

**Republic of Malawi**

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 441 OF 2021**

**FRANCIS GONDWE**

**CLAIMANT**

**AND**

**JOHN MATIYASI**

**DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO**

Kajawo, Counsel for the Claimant  
Mputeni, Counsel for the Defendant  
Mankhambera, Official Court Interpreter

**ORDER**

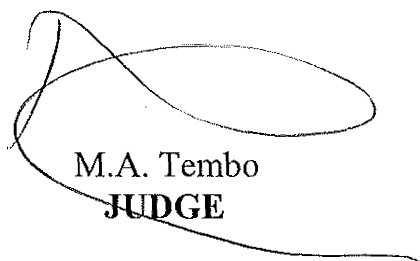
1. This is the order of this Court following the claimant's application for summary judgment on the claimant's claim against the defendant. The application was made under Order 12 rule 23(1) of the Courts (High Court) (Civil Procedure) Rules.
2. The claimant's claim is for damages for personal injuries that he suffered as a result of the alleged negligence of the defendant in making him drive an overloaded vehicle late in the night when he had already had a full day of work, which resulted in the claimant losing control of the vehicle and getting

injured. The claimant also seeks costs of this action. The defendant agrees that he employed the claimant but denies the claim of negligence.

3. On the application for summary judgment, the claimant filed a sworn statement in support of his application and alleged that the defendant's defence is a general denial defence with no particulars on which the denial is based. He indicated that this raises suspicion that the defendant has no defence. He then asserted that he therefore believes that the defendant has no defence. And that the defence filed is a mere sham aimed at causing delay. He therefore prayed for summary judgment. The claimant did not provide any evidence to prove his claim by the sworn statement that he filed in support of his application herein.
4. On his part, the defendant contended that on an application for summary judgment, the claimant must establish his case and then show that the defendant has no defence. The defendant pointed out that the defendant has not proved his case by sworn statement and sought a dismissal of the instant application.
5. The claimant replied that his case cannot be proved at this stage as that is a matter of evidence. He asserted that the application for summary judgment must be determined basing on what is in the statement of case, formerly called pleadings.
6. This Court agrees with the parties that this Court has power to enter summary judgment under Order 12 rule 23(1) of the Courts (High Court) (Civil Procedure) Rules where the defendant has filed a defence but the claimant believes the defendant does not have any real prospect of defending the claim.
7. As correctly submitted by the defendant, and in terms of Order 12 rule 24 of the Courts (High Court) (Civil Procedure) Rules, the procedure on such an application for summary judgment is that the claimant files a sworn statement which verifies the facts in the application and states that the claimant believes there is no defence to the claim. The specific orders sought must also be spelt out.
8. What is significant is that, on an application for summary judgment, the sworn statement must verify the facts in the application. Verifying the facts in the application entails that the claimant must substantiate the facts by sworn statement. When one reads Order 12 rules 25 and 26 it is clear that the claimant must substantiate, prove or establish his claim or case by sworn

- statement. The Court must be satisfied that there is no need for a trial of the application in view of such proof of the claim and lack of an arguable defence.
9. In the present matter, the claimant has not brought evidence to prove his claim. This is clear beyond doubt because even during oral argument the claimant actually asked this Court to enter summary judgment on the basis of the statement of case, previously known as pleadings. However, that is not the import of the procedure on summary judgment, namely, to enter summary judgment on the basis of the statement of case alone. Where a party is of the view that another party's statement of case in defence is lacking, as is alleged in this matter, then an appropriate application to strike out the defence for the alleged irregularity ought to be made in that regard to zero in on the impugned irregularity in the defence but not a summary judgment application.
10. This Court is buttressed in its view above considering the discussion of a similarly worded English Rule, CPR 24, providing for summary judgment in the case of *Easyair Limited v Opal Telecom Ltd* [2009] EWHC 339 (Ch) [2.1] where Mr. Justice Lewison stated a number of points for the Court's consideration on a summary judgment application, namely, whether a claimant has a 'realistic' as opposed to a 'fanciful' prospect of success. 'Realistic' means a claim that is more than merely arguable, a claim that carries a degree of conviction. It was also stated that the Court must not conduct a 'mini-trial' in reaching its conclusion. Nor should the Court take everything a party says at face value without analysis. It was also indicated that under the Rule, the court should consider the evidence before it at the application and evidence that may reasonably be expected to be available at trial. And that the court should be hesitant to make a final decision without a trial (even if at trial the case may turn out to not be all that complicated) if a fuller investigation of the facts might affect the evidence available to a trial judge, and so affect the outcome of the case. And that, on the other hand, if the court is satisfied that all the necessary evidence has been put before it and the parties have had an opportunity to make submissions, the court is encouraged to 'grasp the nettle' and decide short points of law or construction.
11. This Court therefore agrees with the defendant and declines the instant application with costs to the defendant. The matter shall be escalated through mediation.

Made in chambers at Blantyre this 1<sup>st</sup> March, 2022.



M.A. Tembo  
**JUDGE**