissions.

This Court now turns to the Claimant's application for a summary judgment. It is the case of the Claimant that the defence filed by the Defendants is principally a collection of general denials and that the Defendants have not provided any factual basis whatsoever to explain their general denials in the defence. It is the further case of the Claimant that the Defendants have not specifically dealt with any of the substantive claims in the Statement of Claim pertaining to the negligence and have raised no issue fit to go to trial.

The purport of Rule 23 (1) of Order 12 of the CPR, in this Court's considered view, is very clear. It is to be used only where the Defendant does not have any real prospect of defending the claim. In a case where the Court is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law it is obligated not to enter a summary judgment against the Defendant (see: Rule 26 of Order 12 of the CPR).

This Court has perused both the Statement of Claim and the Defence and is of the fortified view that there is an arguable question of law between the parties hereto which is whether or not the accident giving rise to the Claimant's claim was caused by the negligence of the 1st Defendant as the driver of the said motor vehicle at the material time. As alluded to earlier in this Ruling, the Claimant as the party which has alleged is thus obligated

to prove to the satisfaction of the Court that the accident was indeed caused by the negligence of the 1st Defendant.

It is trite that actions for damages for negligence are suitable for summary judgment only if it is clearly established that there is no defence as to liability (see: **Drummer v Brown** [1953] 1 QB 710). As also alluded to earlier in this Ruling, the Claimant has not established that the Defendants have no defence as to liability.

In the premises, this Court also finds no merit in the Claimant`s application for summary judgment.

In passing, the Claimant herein may wish to know that there are proper procedures to be followed in a case where the pleadings of the other party to the case are perceived to have contravened the rules of pleadings than those relating to summary judgments and judgments on admissions.

Conclusion:

This Court has found no merit in both the Claimant`s applications for judgment on admissions and summary judgment. It now proceeds to dismiss the Claimant`s within application with costs to the Defendants. It is so ordered.

Dated this ...3rd... day of ...June... 2019.

J. M. Chirwa
JUDGE