

**JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO 942 OF 2019**

BETWEEN

CATHERINE MATIYASI CLAIMANT

AND

JAMES CHINGWALU 1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED 2ND DEFENDANT

RASHID MEGAH 3RD DEFENDANT

BRITAM INSURANCE COMPANY LIMITED 4TH DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Silungwe, of Counsel, for the Claimant

Mr. Chikwakwa, of Counsel, for the Defendants

Mr. Henry Kachingwe, Court Clerk

RULING

Kenyatta Nyirenda, J.

This is my ruling on the application by the Claimant for summary judgement. The application is brought under Order 12, r.23, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

The Claimant issued a summons against the Defendants and the Statement of Case reads as follows:

- "1. The 1st defendant was at all material times the driver of motor vehicle Freightliner Truck registration number LA 9000/LA 5644, and is sued as such.

2. The 2nd defendant was at all material times the insurer of motor vehicle Freightliner Truck registration number LA 9000/LA 5644, and is sued in that capacity.
3. The 3rd defendant was at all material times the driver of motor vehicle Nissan X-Trail registration number BQ4549, and is sued as such.
4. The 4th defendant was at all material times the insurer of motor vehicle Nissan X-Trail registration number BQ4549, and is sued in that capacity.
5. On or around 19th July, 2019 at about 04:15 hours the 1st defendant was driving motor vehicle Freightliner Truck registration number LA 9000/LA 5644 from the direction of Balaka going towards Ntcheu along the Balaka-Ntcheu M1 road. Upon arrival at Bula village, the 1st defendant so negligently drove the motor vehicle by encroaching on the offside lane of the road at an excessive speed that he hit motor vehicle Nissan X-Trail registration number BQ 4549 coming from the opposite direction which, due to the impact, swerved to the offside lane where it collided with motor vehicle Hiace Minibus registration number NN7791 in which the Claimant was a fee paying passenger. Alternatively, both 1st and 3rd defendants failed to give way to each other or keep to their nearside when they collided, and swerved to the offside lane and hit the minibus.

Particulars of Negligence

- 5.1 Failure to keep to his nearside
- 5.2 Over speeding in the circumstances
- 5.3 Encroaching on the offside lane of the road where the motor vehicle Nissan X-Trail registration number BQ 4549 was being driven and whose impact caused a collusion with motor vehicle Hiace Minibus registration number NN 7791 in which the Claimant was a fee paying passenger
- 5.4 Failure to take a proper look out
- 5.5 Failure to manage and/or control the vehicle so as to avoid the accident.
6. As a result the accident the Claimant suffered serious injuries and special damage.
 - 6.1 **Particulars of injuries**
 - 6.1.1 Fracture of the right leg.
 - 6.1.2 Abrasion on left shoulder
 - 6.1.3 47% permanent incapacity.
 - 6.2 **Particulars of special damage**
 - 6.2.1 Cost of medical report –K5,000.00
 - 6.2.2 Cost of Police report – K3,000.00

And the Claimant claims:-

- a. Damages for pain and suffering;
- b. Damages for loss of amenities of life

- c. Damages for disfigurement;
- d. Damages for loss of earnings and earning capacity
- e. The sum of K8,000.00 damages for cost of medical and police reports; and
- f. Costs of this action."

The 1st and 2nd Defendants filed the following Defence:

- "1. Paragraphs 1 and 2 of the statement of case are admitted.
- 2. The Defendants make no comment to paragraph 3 and 4 of the statement of case as they are matters beyond their knowledge.
- 3. The Defendants refer to paragraph 6 of the statement of claim and deny that the accident occurred as particularized or at all. The 1st Defendant's motor vehicle was lawfully driven along Balaka -Ntcheu road whilst observing the applicable speed limit.
- 4. The Defendants further contend that the drivers of motor vehicle registration numbers BQ4549 Nissan X-trail and NN7791 Toyota Hiace Minibus wholly caused the accident.

Particulars of Negligence of BQ 4549

- a. Driving without due regard to other road users;
- b. Failure to keep to his nearside
- c. Failure to take measures to avoid causing the accident;
- d. Failure to control his motor vehicle so as to avoid hitting NN7791
- e. Generally failing to observe road traffic rules and regulations.

Particulars of Negligence of NN7791

- a. Failure to keep to his nearside
 - b. Failure to take measures to avoid the accident
 - c. Failure to take a proper look out
 - d. Over speeding in the circumstances
 - e. Failure to stop or swerve to avoid colliding with BQ 4549
5. Further the claimant caused or contributed to his own injuries.

Particulars of Negligence

- a. Failure to wear a seatbelt; alternatively
 - b. Driving a vehicle without a seatbelt
6. The Defendants deny the loss and damages pleaded in paragraph 6 of the statement of case and put the Claimant to strict proof thereof.

7. *The 2nd Defendant pleads in the event that the insured is found liable for the claims pleaded, its liability to compensate the claimant and Claimant's losses arising out to the accident is limited to the sum of MK5,000,000.00 under the policy of insurance less any payment made to other claimants from the same or other accident."*

The joint statement of defence of the 3rd and 4th Defendants reads thus:

- "1. *The 4th Defendant and the 3rd Defendant (Hereinafter referred to as 'the Defendants') do not admit the contents of paragraphs 1 and 2 of the Statement of Case which allege matters peculiarly outside the knowledge of the Defendants of which they have not had a reasonable opportunity to verify.*
2. *Paragraph 3 of the Statement of Case is admitted only in so far as is implied thereunder that the 3rd Defendant drove the relevant motor vehicle at the time of the accident.*
3. *The Defendants admit the contents of paragraph 4 of the Statement of Case only to the extent that it is alleged under the said paragraph that the 4th Defendant was the insurer.*
4. *The Defendants refer to paragraph 4 of the Statement of Case and plead as follows in respect thereof.*
 - 4.1 *It is admitted that the freightliner was being driven in the Balaka-Ntcheu direction along the M-1 road while the Nissan X-trail was being driven in the opposite direction. Each motor vehicle was initially being driven within its own lawful lane.*
 - 4.2 *It is further admitted that the driver of the Freightliner later caused it to encroach onto the lane in which X-trail was being driven. The driver of the Freightliner did so negligently causing his motor vehicle to hit the X-trail, a substantially lighter motor vehicle, and in turn he caused it to strike the a Toyota minibus registered as NN7791 which was along the same road.*

PARTICULARS OF THE NEGLIGENCE OF THE DRIVER OF THE FREIGHTLINER

- *Failing to keep his much heavier motor vehicle within his own lane*
- *Encroaching into the other lane when it was not safe to do so.*
- *Failing to keep a proper look out*
- *Failing to notice the approaching X-trail.*
- *Failing to have regard to the safety of other road users and their property*
- *Failing to take any or any sufficient steps to prevent the accident*
- *Driving at a speed which was excessive in the circumstances*

- 4.3 *It is not admitted that the Claimant was a fee paying passenger in the minibus above mentioned and the Claimant is put to strict proof of this allegation. If, which is not admitted, the Claimant was such fee paying passenger, it is contended that the Claimant negligently contributed to the causation of her injuries, if any, either by not wearing a seatbelt or getting into and remaining in a motor vehicle, the minibus, which had no provision for seatbelts. Thus, any damages awarded herein are liable to be apportioned accordingly.*
- 4.4 *The alternative allegation that the 1st and 3rd Defendants failed to give way to each other or keep to their nearside when they collided is denied. The facts clearly disclose that it was the 1st Defendant's sudden encroachment into the 3rd Defendant's lane which caused the multiple collisions which are the subject of this action. The 1st Defendant's encroachment was so sudden, unexpected and improper that there was reasonably no time for the 3rd Defendant to get out of the way without colliding with the 1st Defendant or with NN 7791 or with both.*
- 4.5 *Further to the foregoing, it is denied that the Claimant is entitled to plead in the alternative in the circumstances: as such, the alternative pleading is liable to be struck out and the respective actions against the 3rd and 4th Defendants consequently liable to be dismissed.*
5. *Paragraph 6 of the Statement of Case is denied and the Claimant is put to strict proof of its contents.*
6. *The contents of the relief paragraph are denied and the Defendants contend that the Claimant is not entitled to any of the reliefs sought as has been set out therein or at all.*
7. *If, which has been denied, the 3rd Defendant was negligent, the 4th Defendant can only be liable as a consequence if it is established, on the ground of vicarious liability or otherwise, that the insured was liable as well and any such liability, which is denied, is subject to the contractual provision in the applicable policy of insurance placing a maximum of MK5,000,000.00 on the damages which the 4th Defendant can ever be liable to pay.*
8. *SAVE as a hereinbefore expressly admitted the Defendants deny each and every allegation of fact contained in the statement of Case as if the same were herein et out ad traversed seriatim."*

The application is supported by a sworn statement by Mr. Pempho Kambalame wherein he deposes as follows:

- "2. **THAT** the Claimant commenced this action against the defendants, claiming damages pain and suffering, loss of amenities of life, disfigurement and damages for loss of earnings and earning capacity and special damages as set out in the statement of claim.
3. **THAT** the particulars of claim, as set out in paragraph 5 of the statement of case, are that on or around 19th July, 2019 at about 04:15 hours the 1st defendant was driving motor vehicle Freightliner Truck registration number LA 9000/ LA 5644

from the direction of Balaka going towards Ntcheu along the Balaka-Ntcheu M1 road. Upon arrival at Bula village, the 1st defendant so negligently drove the motor vehicle by encroaching on the offside lane of the road at an excessive speed that he hit motor vehicle Nissan X-Trail registration number BQ 4549 coming from the opposite direction which, due to the impact, swerved to the offside lane where it collided with motor vehicle Hiace Minibus registration number NN 7791 in which the Claimant was a fee paying passenger. Alternatively, both 1st and 3rd defendants failed to give way to each other or keep to their nearside when they collided, and swerved to the offside lane and hit the minibus.

4. **THAT** the particulars of negligence, as set out in paragraph 5.1 – 5.5 of the statement of case are,
 - 4.1 Failure to keep his nearside.
 - 4.2 Over-speeding in the circumstances.
 - 4.3 Encroaching on the offside lane of the road where the motor vehicle Nissan X-trail registration number BQ 4549 was being driven and whose impact caused a collusion with motor vehicle Hiace Minibus registration number NN 7791 in which the Claimant was a fee paying passenger.
 - 4.4 Failure to keep a proper look-out.
 - 4.5 Failure to manage and/or control the vehicle so as to avoid the accident.
5. **THAT** the defendants served defences, copies of which I now produce and mark "PK 1 and PK 2" respectively.
6. **THAT** the defendants' defences are a sham for the following reasons: -
 - 6.1 Both defences do not specifically deny the fact that the accident occurred when the 1st and 3rd defendants' vehicles collided with each other as a result of which the 3rd defendant's vehicle hit the minibus in which the claimant was a passenger in its lane.
 - 6.2 Thus the defendants are liable jointly or severally, and the blame game between the defendants is, therefore, a clear indication that the fault lies with the defendants, not the claimant.
7. **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.
8. **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."

The application is opposed by the Defendants. The 1st and 2nd Defendants rely on a sworn statement filed by Mr. Ephraim Chikwakwa which reads, in part, as follows:

"Who was negligent between 1st Defendant and 3rd Defendant

3. *THAT the fact that the Defendants are blaming each other clearly shows that the tortfeasor is not known and its not something that can be decided summarily and obviously it requires evidence in trial to establish who was responsible for the negligence in question.*
4. *THAT it was the duty of the Claimant to claim against the right party for the alleged negligence. The fact that the Claimant chose to just throw all the Defendants shows that she is not sure who was negligent between the 1st Defendant and the 3rd Defendant.*
5. *THAT this must therefore be decided on trial where parties shall give evidence.*

Negligence of the Claimant

6. *THAT sworn statement in support of the application has not talked the issue of negligence of the Claimant as she did not wear or fasten seat belts which has been raised in the 1st and 2nd Defendants. The 1st and 2nd Defendants deny the injuries as the same were a result of her own want of care.*
7. *THAT this raises an issue of whether the Claimant was negligent or not, a factual and legal issue which requires evidence."*

The sworn statement for the 3rd and 4th Defendant was made by Mr. Charles Martin Mhone and it is in the following terms:

- "3. ***THAT** I refer to paragraphs 7, 8 and 9 of the Sworn Statement filed in support of the application and state that it is not true that the Defence filed by the 3rd and 4th Defendants is a sham as the said defence raises triable issues that it would be in the interest of justice to have the matter determined at trial:*
 - a. *Under paragraph 4.2, the 3rd Defendant clearly plead matters of fact as to how the accident happened, that is, that the accident happened when the 3rd Defendant was negligently hit by Freightliner which encroached on the 3rd Defendant's lane and by reason of which, the Freightliner caused the 3rd Defendant's motor vehicle to strike the minibus registration number NN 7791.*
 - b. *Further, under paragraph 4.4 the Defence plead that the 1st Defendant's encroachment into the 3rd Defendant's lane was so sudden, unexpected and improper that there was no time for the 3rd Defendant to get out of the way without colliding with the minibus.*
 - c. *Further, police investigations clearly show that the accident was not caused by the 3rd Defendant. A copy of the police report is attached hereto and marked as exhibit "CMMI"*

4. ***THAT** by reason of the matters aforesaid, I make reference to the said 3rd and 4th Defendants' Defence and I verily believe that the said Defendants do have real prospect of defending the claim as the said Defence pleads and set out triable issues which can only be determined at trial.*
5. ***THAT** I verily believe that, in the circumstances, this is not a proper case for the Court to enter a summary judgment against the 3rd and 4th Defendants."*

As already stated, the present application has been brought under Order 12, r.23, of the CPR and the same provides as follows:

"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."

A claim by a claimant that a defendant does not have a real prospect of defending the claim means that the claimant is claiming that he or she has real prospect of success in his or her claim against the defendant. The phrase "real prospect of success" was the subject of consideration in the case of **Swain v. Hillman [2001] 1 All ER 92** and Lord Woolf MR defined the words thus:

"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr. Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success..."

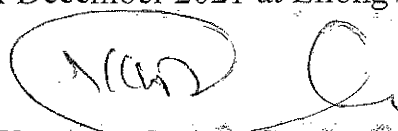
In the present case, as was rightly submitted by both Counsel Mhone and Counsel Chikwakwa, a number of triable issues, both in terms of facts and the law, have been raised. For example, by way of illustration, it is trite that a claimant has to prove his or her case against the defendants. It has never been the case that defendants must prove their respective defences against each other. As such, in the present case, it is the Claimant (and not the Defendants) that is duty bound to prove that the accident was caused due to the negligence of the 1st Defendant or the 3rd Defendant or both. The evidence brought before the Court in support of the application does not do that. Further, the Defendants have raised the issue of contributory negligence on the part of the Claimant for his failure to wear or fasten her seat belt. It is for the Claimant to prove that he was not guilty of any contributory negligence. This is an issue that has to be determined at the trial.

In view of the foregoing and by reason thereof, I am satisfied that the respective statements of defence by the defendants raise fairly arguable points. In short, there is a relevant dispute between the Claimant and the Defendants. In the premises, summary judgement cannot be entered: see Order 12, rule 26, of CPR. The application is, therefore, dismissed with costs.

Catherine Matiyasi v. James Chingwalu & 3 Other

Kenyatta Nyirenda, J.

Pronounced in Court this 6th day of December 2021 at Lilongwe in the Republic of Malawi.

A handwritten signature in black ink, appearing to be 'Kenya Nyirenda', is written over a circular stamp. The signature is fluid and cursive.

Kenyatta Nyirenda

JUDGE