

The Judiciary
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NUMBER 853 OF 2015

BETWEEN

COLLETA MUHURA.....PLAINTIFF

AND

VICTORIA HOTEL LIMITED.....1ST DEFENDANT

NICO GENERAL INSURANCE LIMITED.....2ND DEFENDANT

LEONARD NDINDI.....3RD DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....4TH DEFENDANT

CORAM: A.J. BANDA, ASSISTANT REGISTRAR

Mr. Kalua, for the Plaintiff

Mr. Alide, for the Defendants

Ms. Galafa, Clerk/ Official Interpreter

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RULING

Background

These are summons by the plaintiff asking the court to enter summary judgment or judgment on admission against the first defendant. The matter was initially heard by late Justice Nyakwawa

Usiwa Usiwa before he untimely passed on. He had not yet delivered a ruling before this unfortunate incident, and the file could not be traced. It was then settled that the matter be re-heard on a reconstructed file. The application was supported by an affidavit sworn by Mr. Innocent Kalua, of counsel. The 1st defendant filed an affidavit in opposition. It was sworn by Mr. Shabir Khan, one of the legal practitioner for the 1st defendant.

Evidence

According to the affidavit in support of the application, the plaintiff is a widow of Cosmas Muhura (deceased) who was killed in the crush of several cars, one owned by the 1st defendant and insured by the 2nd defendant on 27th June, 2015. Late Cosmas Muhura was a passenger in one of the vehicles a Nissan Caravan driven by the third defendant and insured by the 4th defendant. The vehicle owned by the first defendant, which was driven by Mr. Panjwani Issa had one of its tyres burst and that forced the car to veer to its right hand side where it collided head on with the Nissan caravan in which the deceased Mhura was a passenger.

It was stated in the affidavit that police inquiries showed that Mr. Issa who was driving the first defendant's owned vehicle was responsible for the accident as he failed to control the vehicle because he was driving in over-speed, whilst the third defendant was blamed for being in experienced. The deceased widow, the plaintiff in this matter, as such commenced these proceedings to recover damages for loss of expectation of life, loss of dependency, and special damages.

Mr. Kalua further deponed that the 1st, 3rd and 4th defendants filed their defences. The 2nd defendant entered into a consent order with the plaintiff whereby judgment was entered against the 2nd defendant for loss of dependency in their capacity as the 1st defendant's insurer. The order was exhibited as IK 6. A sum of K1, 300,000.00 was paid by the 2nd defendant, being the amount remaining on the 1st defendant's insurance policy with the 2nd defendant. The plaintiff further pursued the matter to recover the remainder of his claims against the other three defendants. It was the belief of the plaintiff that since the 2nd defendant admitted liability in its capacity as the 1st defendant's insurer, the 1st defendant's defence denying liability was no longer tenable, and as such prayed that a summary judgment or judgment on admission be entered.

Mr. Khan deponed in his affidavit in opposition to the application the 1st defendant entered defence in its own right. He further stated that there was no point where the 1st defendant agreed with the 2nd defendant on any issues. The 1st defendant never advised or authorized the 2nd defendant to settle the matter on its behalf.

It was further deponed by Mr. Khan that it was his belief that a consent order is arrived at after negotiations between concerned parties and since the 1st defendant was not a party to the agreement, it could not be held liable for something that it did not sanction. It was stated that it was only in clear and plain cases where summary judgment was entered. He stated that from the evidence so far available to the court, it is not clear that the plaintiff is entitled to summary judgment. Instead the evidence raised a lot of triable issues. He deponed that since the claim arose out of an alleged negligence, by law, the plaintiff was supposed to prove the negligence by parading witnesses in a full trial.

He therefore asked the court to dismiss the application with costs.

Issues

Whether summary judgment, or judgment on admission should be entered

Determination

Order 14 r 1 of the Rules of the Supreme Court gave a plaintiff the ability to obtain a quick judgment, to avoid loss of time and costs in pursuing a trial where a response purported to be a defence by a defendant is no reasonable defence. The plaintiff in this case believes that since there is a consent order between the plaintiff and the 2nd defendants who is an insurer of the 1st defendant, the insured's defence cannot be of any merit.

The consent order in mentioned in this application between the plaintiff and the 2nd defendant has four paragraphs as follows;

WHEREAS the plaintiff and the 2nd defendant have through their Legal Practitioners consulted and agreed on settlement of the matter herein on the terms hereinafter appearing.

IT IS NOW hereby ordered and directed BY CONSENT as follows:

- 1. That judgment for loss of dependency be and is hereby entered against the 2nd defendant in its capacity as the 1st defendant's insurer.*
- 2. That accordingly, the 2nd defendant shall pay the plaintiff the sum of K1, 300, 000.00 being the amount remaining on the 1st Defendant's Insurance Policy with the 2nd defendant broken down as follows: K1, 000,000.00 as compensation and K300, 000.00 as costs.*

3. *That the plaintiff shall pursue her claim for the remainder of the compensation for loss of dependency against the 1st, 3rd and 4th defendant*
4. *That upon payment of the total sum of K1, 300,000.00 by the 2nd defendant stipulated above, this matter shall stand wholly withdrawn against the 2nd defendant*

In the end the order is signed by legal counsel of both the plaintiff and the 2nd defendant and it was also endorsed by the registrar.

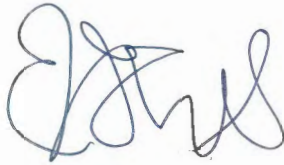
The plaintiff relies on the case *Mrs. A.L. Ntonya t/a Mum's Bakery and Betekesi Kacholola v. Attorney General and Eagle Insurance, High Court Civil Cause Number 313 of 2003*. In that case, the Assistant Registrar, Ligowe, as he then was strike out a defence of an insured defendant, as the claim was fully settled by the insurer defendant. The cited case is not similar to this case at all. Here the

In the instant matter the 1st defendant was not party to the consent order. A consent order is treated similarly as any other contract. One who is not a party to a contract neither derives benefits out of it nor accrue liability from it, by way of enforcement. The 2nd party was never a party to that consent order. In fact even in the case of the 2nd defendant the order is not express on liability. It is only but inferred from agreement to pay for loss of dependency that the 2nd defendant admitted liability. Section 148 of the Road Traffic Act gives a plaintiff mandate to sue an insurer directly as of right. One would speculate that perhaps the 2nd defendant, the insurer did commit to the consent order, without advice from the insured on the understanding that they could so proceed as they were sued directly under section 148 of the Road Traffic Act. The 1st defendant cannot be said to have admitted liability from the consent order to which they were not a party.

I agree with submission of counsel for the first defendant that it is not known the remainder that the plaintiff still seeks from the three other defendants. The main proceeding is dealing with a claim for unliquidated damages. There has not been a clear apportionment of liability from evidence available at this stage of trial, among all other parties involved in the fatal accident. The consent order signed between the plaintiff and the second defendant has not answered the question as to which party was negligent, if at all in the causation of the fatal accident. I find that justice demands that the 1st defendant be accorded leave to defend the matter.

From the foregoing, I dismiss the application of the plaintiff with costs to the 2nd defendant.

Made this 23rd day of April, 2018

A handwritten signature in blue ink, appearing to read 'Austin Banda', with a stylized, cursive script.

Austin Jesse Banda

Assistant Registrar