



THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.15 OF 2017

BETWEEN

Tapiwa Kumbilani (a minor suing through her next friend Patricia Kumbilani)..... Plaintiff

and

Lucky Mpulula..... 1st Defendant

Prime Insurance Company Ltd.....2nd defendant

CORAM:	<i>Madalitso Khoswe Chimwaza</i>	<i>Assistant Registrar</i>
	<i>Silungwe,</i>	<i>Counsel for the Defendant</i>
	<i>S. Mhango</i>	<i>Counsel for the plaintiff</i>
	<i>Mpandaguta</i>	<i>Court Clerk</i>

Ruling on Summons for Summary Judgment

This is a ruling on summons for summary judgment filed by the plaintiff and heavily opposed by the defendants.

Brief facts

The particulars of the claim are that on or around 29th July, 2016 at around 11:00 hours the 1st defendant was driving a motor vehicle Nissan Pick-up registration number DZ 2715 from the direction of Lilongwe going towards Dedza along Dedza /Lilongwe M1 road. Upon arrival at Mbuna Trading Centre, the 1st defendant so negligently drove the motor vehicle that he hit the plaintiff infant who was crossing the road with friends. The plaintiff claim that the 1st defendant drove the vehicle negligently by over speeding at a trading centre are where road users are always milling about, and he failed to keep a proper look out and he failed to manage and control the vehicle so as to avoid the accident.

In their defense the defendants deny liability and claim that the accident was wholly caused by the negligence of the plaintiff who crossed the road without looking to the left or right to make sure that it was safe to cross and that the infant crossed the road without due regard to other road users and oncoming traffic and that the infant was playing in the middle of the road without due regard to oncoming traffic.

In their affidavit in support of the summons for summary judgment the plaintiff claim that the defendants defense is a sham on the grounds that the allegations that the plaintiff infant crossed the road

negligently or was playing on the middle of the road do not exculpate the 1st defendant's duty of care which he owed to her to stop or slow down and a duty to drive at a reasonable speed that would have enabled him to stop within the limits of his vision or in an emergency. The defendant's defense does not give particulars of what he did to show that he discharged this duty. The defendant did not plead any facts to show that the 1st defendant drove the vehicle carefully considering that this was a busy place with people around being a busy trading centre.

The issues for determination by the court are twofold:

- (i) Whether the plaintiff has proved their claim and therefore entitled to summary judgment
- (ii) Whether the defendant has raised a bona fide defense to the plaintiff's claim.

The Law and Analysis

A plaintiff is entitled to obtain summary judgment under Order 14 of the Rules of the Supreme Court if he can clearly establish his claim and the defendant is unable to set up a *bona fide* defense or raise an issue (s) against the claim which ought to be tried (See *Roberts v Plaintiff* [1985] 1BB 597; *Bowsprit Trading (Pty) Ltd v Namalunga Enterprises Ltd* [1992] 15 MLR 33).

Order 14 rule 1 provides as follows;

"where in an action to which this applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that that defendant has no defense to a claim included in the writ, or to a particular part of such a claim, or has no defense as to the amount of any damages claimed, apply to the court for judgement against that defendant."

The law allows a defendant to file and serve an affidavit in opposition to the summons. The defendant is entitled to show cause as to why summary judgment should not be entered. The defendant's affidavit must dwell upon particulars and should as far as possible, deal specifically with the plaintiff's claim and state clearly and concisely what the defense is, and what facts are relied on to support it. It should also state whether the defense goes to the whole or part of the claim, and in the latter case it should specify the part: **Practice note 14/4/5.**

This court is aware that summary judgment is an exception to the norm and that it has to be exercised with caution. It is established principle of law that matters must be decided on merit and that is after hearing both parties. Therefore the court should not shut out defendant by entering summary judgment.

However, in the case of *Pereira vs Ndeule t/a Cenda Building Contractors* [1993] 16(2) MLR 712, in which Chipeta JA, sitting as Deputy Registrar made a distinction between an application for summary judgment under O.14 RSC, and application to set aside a default judgment where the rules allows the presiding officer in a summary judgment application to delve into questions of merits in order to decide whether any proposed defense is valid or only a sham.

This court has noted that the defendants have no valid defense to warrant trial. The defense is a general denial intended to delay the wheels of Justice and defense of contributory negligence does not absolve liability.

The defendant herein cannot plead contributory negligence simply on the basis of the fact that the deceased did not pay attention when she was crossing the road by not looking to the left or right of the road. The issue of contribution to the cause of the accident was dealt with by the court in the case of *Tomasi Munyimbiri v. NICO General Insurance* MSCA 54 OF 2008, It was held in this case that a motorist cannot escape liability by arguing that a cyclist or a pedestrian did not give way on the road even after being warned when the motorist clearly saw the cyclist or pedestrian and he could have

braked or swerved to avoid him. Motorists owe the same duty of care to cyclists or pedestrians as they do to fellow motorists.

This principle was applied by Her Honour Chipao in **Ishmael Piano v. Mangochi Town Assembly and Prime Insurance Civil Cause no. 9 of 2015** where a similar defense was raised to the effect that the deceased did not give way on the road when warned to do so. The honourable Registrar found on the basis of the above authority and several others that such a defense does not raise a triable issue.

This court is satisfied that the plaintiff have made out their case for summary judgement and the two defendants are jointly and severally liable. This court grants summary judgment in favour of the plaintiff on all claims as stipulated in the statement claim against all the two defendants and costs of this action.

Either party aggrieved by the ruling has the right to appeal.

Made in chambers this 9th day of August, 2017



Madalitso K. Chimwaza

ASSISTANT REGISTRAR