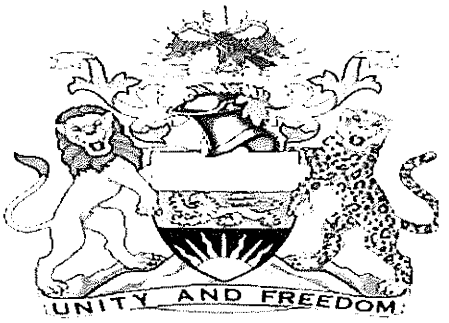

The Judiciary

IN THE HIGH COURT OF MALAWI

CIVIL DIVISION

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 480 OF 2020

Between:

DEBORAH MKALIAINGA (*suing through his father & litigation guardian*

GREYSON MKALIAINGA).....CLAIMANT

-AND-

BRITAM INSURANCE COMPANY LIMITED.....1ST DEFENDANT

ULUMBA LOGISTICS (PTY) LIMITED.....2ND DEFENDANT

ORDER

This is an application to remove the 1st defendant as a party taken under ***Order 6 Rule 8 of the Courts (High Court) (Civil Procedure) Rules, 2017***. The application is supported by a sworn statement sworn statement sworn Counsel Arthur Nanthuru and skeletal arguments. The application is heavily challenged by the claimant as indicated in its sworn statement and skeletal arguments in opposition file by Counsel Isaac Kamunga.

In brief the 1st defendant's argument is that upon receiving court orders, it paid the claimant a total sum of MK5, 000, 000.00 being the maximum liability as per the insurance policy between the 1st defendant and the 2nd defendant. So, on

CORAM: Mr. I. Kamunga (P & S Associates) of Counsel for the Claimant _ Mr. A. Nanthru (Nanthuru & Associates) of Counsel the Defendants _ Ms. N. Munthali, Court Clerk

the authority of ***Andson Kabootolo & Others v. Chifundo Chirwa & Others Personal Injury Cuase No. 780 of 2015***, the 1st defendant discharged its duty under the policy having paid out the agreed sum of Mk5, 000, 000.00. Anything above that ought to be paid by the 2nd defendant. On the other hand, the claimant argues that this issue is actually res judicata as it was already argued and determined by the court at the assessment of costs stage. Counsel invited the court to go through the ruling. Further, it was argued that policy limit is a liability issue and therefore it was already settled by the order of the judge. In reply, counsel for the 1st defendant submitted that the issue of policy limit was never considered by the judge. The judge found both parties liable for the accident and did not go further to consider the issue of policy limit which was specifically pleaded.

Before this court dives into the substance of this matter, we believe we would be doing justice to the matter if we briefly highlight the chronological of events in this matter. The claimant commenced this matter on 20th July, 2020 claiming damages for injuries sustained in a road accident. The 1st defendant subsequently filed a defense in which it was pleaded that its liability is limited to the sum of MK5, 000, 000.00 with respect to damages and costs per the policy of insurance between itself and the 2nd defendant.

At a mediation session conducted on 4th December, 2020 the matter was settled in that judgement on liability was entered in favor of the claimant. The matter was then adjourned pending negotiations on quantum of damages and costs among other processes.

On 4th day of June 2021, the court delivered its ruling on assessment of damages. It appears during the hearing the issue of policy limit arose. However, considering the amount of award that was made, the court did not see any need proceed to discuss on the issue of policy limit. The award was less that the alleged policy limit sum.

Again the issue of policy limit emerged during the assessment of costs. The court having heard the arguments from both parties, it ruled that;

> *"At the hearing, the issue of policy limit was raised by counsel for the defendants arguing that having paid MK4, 300, 000.00 in damages, MK5, 000, 000.00 which is the 1st defendant's policy limit was nearly exhausted and this should be considered when determining the costs payable by the 1st defendant. Counsel for the defendants submitted the policy document to the court.*

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The claimant's position, which I agree with, is that the issue of policy limit is a liability issue and ought to have been settled by the judge when determining liability and it was therefore irregular to raise it now. The court never determined the limit of the 1st defendant liability in its order of 4th December, 2020 and it is beyond me to do it now. Further, the policy document which was not even signed, was irregularly brought to the attention of the court, it was not brought under oath and it would have been disregarded if the issue was rightly before me. What is clear though is that both defendants are liable to the claimant and that the costs assessed herein are payable by both defendants....." ***(order on assessment of costs dated 29th October 2021 at page 2)***

The law is established that an insurer's liability is limited to the sum assured under the policy. However, a party pleading policy limit must successfully prove the same by presenting evidence before the court. Pleading alone is not enough. This matter is past that stage. The Judge already found both parties liable. Should we then be discussing issues of liability limit at this stage?

This court read the order of the Judge dated 4th December 2020. It is clear that the judge, which both parties herein agree, found both parties liable. Regardless of the fact that the issue of policy limit, was pleaded, no specific order was made on it. We are aware that the judgement was a product of a mediation session that was conducted in the presence of both parties. The Judge's order was pursuant to what the parties agreed. This entails that if the 1st defendant was so concerned about the issue of policy limit, it could have raised that issue when conceding liability so that the extent of liability of both defendants be clearly laid down. Without doubt, the order could have specifically stated that the liability of the 1st defendant is limited to the policy limit. Surprisingly, the 1st defendant did not take a step further to seek a determination on the issue of policy limit. Surely, the 1st defendant was not diligent enough to secure itself.

Further, reading through the extract quoted above, it is clear that my learned colleague properly addressed her mind on the issue of policy limit. She heard arguments from both sides and made a determination. It is absurd at this stage to be relitigating the same issue. If the 1st defendant was so agreed, the remedy was to appeal against the said finding.

For the avoidance of doubt, this court agrees with the claimant and my colleague's finding as quoted above. The issue brought by the 1st defendant

before this court is res judicata and must fail. As a matter of caution Order 6 Rule 8 under which this application is taken provides that;

> *The Court may, on an application by a party, order that a party in a proceeding is no longer a party where;*
>
> a. *The person's presence is not necessary to enable the court to make a decision fairly and effectively in the proceeding or*
> b. *There is no good and sufficient reason for the person to continue being a party.*

The present matter was already concluded and both parties participated in the entire proceedings. It would therefore be futile to be removing a party at this stage. It would serve no purpose. Further, it has been earlier stated that the Judge found both parties liable to pay the claimant damages and costs. This is a reason sufficient enough for the 1st defendant to remain a party.

Therefore, the application to remove the 1st defendant as a party is dismissed with costs to the claimant. The said costs are to be assessed if not mutually agreed by the parties.

Dated this 20th day of July, 2022

Ibrahim Hussein

Assistant Registrar

CORAM: Mr. I. Kamunga (P & S Associates) of Counsel for the Claimant _ Mr. A. Nanthru (Nanthuru & Associates) of Counsel the Defendants _ Ms. N. Munthali, Court Clerk