IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 348 OF 2018

BETWEEN:

ELLINA SILAJU **CLAIMANT**

AND

ELECTRICITY SUPPLY CORPORATION OF MALAWI LIMITED **DEFENDANT**

CORAM: JUSTICE M.A. TEMBO

Amidu, Counsel for the Claimant
Kauka, Counsel for the Defendant
Mankhambera, Official Court Interpreter

ORDER

This is this Court's order following an application for summary judgment on the claimant's claim for damages for the personal injuries.

The claimant commenced this matter by summons seeking damages for the personal injuries she had suffered due to the alleged negligence on the part of the defendant in the manner the defendant managed its power lines causing her to be electrocuted. She filed a statement of case alleging the negligence and alternatively nuisance.

The defendant filed a defence in which it denies each claim made by the claimant in her statement of case in relation to the alleged negligent conduct of the defendant and the resultant injuries occasioned to the claimant.

The claimant then filed an application for summary judgment under Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules which provides that

> A claimant may apply to the court for summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have a real prospect of defending the claim.

The claimant filed a sworn statement in support of her application for summary judgment. In the sworn statement she alluded to the fact that she commenced her claim as per her summons and statement of case which she attached to the sworn statement.

She then alluded to the fact that the defendant subsequently filed a defence. She noted that the defendant's defence is merely a general denial defence. She elaborated that the said defence merely denies her claims in her statement of case but does not offer the defendant's version of events or what actually happened.

She consequently contended that the defendant's defence lacks in substance and has no real prospect of success and that summary judgment should be entered for her.

The claimant mainly contended that the defendant's defence fails to meet the requirements on the couching of a defence as laid out in Order 7 of the Courts (High Court) (Civil Procedure) Rules which provides that

> Rule 6. A defendant shall deal with each fact in the claim and shall not deny a claim generally.
>
> Rule 7. Where the defendant does not agree with a fact that the claimant has stated in the claim, the defendant shall file and serve a defence that denies that fact and states what the defendant alleges happened.

The claimant referred to the decision of *Jafali v Khupe and others* Personal injury cause number 48 of 2017 (High Court) (unreported) in which my brother Nriva J. correctly restated the requirements of Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules to the effect that the defendant must deny each fact in the claim and not deny a claim generally. And that the defendant must state what he alleges happened, if he denies the facts alleged in a statement of case.

The claimant observed that the Court in the *Jafali* case stated that general denials are detested by the new rules of procedure in contrast to the old rules or procedure under which the defendant could deny the facts and subject the claimant to strict proof.

She added that the Court in the *Jafali* case held that under the rules of procedure the Court can use its powers to knock out hopeless defences, such as those that do not amount to a legal defence to a claim and that one way of doing that is under Order 12 rule 23 (1) of the of the Courts (High Court) (Civil Procedure) Rules.

With regard to the facts in the *Jafali* case, the claimant observed that the Court stated as follows

> In this matter, the claimant put across a case of injuries and attributed the cause of the said injuries to the negligence of the 1st defendant in driving the bus. There is no defence to that allegation. All the defendants have put is a defence of general denial without specifically disputing the particulars the claimant has raised or offering their explanation of what actually happened. It was open to the 1st defendant to state how or why he was not negligent. Accordingly, I find that the defendants have no defence to the claimant's claims and there is reasonable issue to warrant continuing with the matter all the way to trial. I therefore enter summary judgment against the defendants with costs.

On its part, the defendant contended that the matter of *Jafali* was decided without any appearance of the defendants. That is a correct observation.

The defendant also contends that the *Jafali* case is not binding on this Court and is distinguishable. This Court agrees that indeed that is the position.

In the present matter, the defendant is contesting the application for summary judgment. The defence in question denies each allegation of negligence or breach of statutory duty and puts the claimant to strict proof. The defence also denies the allegation of loss and injury.

The defendant contends that a general defence is one which denies each and every allegation in the statement of claim without responding to each particular and specific allegation.

The defendant wondered how summary judgment can be entered where in response to the claimant's assertions that she stepped on a power line and suffered injury due to the defendant's negligence the defendant has specifically denied each allegation of negligence. And where the injuries are denied by the defendant.

The defendant wondered how the claimant expects the defendant to explain what happened when the defendant stated that the injuries are denied.

The defendant went on to contend that the requirement to explain what happened does not apply in this case. But that it would apply, for instance, in matters of

contract where one asserts that damage to a particular vehicle was as a result of a mechanic using a faulty part and where another denies that claim and contends that in fact the damage was caused by something else and that this would be of application if the defendant was aware of alternative facts.

The defendant then contended that the fundamental rule is that he who asserts must prove.

And that in the *Jafali* case there was a denial of negligence and yet the Court held that there was no defence to the claim of negligence and that as such there was a contradiction.

And further that the *Jafali* case is not correct in so far as it states that it is mandatory that in every case where the defendant denies a fact in the claimant's claim the defendant must state what he alleges happened.

This Court has considered the fundamental statement of the law, alluded to by the defendant, to the effect that he who asserts must prove. And this Court notes that at this stage the claimant has not proved any of her claims that are contained in her statement of case. She has simply made the claims.

What this entails is that once the defendant, in its defence, denies each fact claimed by the claimant as is required under Order 7 rules 6 of the Courts (High Court) (Civil Procedure) Rules it becomes the duty of the clamant to prove her claims by adducing evidence.

This Court agrees with the *Jafali* case to the effect that the rules require a defendant to deny every allegation that has been made. See Order 7 rules 6 of the Courts (High Court) (Civil Procedure) Rules. And that general denials and requirement of strict proof are not looked upon favourably by the new rules of court procedure.

However, the point on which this Court does not agree with the *Jafali* decision is that point by which it posits that it is mandatory that the defendant must always, and in all cases, state what he alleges happened after denying the claimant's statement of facts.

This Court is of the view that Order 7 rule 7 of the Courts (High Court) (Civil Procedure) Rules should be read to mean that where necessary the defendant must state what he alleges happened.

This is because like in the present case, the defendant was not there when it is alleged that the claimant stepped on the electricity line. The events allegedly occurred at 3.00 am. How does the defendant offer facts as to what it alleges happened in relation to the alleged negligence and injuries in such circumstances?

In such a situation it is not necessary for the defendant to allege what happened but it is sufficient for the defendant to state that it denies what is being alleged by the claimant in relation to the facts of negligence and injury asserted. Which the defendant has done in the present matter.

There will of course be matters where it is necessary that the defendant must deny the fact claimed and then state what he alleges happened. And failure to state what the defendant alleges happened will be fatal to the defence.

In the present case, the defendant has denied every allegation of fact made and so the defence is good and the claimant must discharge her duty at law to prove her claim.

Summary judgment can therefore not be entered particularly also because there is no evidence on which this Court can find the defendant liable for negligence and causing the injuries alleged by the claimant.

In that connection, as correctly held in the *Jafali* case, citing with approval, the case of *Swain v Hillman* [2001] 1 ALL ER 91, on an application for summary judgment the court considers whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success. And a "realistic" claim is one that carries some degree of conviction. And that is a claim that is more than merely arguable. See *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

The court must not conduct a mini-trail in reaching its conclusion. See *Swain v Hillman* [2001] 1 ALL ER 91.

This, however, does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court because in some cases it might be clear that the claimant's assertions have no real substance, particularly if contradicted. See *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [10].

It has been pointed out that, in reaching its conclusion the court must take into account not only the evidence actually put before it on an application for summary judgment, but also the evidence that can reasonably be expected to be available

at trial. See *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.

The foregoing persuasive authorities, as persuasively discussed in *Easyair Ltd (t/a Openair) v Opal Telecom Ltd* [2009] EWCA 339 (Ch), show that on an application for summary judgment the one applying for summary judgment must show his case by statements placed before the court and then show why in view of his case the other side has no prospect of success. The Court will not conduct a mini trial but will consider the evidence before it and decide accordingly.

The foregoing authorities are persuasive since Part 24 CPR on summary judgment in England and Wales is materially the same as our own rule on summary judgment in Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules.

In the present matter, the claimant, apart from alluding to her statement of case, has not produced any evidence to show that her case has a prospect of success and a summary judgment application cannot be properly considered in that regard.

This brings this Court to consider the correctness of the procedure adopted in this matter and in the *Jafali* case. This is a matter that was not raised by the parties but which nonetheless exercised this Court's mind on the present application.

This Court observes that what in effect happened in the *Jafali* case, and what the claimant sought in this matter, was to strike out the defence for non-compliance with Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules.

There is clearly an overlap in the Court's jurisdiction on an application to strike out a defence for non-compliance with the Rules, in this case, Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules and an application for summary judgment under Order 12 rule 23 (1) of the Courts (High Court) (Civil Procedure) Rules which provides that a claimant may apply to the court for summary judgment where the defendant has filed a defence but the claimant believes that the defendant does not have a real prospect of defending the claim.

It is important that the two procedures are recognized and properly employed.

This Court is of the view that summary judgment procedure is not an appropriate procedure where the allegation is that, in reality, the claimant seeks to strike out

a defence for non-compliance with the Rules, in this case, Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules.

The appropriate procedure in this case should have been to strike out the defence for non-compliance with the Rules, in this case, Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules. And the application should have been taken out under Order 2 rule 3 of the Courts (High Court) (Civil Procedure) Rules which deals with non-compliance with the Rules.

That application would have concentrated the parties' attention properly on an examination of the defence herein and whether it was couched in compliance with the relevant rules, in this case, Order 7 rules 6 and 7 of the Courts (High Court) (Civil Procedure) Rules.

The decision in the *Jafali* case was therefore not properly arrived at given that the procedure employed was not the correct one and this Court would not follow the same.

There is persuasive authority for treating applications for striking out a statement of case for non-compliance with the rules and applications for summary judgment differently regardless of the fact that there is an overlap in the two jurisdictions.

This persuasive authority relates to the corresponding similar procedures that are provided under Civil Procedure Rules part 3.4.2 (a) for striking out statement of case and Civil Procedure Rules part 24 for summary judgment in England.

It has been persuasively stated in *Saeed and another v Ibrahim and others* [2018] EWHC 3 (Ch) that in considering the two jurisdictions, namely to strike out a statement of case and for summary judgment

> An application under CPR 3.4 (2)(a) focusses exclusively on the statement of case, whereas an application under CPR 24 allows the court to look at the claim itself, the defence, and all the relevant evidence.

It was therefore not appropriate to apply for summary judgment and to focus only on the statement of case without regard to any evidence of the parties on this application.

This Court notes that there is also persuasive authority for the view that there are circumstances where an application to strike out a statement of case may be treated as if it is a summary judgment application. See *Moreney v Anglo-*

European College of Chiropractice [2009] EWCA Civ 1560 and *Ministry of Defence v AB* [2010] EWCA Civ 1317.

The situation in the present case and in the case of *Jafali* is however different in that we did not have an application to strike out as such but an outright application for summary judgment.

For the foregoing reasons, the application for summary judgment is declined with costs to the defendant.

Made in chambers at Blantyre this 7th November 2018.

M.A. Tembo

JUDGE