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IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 555 OF 2016

BETWEEN:

BROWN MKANDAWIRE.....CLAIMANT

AND

PRIME INSURANCE COMPANY LIMITED..... DEFENDANT

CORAM : A.P KAPASWICHE

ASSISTANT REGISTRAR

Mhango

Counsel for the claimant

Chiwaya

For the defence

Kumwenda

Clerk/ Official Interpreter

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## RULING

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### BACKGROUND

The matter came before this court for assessment of damages on the 25<sup>th</sup> May 2021. The claimant testified on the said date. The defendants made an application before this court to cross –examine the medical personnel who prepared the medical report used in the present proceedings and the said application was granted ex-party by this court on 24<sup>th</sup> May 2021. The said application was made under **Order 17 rule 57 (1) of the Court (High Court) Civil Procedure rules of 2017**.

Prior to the granting of the order in question, the claimant had already given notice to the defendant and this court to rely on hearsay evidence contained in the medical report of the Senior Orthopaedic clinical officer who prepared the medical report relied in the present proceedings. It was indicated in the notice that the medical officer will not be called to give oral testimony because all efforts by the claimant to trace the whereabouts of the officer have failed as he reportedly retired from the civil service. This notice was filled pursuant to the provision under **Order 17 rule 55 of the CPR 2017**. Under the said rule, a claimant is entitled to rely on evidence without calling a witness who gave a witness statement. The prayer from the claimant was, therefore, that he should be allowed to use the medical report despite the absence of the officer responsible for preparing the report.

The defendants admitted that they were indeed served with the notice to rely on hearsay evidence but they argued that the rules also gives the defence the liberty to make an application to cross-examine a witness hence they simply exercised their right when making the said application to cross examine the witness hence the defence maintained their stand that the maker of the medical report should avail himself in court for cross –examination and if that fails then the medical report should not be regarded as evidence in these proceedings and be only treated as hearsay evidence.

### THE LAW

The relevant law on the present dispute is under Order 17 rules 55 and 57 of the CPR 2017. The rules provide as follows;

### HEARSAY EVIDENCE

- 55.—(1) Where a party intends to rely on hearsay evidence at trial and either—
- (a) that evidence is to be given by a witness giving oral evidence; or
  - (b) that evidence is contained in a witness statement of a person who is not being called to give oral evidence, that party shall notify any other party of that fact and, on request, give particulars of or relating to, the evidence when serving a witness statement on the other parties in accordance with the Court's order.
- (2) Where sub rule (1) (b) applies, the party intending to rely on the hearsay evidence shall, when he serves the witness statement—
- (a) inform the other parties that the witness is not being called to give oral evidence; and
  - (b) give the reason why the witness will not be called.
- (3) In all other cases where a party intends to rely on hearsay evidence at trial, that party shall notify any other party of that fact and, on request, give particulars of or relating to, the evidence when serving a notice on the other parties which—
- (a) identifies the hearsay evidence;
  - (b) states that the party serving the notice proposes to rely on the hearsay evidence at trial; and
  - (c) gives the reason why the witness will not be called.
- (4) The party proposing to rely on the hearsay evidence shall—
- (a) serve the notice not later than the latest date for serving witness statements; and
  - (b) where the hearsay evidence is to be in a document, supply a copy to any party who

requests him to do so.

- 57.—(1) Where a party proposes to rely on hearsay evidence and does not propose to call the person who made the original statement to give oral evidence, the Court may, on the application of any other party, permit that party to call the maker of the statement to be cross-examined on the contents of the statement.
- (2) An application for permission to cross-examine under this rule shall be made not more than 14 days after the day on which a notice of intention to rely on the hearsay evidence was served on the applicant.

#### **ANALYSIS OF THE LAW AND SUBMISSIONS**

The law is very clear on issues of using a statement or evidence in cases where the maker of the statement in question is unavailable for whatever reason. The claimant followed the procedure under Order 17 rule 55 by giving notice to rely on hearsay evidence and giving reasons justifying the same. The reasons given by the claimant are valid as they have failed to trace the whereabouts of the witness in question. The defence are also within their right to invoke Order 17 rule 57 to require cross examination of the maker of the evidence in question. It is relevant at this point to quote the text of Order 17 rule 57 (1) which provides as follows;

“Where a party proposes to rely on hearsay evidence and does not propose to call the person who made the original statement to give oral evidence, the Court may, on the application of any other party, **permit that party to call the maker of the statement to be cross-examined on the contents of the statement.**” (emphasis is mine)

The situation that we now have is that the claimant has failed to trace the maker of the statement in form of a medical report being relied as hearsay evidence. In the absence of the demand to cross examine from the defence, this court could have proceeded to make a determination on the damages payable and would have treated the medical report as hearsay

evidence and accord its value as such. Since the defence have expressed the desire to cross examine the medical officer, the burden of tracing the witness now goes to them as Order 17 rule 57 (1) clearly provides that the court may permit the party wishing to cross examine the witness to call the maker of the statement to be cross-examined on the contents of the statement.

Having considered the circumstances of the present case this court, therefore, gives the defence a period of 14 days to trace the witness and secure his presence in court failing which the court will proceed on the understanding that the medical report being relied upon is hearsay evidence and will treat it as such. The matter will proceed on the 22<sup>nd</sup> day of June 2021 at 2:30 in the afternoon for the cross-examination of the witness if successfully traced and in the event that the defence fails to trace the witness then the matter will proceed on the same day for hearing of the defence case.

**Pronounced this 7<sup>th</sup> day of JUNE 2021 at LILONGWE**



**ANTHONY PITILIZANI KAPASWICHE**

**ASSISTANT REGISTRAR**