IN THE SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL APPEAL NO. 13 OF 2006

(Being Civil Cause No 2772 of 2004)

BETWEEN:

MSAIWALE CHIGAWA (Dr.)…….APPELLANT

AND

YUNUS ABU MUSSA …… RESPONDENT

BEFORE : Hon Justice Tambala, SC JA
Hon Justice Mtambo, SC JA
Hon Justice Tembo, SC JA

Dr. Msaiwale Chigawa
Present/unrepresented
Nampota, of Counsel.

Mtambo, Sc, JA

J U D G M E N T

This is an appeal against the decision of the High Court and delivered in Chamber on February 27, 2006 in which it upheld the order made by the Deputy Registrar setting aside a judgment which was entered on December 03, 2004,in default of defence, on the ground that the respondent had a defence on the merits. And on the further question whether the respondent was properly represented by learned counsel who appeared, the court was of the view that the appellant waived his right to raise the issue because he did not do so when the matter was before the Registrar. In other words, the High Court is saying that the appellant not having raised the

issue before the Deputy Registrar concerning the appropriateness of the presence of learned Counsel in the matter could not do so on appeal to the Judge in Chambers.

A statement about the background of the case will certainly help to make matter easily comprehensible. On September 20, 2004, by write of summons, the appellant commenced proceedings against the respondent for a specified sum of money, being expenses incurred as a result of a road traffic accident involving their motor vehicles. The insurer of the respondent's motor vehicle was NICO General Insurance Company Limited, hereinafter referred to only as NICO. It (NICO) has not been made a party to the proceedings. On December 03, 2004, the respondent not having entered defence to the action, the appellant obtained judgment in the sum claimed, and a warrant of execution was subsequently issued. Later, the appellant received communication from Messrs Nampota and company, a firm of legal practitioners, to which was attached a copy of an order made by the High Court staying the execution of the warrant, and the judgment was later set aside. It is clear from the record that all this was done by Messrs Nampota and Company on the instructions of NICO on whose behalf it was argued both in the High Court and before us, that it (NICO) was mandated to take over or participate in any action involving the respondent in terms of the insurance policy agreement entered into between them i.e. NICO and the respondent. The relevant clause of the agreement is clause 5 which, in the material part, provides that NICO may at it's own option undertake the defence of any proceedings in any court of law in respect of any action causing or relating to any event which may be the subject of underunity under the agreement.

And it is in these circumstances that the appellant has now come before us mainly to decide whether based merely on the insurance policy agreement, NICO may be granted an audience in these proceeding notwithstanding that it is not a party to the action. But before we consider this, we think we should first and quickly dispose of the issue whether the appellant can be said to have waived the right to raise the matter concerning the appropriateness of the presence of learned counsel from Nampota and Company in the proceedings before the Court. Appeals from decisions of Registrars to a Judge in Chambers are governed by Order 58 of the Rules of the Supreme Court 1965. The Order provides that an appeal from the Registrar to a Judge in Chambers is dealt with by way of actual re-hearing of the application which led to the order

under appeal and the Judge treats the matter as though it came before him for the first time. And, pursuant to the Order, it is common practice, subject of course to the question of costs, to even admit further or additional evidence to that which was before the Registrar therefore, the matter having been before the High Court by way of actual re-hearing of the application which was before the Deputy Registrar and that the High Court should have treated the matter as though it came before it for the first time, it was not open to the judge to refuse the appellant to raise the issue regarding the appropriateness of the presence of learned counsel in the case. Additionally, it seems to use that the issue, especially that learned counsel appears to act for a non-party to the proceedings, is inseparable from the case which was before the Court. Parties or their Counsel, if any, to a proceeding are the core of any court action; they must, therefore, always be properly before the court. We are, therefore of the view that the issue regarding the appropriateness of the presence of counsel was incapable of waiver and, therefore, that the High Court was wrong in its view that the appellant waived his right to raise the matter before it.

We now turn to the question whether NICO, based merely on the insurance policy agreement, may be allowed an audience in these proceedings notwithstanding that it is not a party to the action. In legal parlance, the word 'party' refers to those by or against whom a legal suit is brought; all others who may be affected by the suit are persons interested but not parties. And it is important always to remember that in an action of tort a party has a free-hand to choose as a defendant every person who is liable to him for the act complamed of because, if for nothing else, all persons concerned are jointly and severally liable for all damage caused by such act. After all it is the plaintiff who takes the real risk as he would suffer costs and in some cases damages if he will have dragged a wrong party to Court. Similarly, a defendant, and not the plaintiff, should normally be ordered to pay costs of a successful third party because generally speaking, a defendant and a third party stand in relation to one another as if the defendant had brought a separate action against the third party. This is so because, by way of third party notice, the defendant will be the one to have caused a summons/writ/complaint to be served upon a third party as a person not a party to the action but who is or may bed liable to him for all or part of the plaintiff's claim against him. We thought we should say this just to indicate that it is not for nothing that there are parties to a proceeding. It is because in addition to settlement of a dispute

between or among the parties, there are also the questions of costs and execution of the decision of the court.

We have said above that NICO has not been made a part, to the action. But as can be seen from the facts, it (NICO) has caused, and would like to continue to cause, certain events to happen in these proceedings notwithstanding that it is not a party thereto; this means that it can not be liable in costs. We thought we should make this observation whose relevance will be seen later at the conclusion of this judgment.

We wish to say a word about the doctrue of subrogation and we do so just because it was raised by the appellant. We are saying that the question of subrogation let alone that of assignment, which was also alluded to by the appellant, are without a bearing on the outcome of the appeal. It is clear upon reading clause 5 of the policy of insurance, and it is not disputed, that the contract between NICO and the respondent is one of underunity. NICO agreed to indemnify the respondent for the sums that the latter would became legally liable to pay. The policy also confers a right to NICO to participate in, or undertake, a court action at its 'own option.' And it is on the basis of this that Mr. Nampota argued before us that NICO had the right of audience before us in then name of the respondent. The closest this comes to in insurance law is what is called subrogation, a part of the law of underunity; it literally means substitution of one person for another. It is really that where an insurer –or any other person who enters into a contract to indemnify another - pays the amount of the loss or damages to the insured, he is entitled to the advantages of every right of action of the assured, whether in contract or intort, which may go in diminution of the boss: see Castellain v Preston (1883) 11 QBD 380; (1881-85)d All ER Rep. 493 and H. Cousins & Co Ltd v D & C Carriers Ltd (1971)d 1 ALL ER 55; (1971) 2 QB 230. It is an element of subrogation, therefore that in order to subrogate to the rights of an assured an insurer must first indemnify the insured. The question would then have becomes whether the fact that NICO had not paid the appellant, and in fact appears to be disputing liability, prevents it from talking about subrogation to the respondents rights in the action at all. The answer would certainly have been in the affirmative NICO has not indemnified the respondent in respect of the damage and, therefore, cannot be subrogated to his (the respondent's) rights against the appellant.

The result of all this is that NICO cannot be granted an audience in these proceedings merely on the basis of the insurance policy agreement without being a party thereto (to the proceedings). Accordingly, we allow the appeal in its entirety.

The question of costs has exercised our minds quite considerably bearing in mind that the appellant has had the fruits of his suit kept away for a very long period at the instance of a non-party a party to the action. And learned counsel should have known that it was not possible to successfully take up the matter in those circumstances. And since it would be wrong to condemn the respondent in costs (because it does not seem to us that he sanctioned the involvement of Messrs Nampota and Company, and since we cannot also condemn NICO (because it is not a party to the action), we think that learned counsel's firm should pay the costs both here and below.

DELIVERED in open Court this ……. Day of November 2006 at Blantyre

Justice D.G. Tambala, JA

Justice I. J. Mtambo , JA

Justice A. K Tembo, JA