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THE REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO.905 OF 2016

BETWEEN

Wexton Daniel Mtandaza Gande..... Plaintiff

and

Gomezgani Mwandira..... 1st Defendant

Reunion Insurance Company Ltd.....2nd Defendant

Coram:	M. K. Chimwaza	Assistant Registrar
	Silungwe	Counsel for the plaintiff
	Wawanya Dossi	Counsel for the Defendant
	Mpandaguta	Court clerk

RULING ON SUMMONS FOR SUMMARY JUDGMENT

Introduction

This a ruling on a summons for summary judgment filed by the plaintiff pursuant to **Order 14 (2) RSC**. The plaintiff is claiming damages for pain and suffering and loss of amenities of life, disfigurement, loss of earnings and earning capacity, special damages of K122,400.00 for cost of repairing of motor cycle and preparation of medical and police report.

The brief facts according to the statement of claim are that on or about 5th May 2016 at around 10:30 hours the 1st defendant was driving the motor vehicle Volvo Saloon registration Number BU6076 from the direction of Lilongwe District heading towards Kasungu district along the MI road. Upon arrival at Camel Trading Centre he so negligently overtook the plaintiff was riding a motor cycle registration number BR 9803 RD MTR heading the same direction that he collided with the plaintiff in the process. The particulars of negligence were that the 1st defendant improperly and carelessly overtook without due regard to other road users, he failed to keep a proper look out and failed to manage and control the vehicle so as to avoid the

accident. As a result he suffered fracture of medial malleolus of the ankle, fracture of the distal fibula, cut wound on the face, multiple bruises on the right leg and both arms, scars in the affected areas and sustained 40% incapacity.

In defence the defendant denied liability for negligence and attributed the accident solely to the plaintiff or alternatively that it was contributed by the plaintiff in that he failed to pay sufficient heed to the presence of the 1st defendant's motor vehicle on the road, he failed to see the said motor vehicle in sufficient time to avoid the collision or at all or that he failed to manage and / or control the motor cycle so as to avoid the accident.

Issue for Determination

Whether the plaintiff has managed to prove his case to warrant a summary judgement

Whether the defendants defence has merit to warrant a trial

The Law and Reasoned 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.

In the present case the plaintiff claim that the defendants defence of sole or contributory negligence on the part of the plaintiff is a logical impossibility as the defendants have not denied that the accident happened as the 1st defendant was overtaking the plaintiff as such the plaintiff could not have failed to pay sufficient heed to the presence of 1st defendants motor vehicle on the road. They claim that this defence is a sham, too general, vague and evasive, falling short of imputing any specific acts or omission on the plaintiff.

In the case of **Munyimbiri vs NICO General Insurance Company Limited** MSCA Civil Appeal No. 54 of 2008 (Unreported) the Supreme Court stated that motorists owe same duty of care to cyclists or pedestrians as they do to fellow motorists, such that a motorist cannot proceed to hit a cyclist or a pedestrian simply because the cyclist or pedestrian failed to give way, even when the motorist clearly saw the cyclist or pedestrian in front of him and could have braked or swerved to avoid him, a position recently emphasized by Justice Kachale in **Moses Lameck and another vs Saukani Chinthenga and Prime Insurance Co. Ltd** Civil cause No. 545 of 2015.

This court upon analyzing the case on both sides finds that the plaintiff has not raised a valid case warranting summary judgement.

The defendants defence raises a valid defence worthy taking to trial. The fact that the accident happened as the defendant was overtaking the plaintiff does not mean he was negligent per se. The rules of the road allows motorists to overtake each other and both parties have a role to play under such circumstances. There is no evidence that the 1st defendant did the overtake at a place where it is prohibited to do so according to the rules of the road or when it was not safe to do so for both motorists.

The defendant has managed to raise a triable issue of contributory negligence on the part of the plaintiff worthy to be tried and this court is dismissing the summons for summary judgement. Matter will proceed to trial and costs are in the cause.

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

Made in Chambers this 22nd day of April, 2018 at Lilongwe.



Madalitso K. Chimwaza

ASSISTANT REGISTRAR