

THE REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
CIVIL CAUSE NO.168 OF 2017

BETWEEN

Evance Kataika..... Plaintiff

AND

Selemani Ali.....1<sup>st</sup> Defendant

National AIDS Commission.....2<sup>nd</sup> Defendant

REUNION Insurance CO. Ltd.....3<sup>rd</sup> Defendant

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CORAM:    *Madalitso Khoswe Chimwaza,*                      *Assistant Registrar*  
              *D. Silungwe,*    *Counsel for the plaintiff*  
              *K.W. Dossi*    *Counsel for defendants*  
              *Mpandaguta*     *Court Clerk*

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**RULING ON SUMMONS FOR SUMMARY JUDGMENT**

This is a ruling on a summons for summary judgement pursuant to Order 14 rule 2 of the Rules of Supreme Court (RSC). It is supported by an affidavit and skeleton arguments. The summons is heavily opposed by the defendants.

**Brief Facts**

The plaintiff commenced action through writ of summons and in the statement of claim the plaintiff is claiming damages for pain and suffering, loss of amenities of life, damages for disfigurement, loss of earning capacity and special damages of K59,270 for medical expenses, police report and costs of the action. Para 6.2 of statement of claim

This follows an accident that happened on or about the 5<sup>th</sup> of September 2016 at around 18:15 hours when the 1<sup>st</sup> defendant was driving motor vehicle Toyota Hilux Registration number BP 6997 from the direction of Mchinji towards Lilongwe along the Mchinji –Lilongwe road. On arrival at Cheyadi village he so negligently made a three point turn in the middle of the road

when motor vehicle Toyota Hiace Minibus registration Number LA 4332 was close that the said motor vehicle Toyota Hiace hit the 1<sup>st</sup> defendants motor vehicle Toyota Hilux BP 6997. Para 5 of statement of claim.

The 1<sup>st</sup> defendant was the driver of Toyota Hilux BP 6997 and 2<sup>nd</sup> defendant's agent/ employee while the plaintiff was a fee-paying passenger in the Toyota Hiace Reg. no. LA 4332.

The 3<sup>rd</sup> defendant was at all material time the insurer of motor vehicle Toyota Voxy Station Wagon registration No. BU 1109 and is sued in that capacity. Para 4 of statement of claim.

The defendants filed a defense on 29/3/17 in which they admitted that the 3<sup>rd</sup> defendant was insurer of motor vehicle registration No. BP 6997 Toyota Hilux.

The defendants referred to paragraph 5 of the statement of claim and deny that the collision was solely or alternatively contributed by the negligence of the driver of motor vehicle Toyota Hiace minibus registration number LA 4332 and demanded strict proof from the plaintiff.

The defendants filed affidavit and skeleton arguments in opposition to the summons for summary judgement in which they refer to the vehicle that was involved in the accident on 5<sup>th</sup> September 2016 to be BU 1109 and that the defendants have a defense on merit, 1<sup>st</sup> defendant was not negligent and therefore not liable for plaintiff claims.

#### **Issue for Determination**

- (i) Whether the plaintiff has proved the claims and therefore entitled to summary judgment
- (ii) Whether the defendant has raised a bona fide defense to the plaintiff's claim.

#### **The Law**

A plaintiff is entitled to obtain summary judgment under Order 14 of the Rules of the Supreme Court if he can clearly establish his claim and the defendant is unable to set up a *bona fide* defense or raise an issue (s) against the claim which ought to be tried (See *Roberts v Plaintiff* [1985]1BB 597; *Bowsprit Trading (Pty) Ltd v Namalunga Enterprises Ltd* [1992] 15 MLR 33).

Order 14 rule 1 provides as follows;

*"where in an action to which this applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defense to a claim included in the writ, or to a particular part of such a claim, or has no defense as to the amount of any damages claimed, apply to the court for judgement against that defendant."*

The law allows a defendant to file and serve an affidavit in opposition to the summons. The defendant is entitled to show cause as to why summary judgment should not be entered.

The defendant's affidavit must dwell upon particulars and should as far as possible, deal specifically with the plaintiff's claim and state clearly and concisely what the defense is, and what facts are relied on to support it. It should also state whether the defense goes to the whole or part of the claim, and in the latter case it should specify the part: **Practice note 14/4/5.**

This court is quite mindful of the fact that summary judgment is an exception to the general rule that ideally where parties dispute the claims the court should not deny the defendant an opportunity to be heard.

In the case of **Pereira vs Ndeule t/a Cenda Building Contractors [1993] 16(2) MLR 712**, in which Chipeta JA, sitting as Deputy Registrar made a distinction between an application for summary judgment under O.14 RSC, and application to set aside a default judgment where the rules allows the presiding officer in a summary judgment application to delve into questions of merits in order to decide whether any proposed defense is valid or only a sham.

#### **Reasoned Analysis of Law and Facts**

This court has noted that the plaintiff filed and adopted an affidavit and skeleton arguments in support of the summons. In the affidavit the plaintiff has referred to vehicles BP 6997 Toyota Hilux being driven by 1<sup>st</sup> defendant and LA 4332 Toyota Hiace minibus in which the plaintiff was a fee paying passenger being the ones that were involved in the accident. There is no mention of a vehicle BU 1109 Voxy as being the one that was involved in the accident. The only para where this vehicle is mentioned is under para 4 of the statement of claim in which it is being referred to as the vehicle which was insured by 3<sup>rd</sup> defendant. The defendants in the affidavit in opposition to the summons they have also referred to this vehicle BU 1109, and yet in the defence it was not mentioned as being the one that was involved in the accident.

The 3<sup>rd</sup> defendant was at all material time the insurer of motor vehicle Toyota Voxy Station Wagon registration No. BU 1109 and is sued in that capacity. Para 4 of statement of claim.


The defendants filed a defense on 29/3/17 in which they admitted that the 3<sup>rd</sup> defendant was insurer of motor vehicle registration No. BP 6997 Toyota Hilux.

This court is at a loss whether this vehicle BU 1109 was indeed involved in the accident and caused the injuries being claimed by the plaintiff despite being mentioned to have been insured by 3<sup>rd</sup> defendant.

With these observations this court is reluctant to grant the summary judgement as there are doubts as regards the plaintiff's case, as well as the defendants case and the doubts can not be resolved through affidavit evidence. This matter will proceed to trial so that these issues can be clarified through evidence given by both parties and be subjected to cross examination.

Summons for summary judgement dismissed with costs in the cause. Matter will be set down for trial.

Made in Chambers this 2<sup>nd</sup> day of March, 2018



Madalitso K. Chimwaza

**ASSISTANT REGISTRAR**