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IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 838 OF 2020

BETWEEN:

KETRINA CHIZONDA (Mother suing on her own behalf and on behalf of the beneficiaries and dependents of the estate of MANUEL SIKALIOTI and PEMPHERO SIKALIOTI (Deceased)).....1ST CLAIMANT

WILLINESS JOSEPH (suing through SELINA JOSEPH mother and next friend)... 2ND CLAIMANT

AND

PRECIOUS KAMBANI.....1ST DEFENDANT

BRITAM INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM: A.P KAPASWICHE

ASSISTANT REGISTRAR

Namasala

Counsel for the claimant

Makoko

For the defence

Kumwenda

Clerk/ Official Interpreter

RULING

BACKGROUND

The matter came before this court for taxation of costs on the 24th day of June 2021. Before the date of hearing, the defence filled a notice of preliminary objections on the 17th day of June 2021. The court proceeded to hear the parties on the preliminary objections and adjourned the matter for ruling and this is the ruling on the preliminary objections.

SUBMISSIONS

The preliminary objection raised by the defence is based on the consent order that the parties entered on the 24th day of February 2021. It was argued that the said consent order limited both the defendant's liability to the Insurance Policy Limit and accordingly, the matter need not proceed for taxation of costs. It was argued that the 24th February consent came about on the understanding that liability was to be entered subject to the policy limit of MK5,000,000.00 on behalf of the 1st and the 2nd defendant. It was submitted that the claimant has fallen foul of the dictates of the consent order which clearly indicates that both the defendant's liability would be limited to the policy limit hence the payment of MK5,000,000.00 on the part of the defendants should entitle them to discontinuance and withdraw of all related matters herein.

The defence cited the case of **Andson Kabotolo & Others vs Real Insurance & Others Personal Injury Cause No.780 of 2015** where the court found that the policy limit covered any liability in a personal injury claim inclusive of both damages and costs and that once the insurance company has paid up the maximum of the policy limit to the successful third party, then the insurer's obligations are exhausted such that the excess beyond the policy limit, be it damages or costs of litigation, shall be recoverable by the successful third party from the insured who are primarily liable for the tort.

The claimants objected to the argument advanced by the defence. Counsel Namasala invited this court to take a look at the consent order referred to. It was submitted that the said consent order is in three parts; the first part says that the defendants admit liability subject to

the insurance policy limit of MK5,000,000.00; the second part says that if the parties cannot agree on quantum, then the matter will come for assessment of damages and the third and last part says that costs are for the claimant. It was argued that there is nothing in this consent order showing that the claimant waived his right to recover costs in the present case. On the cited Kabotolo case, Counsel for the claimant argued that the said case is very clear that if the insurance policy limit is exhausted; the excess is recoverable from the insured. In the present case, the insured is the first defendant and is being represented by Counsel Makoko and following the Kabotolo case, there is nothing barring the claimant from recovering the costs from the first defendant.

ANALYSIS AND DETERMINATION

I have gone through the consent order and fully appreciated the Kabotolo case cited by the defence. Going through the consent and the Kabotolo case, I do not see any reason why the defence would argue that costs should not be taxed in favour of the claimants. There is nothing in the consent order that stops the claimants from recovering the costs as actually the last part of the said consent specifically states that the claimants are entitled to costs. The argument of the defence would have made sense if the first paragraph of the consent had specifically spelt out that the liability of MK5,000,000.00 stated covers both damages and costs of the action as that would have meant that both parties had the understanding to settle all the matters at MK5,000,000.00.

The Kabotolo case clearly states that the issue of policy limit is only concerning the insurance company and not the insured and this is why the case continues to say that where there is anything to be paid exceeding the policy limit then this has to be paid by the insured and not the insurance company. The case does not say that even the insured's liability is limited to the limit of the insurance policy.

Having considered the circumstances of the present case this court, therefore, is of the reasoned view that the preliminary objection raised by the defence has no basis and it has to fall. The matter will proceed on the 14th day of July 2021 at 2:00 in the afternoon for the taxation of costs.

Pronounced this 28th Day of JUNE 2021 at LILONGWE

A handwritten signature in black ink, consisting of a stylized 'A' and 'K' intertwined within a circular flourish.

ANTHONY PFILIZANI KAPASWICHE

ASSISTANT REGISTRAR