IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY

CIVIL CAUSE NO 718 OF 2015

MPHATSO MTUWA ..... PLAINTIFF

And

CHIKONDI KATUNDU ..... 1ST DEFENDANT
REAL INSURANCE COMPANY LIMITED ..... 2ND DEFENDANT

Coram: **Hon. Justice R. Mbvundula**
Sauti, Counsel for the Plaintiff
Nazombe, Counsel for the Defendant
Mpasu, Official Interpreter

JUDGMENT

The plaintiff's action is for damages for the alleged negligence of the 1st defendant in his driving of a motor vehicle which was insured by the 2nd defendant.

Before I delve into further details I wish to make one observation, and it is that despite the 1st defendant being officially a party to the proceedings, the plaintiff did not, throughout the proceedings, involve him/her. Starting with the statement of claim, it is only the 2nd defendant who is mentioned as the insurer of the vehicle. There is literally no mention of the 1st defendant be it as the owner or drive of the vehicle. Further to that the court record does not show that the 1st defendant was ever served with any of the court process. I also note that there are a number of consent orders to which the only parties are the plaintiff and the 2nd defendant. See for example the Consent Order for Directions and the Consent Order dated 16th December 2016 allowing the filing of a witness statement for the plaintiff and Defendants (sic) trial bundle out of time. Even the Certificate of Termination of Mediation is addressed only to the plaintiff's and the 2nd defendant's legal practitioners, which points to the fact that the 1st defendant was also not involved in the mediation efforts. Equally material is the fact that the 1st defendant did not participate in the trial. This is understandable given the lack of proof of service on him/her of the

Notice of Hearing. I conclude, in the premises, that the plaintiff abandoned his claim against the 1st defendant and the only parties to the action are the plaintiff and the 2nd defendant.

The 2nd defendant raised two defences, the first challenging the allegation of negligence, and the second denying that the plaintiff was entitled to recover under the policy of insurance covering the vehicle. In my assessment, if the 2nd defendant's second defence would succeed, there would be no need to address the first, because that would automatically remove the 2nd defendant from the picture. For that reason I propose to deal first with the 2nd defence.

It is the 2nd defendant's case that the policy of insurance did not cover liability in respect of bodily injury to persons being carried as passengers in the motor vehicle in question, other than those carried by reason of or in pursuance of a contract of employment, and that the plaintiff fell within this exception. The relevant clause was tendered in evidence.

During cross examination of DW1 who testified on the point, it was sought to demonstrate that the policy referred to covered the period from 1st September 2011 to 31st December 2011 only, and therefore not applicable to the year 2015 when the cause of action herein arose. DW1 explained however that the practice in the insurance industry is that the policy of insurance is issued only once and thereafter what are issued are renewal notes still pertaining to the same policy. In this case therefore that the original policy document mentioned 2011 did not mean the agreement expired on 31st December 2011. Counsel for the plaintiff has submitted that the policy document bearing 2011 dates should not be accepted, for the very reason that it refers to 2011. He submits that the 2nd defendant should have produced a policy document bearing the year 2015, failing which, having admitted to have had a policy covering the motor vehicle the 2nd defendant should not be held liable to the plaintiff on the basis of the policy not produced.

Section 144(b) of the Road Traffic Act provides:

"A policy of insurance shall not be required to cover – except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment – liability in respect of death of or bodily injury to persons being carried in or upon entering or getting onto or alighting from such motor vehicle at the time of the occurrence of the event out of which the claim arose"

It is therefore not imperative for the owner of a motor vehicle to provide for passenger liability except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment. The 2nd defendant therefore was under no such obligation since the plaintiff did not fall within the imperative category. *Chitty on Contracts* 27th Edition, at par. 39-042 states that the term "renewal" is used to denote, inter alia, "extension of the original period of cover". This means that the parties can extend the original period without necessarily executing a fresh agreement, giving the original one a new lease of life, so to speak. I am inclined therefore to accept DW1's explanation that the policy of insurance of 2011

was renewed several times and was the one applicable in 2015 at the time of the accident herein. Therefore the policy did not cover the plaintiff as he was not within its ambit since it did not provide for liability in respect of passengers other than those carried by reason of or in pursuance of a contract of employment, into which category the plaintiff did not fall. Even if, therefore, negligence was proved, the plaintiff could not recover from the 2nd defendant. I accordingly dismiss the claim against the 2nd defendant.

As I pointed out earlier on, the plaintiff's claim against the 1st defendant was abandoned. As such I cannot also find against him

In the final result the plaintiff's claim fails in its entirety.

The plaintiff shall bear costs.

Pronounced in open court at Blantyre this 11th day of March 2019.

R Mbvundula
JUDGE