JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
PERSONAL INJURIES CAUSE NO 110 OF 2018

BETWEEN

LINDA JUSTIN MHANGO (suing as administratrix of the estate of LINDA NGULUBE on behalf of the estate and dependants of the Deceased) ……..…….…… CLAIMANT

AND

ZONDWAYO NDHLOVU ..... 1ST DEFENDANT
REUNION INSURANCE COMPANY LIMITED ..... 2ND DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Mr. Silungwe, of Counsel, for the Claimant
Mrs. Mapemba, of Counsel, for the Defendants
Mr. D. K. Itai, Court Clerk

RULING

Kenyatta Nyirenda, J.

The Claimant seeks an order for summary judgement against the Defendants. The application is brought under Order 12, r.23, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

On 28th February 2018, the Claimant issued a summons against the Defendants and the Statement of Case reads as follows:

> *"1. The claimant is the appointed administratrix of the estate of Linda Ngulube (deceased) and brings this action on behalf of the said estate of Linda Ngulube and on behalf of the dependants of the deceased.*
>
> *Particulars of the deceased*
>
> *1.1. Was 40 years old.*
>
> *1.2 Was doing various businesses, including running a grocery shop.*

Particulars of dependants

Name of Dependant	*Relationship*
1.3 Fraser Ngulube	*father*

2. The 1st defendant was at all material times the driver of motor vehicle Toyota Sienta registration number CP 6525, and is sued as such.

3. The 2nd defendant was at all material times the insurer of motor vehicle Toyota Sienta registration number CP 6525, and is sued in that capacity.

4. On or around 31st May, 2016 at about 07:17 hours the 1st defendant was driving motor vehicle Toyota Sienta registration number CP 6525 from the direction of Majiasawa going towards Mzimba town. Upon arrival near Malawi Revenue Authority offices he so negligently drove the motor vehicle that he failed to negotiate a right corner/curve due to over-speeding and swerved to the extreme offside up to the dirt verge where he hit the deceased pedestrian who was walking on the dirt verge of the road. The deceased died of her injuries.

Particulars of negligence

4.1 Over-speeding at a built-up area.

4.2 Over-speeding in the circumstances.

4.3 Failure to keep to his nearside of the road.

4.4 Failure to slow down at a curve/corner.

4.5 Failure to keep a proper look-out.

4.6 Failure to manage and/or control the vehicle so as to avoid the accident.

5. As a result of the accident the estate of the deceased has suffered loss of expectation of life and costs of police report and death report, and the defendant have suffered loss of dependency

And the Claimant claims:-

a. Damages for expectation of life

b. Damages for loss of dependency

c. K6,000.00 cost of police report and death report

d. Costs of this action"

On 6th February 2018, the Defendants filed the following Defence:

"1. The defendants makes no comment as regards paragraphs 1 of the statement of claim and puts the claimant to strict proof.

2. Paragraphs 2, 3 and 4 of the statement of claim are admitted.

3. In reference to paragraph 4 of the statement of claim the Defendants admits that on the said date and road a collision/accident occurred. Save as aforesaid the defendants deny paragraph 4 of the statement of claim and puts the Claimant to strict proof.

4. *In reference to paragraph 4 of the statement of claim the defendants deny that the said collision was caused by the alleged or any negligence as alleged therein and states that the said accident was solely and or negligently contributed by the deceased*

Particulars of negligence

a. Walking without due regard to other road users;
b. Walking without due regard to his own safety;
c. Failing to keep a proper look
d. Failure to take measures to avoid the accident

5. *The particularized claims are denied and the Claimant is put to strict proof thereof.*
6. *The paragraph 5 of the statement of claim is denied and the claimant is put to strict proof.*
7. *Without prejudice to the foregoing, the 2nd Defendant pleads in the alternative that its liability is subject to the owner of the vehicle being found liable in respect to the accident herein.*
8. *The 2nd Defendant pleads that its liability, if any, is limited to indemnity the owner of the motor vehicle to the maximum liability contained in the contract of insurance..”*

The application is supported by a sworn statement by Mr. Donvan Silungwe and the relevant part thereof states as follows:

“5. ***THAT*** *the defendants served a defence, herewith produced and marked* ***“DS 2”.***

6. ***THAT*** *in paragraph 4 of the defence, the defendants refer to paragraph 4 of the statement of case and generally deny negligence without providing any alternative facts of how the accident occurred and aver that the accident was wholly caused or contributed by the negligence of the deceased, the particulars of which are as follows:*

6.1 Walking without due regard to other road users.

6.2 Walking without due regard to his own safety.

6.3 Failing to keep a proper look-out.

6.4 Failure to take measures to avoid the accident.

7. ***THAT*** *the defendants’ defence and the particulars of their allegations of sole or contributory negligence on the part of the deceased are a sham on the following reasons:*

[the text of reasons is set out below]

8. ***THAT*** *I believe, therefore, that the defendants do not have a defence to the claimant’s claim herein except as to the amount of damages.*

9. ***THAT*** *in the circumstances it would be only fair and just, and in the interest of justice, that a summary judgment be entered against the defendants.*

10. ***THAT*** *a summary judgment should be entered on the further ground that the defence is irregular as it is not verified with a sworn statement and is not accompanied by a list of documents."*

The application is opposed by the Defendants and a statement was sworn by Mrs. Stella Rose Mapemba, on behalf of the Defendants, to that effect. The sworn statement is couched in the following terms:

"2. ***THAT*** *Claimant commenced the current proceedings against the Defendant on 2nd February, 2018, claiming damages for loss of expectation of life, loss of dependency, cost of police report and costs for the actions arising from a motor vehicle accident involving a Toyota Sienta registration number CP 6525 driven by the 1st Defendant and insured by the 2nd Defendant.*

3. ***THAT*** *the Claimant alleged that the said accident was caused by the negligence of the 1st Defendant.*

4. ***THAT*** *the Defendants filed a defence which specifically pleaded contributory negligence as seen in paragraph 4 of the Defence, hereby exhibited and marked "**SRM1").***

5. ***THAT*** *the Defendants while acknowledging the occurrence of the accident further averred that the said accident was partly caused by the negligence of the victim.*

6. ***THAT*** *contributory negligence is a fair and bonafide defence for this matter and the court should allow the Defendants to defend the matter at trial.*

7. ***THAT*** *the deceased failed to keep a proper look-out consequently he failed to notice the presence of the 1st Defendant's vehicle and thereby avoiding the accident herein.*

8. ***THAT*** *the deceased was further walking without due regard to other road users and indeed without due regard to his own safety by walking too close to the 1st Defendant's lane.*

9. ***THAT*** *In the circumstances after specifically pleading contributory negligence, it would be fair and just to allow the Defendants to defend the matter at trial.*

10. ***THAT*** *from the foregoing it our considered view that the Defendants have a fair and bonafide defence and they should be allowed to defend the matter at trial.*

11. ***THAT*** *in the circumstances, it is prayed that the application for summary judgment herein be dismissed with costs."*

It is the case of the Claimant that the Defendants' defence and the particulars of their allegations of sole or contributory negligence on the part of the Deceased are a sham on the following reasons, [set out in the Claimant's Skeleton Arguments]:

"3.12.1 The defendants do not specifically dispute the fact that the 1st defendant hit the deceased when he failed to negotiate a right corner/curve due to over-speeding and swerved to the extreme offside up to the dirt verge where he hit the deceased pedestrian who was walking on the dirt verge of the road.

3.12.2 The defendants' averment that the deceased walked without due regard to other road users is too general and falls short of imputing any specific sole or contributory negligence on the part of the deceased. The deceased was walking on the far dirt verge of the road, and the 1st defendant hit her there when he lost control of the vehicle. Therefore, walking on the far dirt verge of the road cannot in any way constitute sole or contributory negligence in any way as 'walking without due regard to other road users'.

3.12.3 The defendants' averment that the deceased walked without due regard to his own safety is, again, too general and falls short of imputing any specific sole or contributory negligence on the part of the deceased. The deceased was walking on the far dirt verge of the road where the 1st defendant hit her when he lost control of the vehicle. Therefore, the 1st defendant cannot hit the deceased on the far dirt verge of the road after losing control of the vehicle and claim that the deceased was 'walking without due regard to his own'.

3.12.4 The averment that the deceased failed to keep any proper look-out, without any attendant facts, is too general to constitute any sole or contributory negligence.

3.12.5 The averment that the deceased failed to take measures to avoid the accident, without any attendant facts, is, again, too general to constitute any sole or contributory negligence."

Counsel Silungwe buttressed his submission by citing, among other authorities, the cases of **Registered Trustees of Sedom v. Buleya [1991] 14 MLR 422 (HC)**, **Emmanuel Fole v. Steven Ngomwa and Prime Insurance Co. Ltd, Civil Cause No. 270 of 2017 (unrep), Pereira v. Ndaule t/a Cenda Building Contractors [1993] 16(2) MLR 712 (HC)**, **Emily James and another v. Kennedy Wahl and others Civil Cause No. 996 of 2016 (unrep)** and **Munyimbiri v. Nico General Insurance Company Limited MSCA Civil Appeal No. 54 of 2008 (unrep).**

In **Registered Trustees of Sedom v. Buleya [1991]**, supra, Mwaungulu R, as he then was, said that a defendant must plead facts to substantiate the denial, and not merely plead bare denials. In **Emmanuel Fole v. Steven Ngomwa and Prime Insurance Co. Ltd**, supra, the learned Assistant Registrar, Her Honour Chimwaza, observed as follows as regards defences containing general denials:

> *"In the present matter this court has looked at the defense, but it is lacking in substance. The defendants deny liability and demand strict proof of the claims by the plaintiff. They attribute the accident to the negligence of the driver of MZ 8903 who is the plaintiff now but do not give the details of the negligence what he did or failed to do that caused the accident. They have not given any facts to challenge the allegation that the defendant left his lane and hit the plaintiff on his lane. With these observations, this court finds that the plaintiff has managed to satisfy this court that the defendant has no defense worth taking the matter to trial. The defense is a general denial without supporting facts which they are relying upon."*

Pereira v. Ndaule t/a Cenda Building Contractors, supra, was cited for the distinction that the learned Deputy Registrar, His Honour Chipeta, drew between an application for summary judgment and an application for setting aside a default judgment at p.714:

> *"It is important I think at this stage to warn myself that the hearing of an application to set aside judgment is essentially different from the hearing of an application for summary judgment, such as under Order 14 of the Rules of Supreme Court. Whereas in applications for summary judgment I am allowed by the rules to delve into questions of merit in order to decide whether any proposed defence is valid or only a sham."*

In **Emily James and another v. Kennedy Wahl and others**, supra, the learned Assistant Registrar, His Honour Chirwa, in granting a summary judgment had this to say:

> *"Looking at the matter now before this court, it is this court's view that the defence by the defendants is not a valid one and this is for the following reason: while on the one hand the plaintiff claims that the 1st defendant hit the deceased at the far left dirt verge of the road where it was lawful for him to cycle, the defendants, ... on the other hand, have not delved onto this particular fact to dispute it with a different version. All they claim is that the deceased was contributorily negligent in that he failed to take a proper look out, failed to pay any or any sufficient heed to the presence of the motor vehicle on the road and generally, acted in a manner that was in disregard of his own safety.*
>
> *The defence pleaded by the defendants does not zoom in on the fact of the deceased having cycled on the far dirt verge of the road. At any rate, all the defence does is to run counter to the views of the Supreme Court in the case of Munyimbiri v. Nico General Insurance Company Limited MSCA Civil Appeal Number 54 of 2008, where it was held that motorists owe same duty of care to cyclists or pedestrians as they do to fellow motorists such that a motorists cannot proceed to hit a cyclist or pedestrian simply because they failed to give way, even when the motorist clearly saw the cyclist or pedestrian in front of him and could have braked or swerved to avoid him."*

In her submissions, Counsel Mapemba argued that as the Defendants have pleaded contributory negligence, the application should be dismissed. It might be useful to set out the Defendants' Skeleton Arguments in full:

> *"3.* ***THE LAW AND ARGUMENTS***
>
> *3.1 According to* ***O.12 r.23 of the Courts (High Court)(Civil Procedure Rules, 2017****, a plaintiff can file Summons for Summary Judgement on the ground that the defendant has no defence to a claim included in the Writ, or to a particular part of the of such claim, or has no defence to such a claim or part except as to the amount of any damages claimed.*
>
> *3.2 The purpose of Order 12 r. 23 is to enable the Plaintiff obtain judgment without trial if he prove his claim clearly and if the Defendant is unable to set up a bona fide defence or to raise an issue against the claim which ought to be tried . See* ***Malawi College of Accountancy –vs- J Jafuli t/a Hopco Estate Agents , Civil cause Number 1248 of 1196, Robert v Plant [1895] 1QB 597***
>
> *3.3 Once the Plaintiff establishes a prima facie case he becomes entitled to judgment. The burden then shifts to the Defendant to satisfy the Court why judgment should not be given against him.*
>
> *3.4 The Defendant may show cause on the merits by demonstrating that he has a god cause to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or areal dispute as to the amount due which requires the taking of a n account to determine, or any other circumstances showing reasonable grounds of a bona fide defence.*
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> ***4. LEAVE TO DEFEND***
>
> *4.1 A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court.*
>
> *4.2 As a general principle, where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend.*
>
> *4.3 In the case of* ***Mzoma -vs- Attorney General, Civil Cause Number 366 of 2002 (Unrep)*** *the court observed as follows;*
>
> *"This I believe demonstrated why as courts we should be slow to award summary judgement in matters where the cause of action is said to arise from negligence .This is in the sense that the defence to such claim would really just have to deny that there was no negligence and put the plaintiff*

to strict proof thereof .Indeed, I would want to believe that as courts we cannot expect a defence to acclaim of negligence to say more than that. In any case i would want to believe that since the defence disputes the aspect of negligence specifically, then it cannot be termed as a general traverse, especially since negligence is a tort per se and refers to blameworthy state of mind of a person"

4.4 In the case of ***Margaret Kasambala & Jossam Mulelemba (suing as administrators of the state of John Kasambala on behalf of the estate and dependants of the Deceased) –vs- Anderson Banda and Britam Insurance Company Limited ,Civil Cause No.1138 of 2016*** *, the Honourable Assistant Registrar Chirwa agreed with the Mzoma case and dismissed the application for summary judgement and stated that "the fact that there was contributory negligence being specifically pleaded by the defendant, is one worth to try as an issue before the court"*

4.5 The court ,in the case of ***Gift Mabvumbe –vs-Silvia Mwale and Real Insurance Company Limited , Civil Cause No.1221 of 2015*** *also refused to grant the plaintiff summary judgement on the ground that , amongst others , the defence raised an issue of negligence /contributory negligence which ought to be tried.*

4.6 Further to the above, in a more recent case ***Dorothy Machiki& Hazwell Yoke –vs- Keegan Ngajilo & Reunion Insurance Company Limited, Civil Cause Number 650 of 2017****, Hon Justice Mkandawire stated as follows:*

"It is my considered view that the defendants have successfully disclosed the nature of the defence. The issue of contributory negligence which has been particularized in the defence does raise a relevant dispute between the parties and the defence raised is bona fide. I therefore find that this is not a proper case where I should enter summary judgement "

4.7 Actions for damages for negligence are only suitable for procedure under Order 12r.23 if it clearly established that there is no defense as to liability.

5. ***SUBMISSION***

5.1 The defendants have specifically pleaded contributory negligence and have given particulars of the said negligence in their defence.

5.2 The Defendants are thus not required to say more than the pleaded defence in the circumstances especially when the elements of the said contributory negligence have been particularized.

5.3 The fact that the Defendants have not disputed the occurrence of the accident does not take away their right to plead contributory negligence as the mere fact of the said defence already assumes that accident in this particular incident did in fact take place.

5.4 Contributory negligence is thus a fair and bonafide defence and accordingly the Defendants need to be given leave to defend this matter at trial."

In his reply, Counsel Silungwe invited the Court to note that what the Defence refers to as "Particulars of negligence" are not particulars at all. He argued that the Defendants were aware that they had to give particulars of the alleged contributory negligence but they failed to do so.

I have considered the submissions by both Counsel and I fully agree with Counsel Silungwe that the Defence does not comply with the requirements of CPR in many respects. Firstly, the Defendants have not stated the facts of the accident as known to them, contrary to the prescriptions of Order 7, r.1, of CPR which requires a statement of case to, among other matters:

(a) set out the material facts between the parties, as each party sees them, but not the evidence to prove them;

(b) show the areas where the parties agree;

(c) show the areas where the parties disagree that need to be decided by the Court;

(d) be as brief as the nature of the proceeding permits;

(e) identify any statute or principle of law on which the party relies, but not contain the legal arguments about the statute or principle;

(f) where the party is relying on customary law, state the customary law;

(g) state specifically any fact that if not stated specifically, it would take another party by surprise" – Emphasis by underlining supplied

One of the objectives of Order 7, r.1, of CPR is to address the ills brought about by the so called "holding defences", that is, defences filed with the Court by a party either whilst waiting for instructions from a party regarding facts of a particular case or to simply frustrate the proceedings. It is time parties and their lawyers released that resort to such a defence is no longer tenable. As was aptly observed by the Court in **Chikondi Mkwapatira v. Mr. Wexxing Jiang and Prime Insurance, HC/PR Personal Injury Cause No. 684 (unreported)**:

> *"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."*

The defence in the present case is a perfect example of a holding defence. The Defence allege contributory negligence but the allegation is being made in abstract. I have read and re-read the Defence in search of statements therein as regards what the Defendant alleges happened but my search has been in vain. The Defence does not contain any statement as to how the accident happened to blame the Deceased of contributory negligence. This is contrary to Order 7, r. 1 and r.7, of CPR.

Secondly, it is also noteworthy that the Defendants filed neither a list of documents verified by a sworn statement nor copies of the document on the list as required by the CPR. To my mind, the only reasonable explanation for this omission and the other matters referred to hereinbefore is lack of brief on the part of the Defendant's legal practitioners on the material facts of the case. As a result, the allegations in the Defence are purely speculative and not supported by any evidence before the Court.

Thirdly, as was rightly observed by Counsel Silungwe, what are termed as "particulars of negligence" in the Defence are misleading misnomers. For example, "walking without due regard to other road users" by itself cannot qualify as being particulars of negligence. It has to be read with something else such as a statement to the effect that the Deceased was walking right in the middle of the road at the material time. Paragraph 4 of the Statement of Case illustrates my point: the particulars of negligence therein arise out of the chapeau (opening words) of the said paragraph.

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

Pronounced in Court this 30th day of April 2019 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE