MALAWI JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NO. 872 OF 2013

BETWEEN:

MEPHER NKHOMA.....PLAINTIFF

AND

BARNET KOKO.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: THE HON JUSTICE H.S.B. POTANI

Mr. Mickeus, Counsel for the Plaintiff

Mr. Mpaka, Counsel for the Defendants

Mr. Kanchiputu, Court Clerk

RULING

The plaintiff commenced this action against the two defendants claiming damages for personal injuries arising from a road traffic accident attributed to the negligence of the 1st defendant in driving a motor vehicle insured by the 2nd defendant. When

the matter was called for trial on December 16, 2015, it came to light that counsel for the defendants had on December 11 filed and served a notice that at the hearing, the 2nd defendant would apply to for leave to amend its defence. The notice was filed and served with a draft of the amended defence. As logic would demand, the court directed that the proposal to amend the defence be dealt with as a preliminary issue whereupon counsel for the plaintiff registered serious objection to the amendment resulting in protracted arguments and submissions from both sides to the case upon which the court now makes its determination.

Two points have been canvassed by the plaintiff in objecting to the amendment. Firstly that the amendment is coming at a very late stage as to occasion injustice. According to counsel for the plaintiff, although the law allows and it is in the discretion of the court to grant amendments to pleadings, the court may not grant amendments if satisfied that they will occasion injustice to the other party. In a bid to demonstrate that the amendment sought herein would cause injustice to the plaintiff, counsel argued that the policy of insurance which the 2nd defendant relies on in the proposed amendment has always been in the custody of the 2nd defendant since the action was commenced in 2013 as such the 2nd defendant was aware of its terms and conditions yet they never raised them until the time of trial. It has been observed by counsel that in the initial defence, it was denied that the 2nd defendant had insured the vehicle involved in the accident the plaintiff got injured. Stemming

from that observation, it is counsel's submission that had the defendants raised the issues about the terms and conditions of the insurance policy in the initial defence, the plaintiff would have most probably not continued with the action hence the plaintiff prays that should the court allow the amendment the defendants should be condemned to costs of the action

The second point of objection advanced by the plaintiff is that the defendants having initially filed and served a joint defence, there can be no 2nd defendant's defence to be amended, rather any amendment sought should be to the joint defence. It is contended by the plaintiff that the way the amendment is being introduced it is as if the 2nd defendant intends to bring up its defence now.

It is the plaintiff's submission that these two points go to show that the 2nd defendant is acting *mala fide* as such the amendment should not be allowed. In aid of this submission the case of **Tildesley v. Harper** (1878) 10 Ch. D. 393 has been cited in which Bramwell L.J. said:

My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. [Emphasis added]

On the part of the defendants, it has been argued that delay in seeking an amendment, it is own does not take away the right. Counsel for the defendant has implored the

court to be guided by the case of **G. L. Baker Ltd v. Medway Building & Supplies Ltd** [1958] 1 W.L.R. 1216 which is to the effect that it is a guiding principle of cardinal importance on the question of amendment that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings. It is the contention of counsel for the defendants that apart from talking of injustice several times in his submissions, counsel for the plaintiff has not singled out the injustice the plaintiff will suffer if the amendment is allowed. On the contrary, it has been argued by the defendants, the fact that the amendment is being sought before trial will allow the plaintiff to tackle the amendments is her evidence hence the issue of injustice would not arise.

On the issue of the proposed amendment coming in as a separate defence for the 2nd defendant, the gist of the defendants' response is that that is a mere technical aspect which would not prevent the plaintiff from appreciating the issues being raised.

In the determination of the matter under contestation, the court would wish to first state that amendment of court process, in particular pleadings, is well provided for in Order 20 of the Rules of the Supreme Court and is not an unfamiliar territory to the court and practitioners of the law. Indeed there is a litany of case authorities on the subject including those referred to by counsel in their respective arguments and submissions. The court particularly finds the case of **Cropper v. Smith** (1883) 26

Ch.D. 700 to be very illuminating and instructive. On pages 710 to 711 Lord Justice Bowen made the following authoritative exposition of the law:

It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights ... I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or grace ... It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right

What comes out from the above dictum and indeed the cases alluded to by counsel on both sides is that ordinarily, courts would readily entertain amendments except where allowing the amendment would be prejudicial to the other party to an extent that cannot be compensated for by costs or otherwise. In the case at hand, listening to the arguments and submissions by counsel for the plaintiff, it seems the prejudice or injustice the plaintiff believes would suffer is that if the amended defence is allowed, the claim against the 2nd defendant would be unsustainable such that if the issues raised in the amended defence were raised in the initial defence the plaintiff would most probably not have continued with the action. In other words, the

plaintiff is saying if they were made aware of the issues raised in the amended defence earlier, they could not have spent the energies so far spend in pursing the claim against the 2nd defendant. Certainly it would be unjust to shut out the 2nd defendant from putting forward a defence that would enable the court to fairly decide on the case simply because the defence is being brought up late after the plaintiff has incurred costs in pursing the claim on the basis of the initial defence. As rightly argued by counsel for the defendants ,as the amendment being sought before trial, the plaintiff would have the opportunity to respond to the issues raised in it through the evidence she is yet to present. The position of the court therefore is that the prejudice the amendment would cause is one that can be compensated for by costs.

The court has also considered the attack the plaintiff has made on the amended defence that defendants having initially filed and served a joint defence, there can be no 2nd defendant's defence to be amended, rather any amendment sought should be to the joint defence otherwise it would be tantamount to allowing the 2nd defendant to bring up its defence belatedly. It is the considered view of the court that this an irregularity which has not prejudiced the plaintiff in any way. As contended by the defendants, it has not prevented the plaintiff from appreciating the issues raised in the amended defence.

In the light of the foregoing, it is the court's final position that the justice of the case would best be served by allowing the amendment with a direction that the proposed

amendments be incorporated in the initial joint defence and that the 2nd defendant shall bear costs so far incurred in these proceedings.

Made this day of February 28, 2017, at Blantyre in the Republic of Malawi

H.S.B. POTANI

JUDGE