Malawi Judiciary

IN THE MALAWI SUPREME COURT OF APPEAL

SITTING AT LILONGWE

CIVIL APPEAL CAUSE NO. 09 OF 2016

(Being High Court Civil Case 486 of 2009 Lilongwe District Registry)

BETWEEN:

CHRISSIE KATHUMBA .....APPELLANT
(suing on her own behalf and on behalf of the Estate of Steven Kathumba (Deceased)).

AND

AGMA CORPORATION LIMITED .....1st RESPONDENT

CITIZEN INSURANCE LIMITED .....2nd RESPONDENT

RESPONDENT

CORAM : HONOURABLE JUSTICE E. B. TWEA, SC JA
HONOURABLE JUSTICE DR. J M ANSAH SC JA
HONOURABLE JUSTICE R. R. MZIKAMANDA SC JA

Absent - Counsel for the Appellant

Kalua - Counsel for First Respondent

Absent - Counsel for the Second Respondent

C. Masiyano - Recording Officer

JUDGMENT

Justice E.B. Twea SC

The appellant, who was plaintiff in the Court below, brought this action claiming damages for loss of dependency, expectation of life, special damages and costs. The action was on her own behalf and on behalf of the estate of late Steven Kathumba. The action was brought against AGMA Corporation Limited and Citizen Insurance Company Limited.

On 8th March, 2013 the writ of summons was amended – the first respondent AGMA Corporation Limited was substitute by AGMA Holdings Limited. Notwithstanding the amendment. The Court below did not amend its record and the new defendant did not file a defence. The proceedings continued on the assumption that the substituted party adopted the defence filed by AGMA Corporation Limited.

We must point out therefore, that this case suffered lack of care in drawing up the pleadings and in the conduct. To illustrate this point, when the plaintiff closed her case, the 1st defendant did not formally present its case. The parties just informed the court that they had agreed to file written submissions within 14 days. The case was then adjourned generally for judgment. The judge cautioned the parties that should they fail to file written submission within 14 days, the court would proceed to write the judgment. We shall not dwell on the lack of industry in the conduct of this case, however, we will point out the effect thereof in respect of the finding of the Court below.

As we had said earlier the plaintiff's action was for loss of dependence. Notwithstanding that the statement of claim did cite the name of the plaintiffs deceased husband, except in the particulars of the plaintiff capacity to sue, it was clear that the death alleged was a result of a collision between the deceased's vehicle and a bus registration AXA 11. It was the claim of the plaintiff that the bus belonged to the first respondent herein, AGMA Holdings Limited and was insured by the second respondent Messrs Citizen Insurance Limited. It is important to note that the first respondent did not, after the amendment, file or formerly adopt the defence. The defence on record filed for AGMA Corporation Limited was treated and accepted as the first respondent's defence. By the said defence the first respondent generally denied any knowledge of the events pleaded and also denied being the owner of the bus registration, AXA 11.

Since the first respondent assumed the defence of AGMA Corporation Limited, it is on record and not disputed or denied, that the second respondent and the plaintiff reached a settlement on all personal injury claims. The settlement agreement discharged both respondents against liability for personal injuries. This was not disputed by the first respondent.

It is further on record that the plaintiff, now appellant, took out a summons for summary judgment. The only issue in dispute was ownership of the bus registration AXA 11. The appellant requested for an adjournment and applied that the court should order that documents be produced to prove or disapprove the ownership of the bus. This is what the court said:

> *"From the submission by both parties it is clear that the main contention is the ownership of the vehicle that was involved in an accident the subject of these proceedings the proposal by the plaintiff that we adjourn the proceedings to allow the parties to bring evidence of ownership of AXA 11 impliedly means that the plaintiff enough evidence (preferably documentary evidence) to prove that the vehicle is owned by the 1st defendant. I am of the opinion that there is need for documentary evidence from the Road Traffic Department to show that the vehicle belongs to the first defendant. I would not want to be seen to be prosecuting the plaintiffs case from the bench by ordering the plaintiff more evidence or assertion that AXA 11 is owned by the 1st defendant. The matter should be contested at the trial. It is or that alone that the plaintiff application for summary judgment must fail with costs to the first defendant."*

Notwithstanding the missing words in the text, the position taken by the court is clear. This was not only unfortunate, it was contrary to the duty that the court owes to the parties to ensure that justice is done. Order 38 rule 3 of the RSC, 1965 is clear on this; It provides as follows:

> *"3-(1) without prejudice to rule 2, the court may, on or before trial of any action, order that evidence of any particular fact shall be given at the trial in such manner as may be specified by the order.*
>
> *(2) The power conferred by paragraph (1) extends in particular to ordering that evidence of any particular fact may be given at the trial.*
>
> *(a) by statement on oath of information or belief, or*

(b) by the production of documents or entries in books, or

(c) by copies of documents or entries in books , or

(d) in case of a fact which is or was a matter of common knowledge either generally or in a particular district, by the production of a specified newspaper which contains a statement of that fact."

This power is in addition to the power under Order 38 rule 13, which provides:

> *"13-(1) At any stage in a cause or matter the court may order any person to attend any proceedings in the cause or matter and produce any evidence to be specified or described in the order, the production of which appears to the court to be necessary for the purpose of that proceeding.*
>
> *(2) No person shall be compelled by an order under paragraph (1) to produce any document in a proceeding in a cause or matter which he could not be compelled to produce at the trial of that cause or matter"*

The power can be exercised at the hearing of summons of direction, or on application by notice under the rules made exparte in respect of Order 38 rule13.

The court was aware that the only issue that needed to be resolved was ownership or control of the bus registration AXA 11. It is our view that had the court taken into account its power under order 38, it would not have come to the conclusion that it would be aiding one party against the other. It is our view that it would have exercised its discretion differently.

This issue not having been resolved the appellant applied for and was granted a subpoena to produce the documents in respect of the registration of the bus registration AXA 11. The appellant purported to produce the registration certificate during trial. The court upheld the respondent's objection on grounds, among others, that it was not part of the documents disclosed by the appellant.

It would appear that the Court below based its ruling on order 38 rule 2A, on exchange of witness statement and the objectives therefore, In particular, the concern was that one party should not be taken by surprise. While this position is correct at law, we do not think that that was the issue. In our view the issue was

the failure by the appellant to call the officer from the Road Traffic Directorate, who had custody of the records on registration of motor vehicles, to come and produce it. The officer was subpoaned. The officer was required to appear before court to identify the document and tender it. Counsel should not have tried to tender the document herself. This notwithstanding, it was within the power of the Court below to remedy it. There was a court order and therefore notice. The officer who had been summoned should have been called to identify the document and tender it. The Court below should not have rejected the document because it was not open to the respondent to plead surprise.

Further, it is significant to note that the respondent was not consistent. It did not object to the tendering in evidence of the "Letters of Administration" which were not disclosed in the pleadings. The court should have taken into account that the respondent was selective against documents that were in favour of the appellant, not necessary, that there was procedural default.

In the course of submissions, in respect of the certificate of registration, the respondent said:

> *"My collegue has submitted that there is no prejudice on the part of the first defendant that this document is allowed. My Lady you will notice in their pleadings especially in paragraph 2 of the first defendants defence that there is denial of ownership of the motor vehicle. I also raised that issue when we discussed before coming to court and I showed to him the copy of documents I have, the copy of the blue book which I got from first defendant. The contents of that documents are different from the contact of the document which is being produced in this court. They both pertain to AXA 11 but the contents are different especially the ownership. Clearly my colleague does not expect me to see a document and start verifying with my client on that document when the matter is already due for trial. There is clear prejudice in this matter....."*

Such line of submissions was most unfortunate.

First and foremost the respondent did not disclose any document in its bundle of pleading. It had no right therefore to submit that it had, in its custody, a different document in respect of the same bus. Secondly, this should have put the Court below on notice that the poor conduct of the case was an issue in this matter. It should have taken steps to remedy the situation so that there be a fair trial of issues.

Having considered this case, notwithstanding the lack of industry on both sides and the default on the part of the Court below, we find that this appeal must succeed.

First it should not be forgotten that the action was based on negligence. There is no dispute that the bus was driven negligently and thereby caused the collision. Further, there is no dispute that the driver who drove the bus negligently, thereby causing the accident, was convicted for careless driving. The only issue that was before the Court below was who owned or had control of the said bus.

It was the evidence of the appellant that the bus that was involved in the accident was registered in the name of AGMA Holdings Limited, the first defendant, now respondent in this Court. This evidence was not challenged at all. The issue throughout, even in the judgment, was that the registration should be proved by a document. We don't think so. In this case the respondent did not raise any doubt as to the basis of the appellant's knowledge of the registration of the bus so as to require such proof. Granted the respondent pleaded that it did not own the bus. However, it did not challenge the appellant. The oral evidence was that the bus was registered to AGMA Holdings Limited and insured by Citizen Insurance the second defendant. The appellant sued the insurer and the insured. The insurer admitted the suit and settled. The insurer in the settlement agreement absorbed the insured from any liability in respect of personal injuries. The respondent, being the reputed insured, did not did not challenge this evidence. In fact at the beginning of the trial the respondent applied that the proceedings be stayed because Citizen Insurance Limited was in liquidation. It did not refute that the bus was insured be Citizen Insurance Limited. The veracity of the appellant's statement therefore, was not disputed. No legal basis for seeking the registration document, as the best evidence, was established.

Further, the documents of ownership would, ordinarily, be in the custody the owner of the bus, As we said in the case of **Bentley Namasasu vs Ulemu Msungama and The Electrical Commission MSCA Civil Appeal of 2016,** the respondent would not have expected the appellant to produce documents that were not in her custody. In the absence of any evidence to the contrary we are satisfied that the appellant established, on a balance of probabilities, that the bus in issue was registered to or controlled by the respondent.

It is our finding therefore that the bus, registration AXA 11, was driven negligently and caused the collision that resulted in the death of the husband and child of the appellant. Further, we find that the said bus was registered to or controlled by the

respondent. We give judgment for the appellant with cost in this Court and the Court below.

Pronounced in open court this 13th day of April 2018 at Lilongwe.

Signed: .....

HONOURABLE JUSTICE E.B. TWEA SC

Signed: .....

HONOURABLE JUSTICE DR J.M. ANSAH SC

Signed: .....

HONOURABLE JUSTICE R.R. MZIKAMANDA SC