



JUDICIA
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY (CIVIL DIVISION)
CIVIL CAUSE NO 132 OF 2023

BETWEEN

ENET MELEKA (suing on her own behalf and on behalf
of all the dependents of Ellen Chawanda, Deceased) 1ST CLAIMANT

MARY CHAOLA 2ND CLAIMANT

AND

SAFEGUARD SECURITY SERVICES 1ST DEFENDANT

CROSSROADS HOTEL (LILONGWE) 2ND DEFENDANT

MTALISON DAMIANO 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Sato, Counsel for the Claimants

Ms. Chinula, Counsel for the Defendants

Ms. Alinafe Mtenje, Court Clerk

RULING

Kenyatta Nyirenda, J.

1. This is my ruling on an application made by the Claimants for summary judgment and judgment on admission against the 2nd Defendant. The application is brought under Order 12, rules 23 and 28, of the Court (High Court) (Civil Procedure) Rules [Hereinafter referred to as "CPR"].

2. The Statement of Claim reads as follows:

"1. The 1st Claimant bring this action against the Defendants on her behalf, and on behalf of all the dependents of the estate of Ellen Chawanda (Deceased).

2. *The 2nd Claimant brings this action on her own behalf.*
3. *The joint action is premised on common law negligence, premises liability and Section 19 of the Control and Diseases of Animals Act (Cap 66:02) of the Laws of Malawi and Section 6 of the Local Government (Lilongwe City Council) (Control of Animals) By-laws, 2018.*
4. *The 1st Defendant is sued as the owner of the dog which killed the late Ellen Chawanda. The 1st Defendant is also being sued as the employer of the dog handler who on the material day failed to properly handle the dog leading to tragic events as appear hereunder.*
5. *The 2nd Defendant is strictly sued as owner of the premises where the dog attack occurred.*
6. *The 3rd Defendant is sued as the person who acted negligently by failing to handle a vicious dog contrary to his reputed skills and duty of care.*
7. *On or about the 25th day of July 2023, at about 17:00 hrs, the 2nd Claimant was walking along side Ellen Chawanda (Deceased) at Crossroads Hotel (Lilongwe) premises when a vicious dog owned by the 1st Defendant and controlled by the 3rd Defendant attacked and killed Ellen Chawanda (Deceased).*
8. *Upon witnessing this heinous scene, the 2nd Claimant lost consciousness and fainted only to wake up to news that her sister now deceased had died.*
9. *The Claimants state that the death of Ellen Chawanda was caused by the Defendants' negligence;*

PARTICULARS OF NEGLIGENCE

- a) *Bringing a vicious dog into the public and failure to restrain it either by caging, chaining or muzzling it;*
 - b) *Failure to warn premises users of the danger of a vicious dog;*
 - c) *Generally, failure to employ other mechanisms to restrain or contain the vicious dog.*
10. *Following the incident, the deceased herein lost heavy amounts of blood and was pronounced dead upon arrival at Bwaila Hospital in Lilongwe.*
 11. *As a result of the accident, the Claimants have suffered loss and damage for which the Defendants should ordinarily be responsible.*

PARTICULARS OF LOSS AND DAMAGE

- a) *Loss of expectation of life.*
- b) *Loss of dependency.*
- c) *Loss of companionship.*
- d) *Shock*

WHEREFORE the Claimants claim the following reliefs:

- a) *Damages for loss dependence.*
- b) *Damages for loss of expectation of life.*
- c) *Damages for loss of companionship.*
- d) *Damages for shock.*
- e) *Costs of this action."*

3. The 2nd Defendant filed the following Defence:

- 1. *The 2nd Defendant refers to paragraphs 1 and 2 of the Statement of Case and admits the contents thereof.*
- 2. *The 2nd Defendant refers to paragraph 3 of the Statement of Case and denies the contents thereof and puts the Claimants to strict proof thereof.*
- 3. *The 2nd Defendant refers to paragraph 4 of the Statement of Case and makes no admission thereto.*
- 4. *The 2nd Defendant refers to paragraph 5 of the Statement of Case and admits the contents thereof.*
- 5. *The 2nd Defendant refers to paragraphs, 6, 7, and 8 of the Statement of Case and make no admission to the contents thereof.*
- 6. *The 2nd Defendant refers to paragraph 9 (a) of the Statement of Case and contends that it did not bring the dog into the public but the 2nd Defendant entered into a contract with the 1st Defendant for provision of the security services at its premises and it was the sole responsibility of the 1st and 3rd Defendants o professionally execute the contract for security services.*
- 7. *The 2nd Defendant refers to paragraph 9 (b) of the Statement of Case and denies its contents and contends that it was responsibility of the 1st Defendant's dog handler to warn the premises users of the presence of the dog under the contract the 2nd Defendant had with the 1st Defendant, because the 2nd Defendant did not own the dog, and because the 1st Defendant was contracted to render professional services to the 2nd Defendant.*
- 8. *The 2nd Defendant refers to paragraph 9 (c) of the Statement of Case and contends that it was not within the 2nd Defendant's purview to employ mechanisms to restrain or contain the dog because the dog did not belong to the 2nd Defendant and in any case that burden lay solely within the 1st and 3rd Defendants.*
- 9. *The 2nd Defendant refers to paragraph 10 of the Statement of Case and makes no admission to the contents thereof.*
- 10. *The 2nd Defendant refers to paragraph 11 and admits the contents thereof to the extent that the Claimants have suffered damage for which they ought to be compensated, but denies responsibility because the dog did not belong to the 2nd Defendant.*
- 11. *Save as herein above expressly admitted, the Defendant denies each and every allegation of fact set out in the Statement of Case as if each was set out and traversed seriatim."*

4. Neither the 1st Defendant nor the 3rd Defendant filed a defence. The Claimants are not pursuing the case against the 1st Defendant and the 3rd Defendants.

5. The application is supported by a sworn statement made by Counsel Sato wherein he deposes as follows:

"11. That I have appreciated the defence and find that it offers no defence at all to the Claimants' claims.

Grounds of the Defence

12. *That I have had occasion to appreciate the grounds of the defence by the 2nd Defendant and note that the main grounds of the defence are as follows;*

- a. *That the Claimants' action is not based on common law negligence, premises liability, Section 19 of the Control and Diseases of Animals Act (Cap 66:02) of the Laws of Malawi and Section 6 of the Local Government (Lilongwe City Council) (Control of Animals) By-laws, 2018. The 2nd Defendant puts the Claimants to strict proof.*
- b. *That it was not the responsibility of the 2nd Defendant to warn premises users of the danger of a vicious dog.*
- c. *That it did not bring a vicious dog onto its premises and that it was not within its purview to employ mechanisms for restraining the dog.*

Admissions

13. *That I have looked at paragraphs 4 and 6 of the 2nd Defendant's defense and note that the same contain an admission that the 2nd Defendant is the owner of the premises where fatal dog attack against Ellen Chawanda (Deceased) occurred.*

14. *That by implication therefore, it can be deduced as well as res ipsa loquitur that indeed the fatal dog attack happened on the 2nd Defendant's premises.*

15. *That I have also appreciated paragraph 10 of the 2nd Defendant's defense and note that the 2nd Defendant admits that the Claimants have suffered damage for which they ought to be compensated for albeit from someone else, and not the 2nd Defendant.*

16. *That I have looked at the totality of the 2nd Defendant's defence and note that that the 2nd Defendant had a contract with the 1st Defendant which allowed the 2nd Defendant to bring the dog onto its premises.*

17. *That the totality of the defence is therefore that the dog was brought onto the 2nd Defendant's premises with its permission through the contract with the 1st Defendant.*

Failure to Comply with the Order 7 of the Courts (High Court) (Civil Procedure), Rules 2017

18. *That I have looked at paragraph 5 of the Defendant's defence and note that it does not meet the threshold of the requirements for pleading a defence and thereof proffers no defence at all.*
19. *That the 2nd Defendant has failed to deny or admit the facts in the Claimants' paragraphs 6, 7 and 8 or explained what the Claimant alleges to have happened or in the alternative failed to plead lack of knowledge of a fact.*
20. *That the I have further looked at the 2nd Defendants defence and note that the Defendant has not disputed the fact the death of Ellen Chawanda (Deceased) as pleaded in paragraph 9 of the Claimants' pleadings was caused by the Defendants' negligence and therefore that the 2nd Defendant therefore agrees with this fact.*

The Claimants' Claim Against the 2nd Defendant

21. *That I have applied my professional judgment and note that the Claimants' claim against the 2nd Defendant discloses actions in common law negligence and premises liability which have not been effectively denied, and have thus been admitted to as per the above averments.*

Conclusion

22. *That I repeat the foregoing and state that the 2nd Defendant has admitted to being the owner of the premises where the fatal dog attack happened as well as failed to proffer a defence to the common law negligence pleaded against it.*
23. *That the 2nd Defendant has also admitted to being the owner of the premises where the fatal dog attack occurred. It has denied being under a duty despite being the premises owner.*
24. *From the totality of the foregoing, I am of the view that the 2nd Defendant's proffered Defense is fanciful as against the Claimants' claims, and the facts as married with the Claimants' as well as the 2nd Defendant's pleadings do not raise any realistic triable issues.*
25. *Therefore, this is an appropriate case in which the Court should enter summary judgement and /or judgment on admission as there are no issues to go for trial.*
26. *I verify that the contents above have been sworn by me and undertake to be liable for perjury in the event that I have stated anything in it which I know as a matter of fact not to be true.*

WHEREFORE, I humbly pray before this Honourable Court for an order striking out the Defendant's defence and entering summary judgment for the Claimants on the reliefs set out in the Statement of Case herein."

6. The 2nd Defendant is opposed to the application and reliance has been placed on the following sworn statement made by Counsel Uchizi Chinula:

- “11. *THAT I refer to the Sworn Statement in support of the application more specifically paragraph 12 and state that the 2nd defendant having entered into a contract for the provision of security services at its premises and not having any control of the dog under the contract there is a relevant dispute between the parties about a both fact and law that warrants the dispute to proceed to trial.*
12. *THAT at the trial the Court will clearly appreciate the relevant dispute vis-à-vis the liability or not of the 2nd Defendant which engaged a security company to render professional services in the event that the security companies agents or employees negligently carry out their duties which results in the death of an individual.*
13. *THAT the 2nd Defendant has not made any admissions because the law in Order 12 rule 28(2) CPR states that the party may do this by giving notice in writing, such as in a statement of case or by letter however the 2nd Defendant has maintained that it is not liable for the death of the deceased nor has it given notice that it admits liability to warrant a judgment on admission being entered against it.*
14. *THAT entering a judgment on admission against the 2nd Defendant where no such admission has been made and without affording the 2nd Defendant the right to be heard would amount to a violation of the 2nd Defendants constitutional right of access to justice for the settlement of the legal issues herein.*
15. *THAT by reason of the matters aforementioned, the Defendant verily believes that the application for Summary Judgment is unjustifiable and must fail as there is a relevant dispute between the parties.”*

7. I have considered the application, including the submissions by the parties through their respective Counsel. On an application for summary judgement, the court considers whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: see **Swain v. Hillman** [2001] 1 ALL ER 91. A “realistic” claim is one that carries some degree of conviction, that is, it is more than merely arguable: see **ED & F Man Liquid Products v. Patel** [2003] ECWA Civ 472.

8. Courts are warned against taking at face value and without analysis everything that claimants put in their statements before the court because in some cases it might be clear that the statements have no real substance, particularly if contradicted: see **Easyair Ltd (t/a Openair) v. Opal Telecom Ltd** [2009] EWCA 339 (Ch) and **ED & F Man Liquid Products v. Patel**, supra.

9. In a nutshell, an applicant for summary judgement must show his or her case by statements placed before the court and then show why in view of his or her case

the defendant has no prospect of success. The court will not conduct a mini trial but will consider the evidence before it and decide accordingly: see **Swain v. Hillman, supra.**

10. Order 12, rule 26, of the CPR enjoins the Court not to enter summary judgment against a defendant where it is satisfied that there is a relevant dispute between the parties about a fact or an arguable question of law.

11. Order 12, rule 28 of the CPR provides as follows:

- "28. —(1) *A party may admit the truth of the whole or any part of another party's claim.*
- (2) *The party may do this by giving notice in writing, such as in a statement of case or by letter.*
- (3) *Where the only remedy which the claimant is seeking is the payment of money, the defendant may also make an admission in accordance with—*
- (a) *rule 32;*
 - (b) *rule 33;*
 - (c) *rule 34; or*
 - (d) *rule 35*
- (4) *Where the defendant makes an admission as mentioned in paragraph (3), the claimant has a right to enter judgment, except where—*
- (a) *the defendant is a person under a disability; or*
 - (b) *the claimant is a person under a disability and the admission is made under rule 33 or 35."*

12. In the present case, a perusal of the respective statements of cases and the respective sworn statements, that is, the sworn statement in support of the application and the sworn statement in opposition shows that there are a number of arguable issues, both of facts and law.

13. Firstly, according to the averments in paragraph 6 of the Statement of Claim, the Claimants allege that the 3rd Defendant "acted negligently by failing to handle a vicious dog contrary to his reputed skill and duty of care". The allegation is denied by the Defendants and no evidence has been led to establish this allegation. In this

regard, I am inclined to agree with the Defendants that there is a relevant dispute regarding the question whether or not the 3rd Defendant acted negligently as alleged by the Claimants.

14. Secondly, the Claimants also premise their claim on the Control and Diseases of Animals Act. The Act, in section 2, defines “owner” in relation to a dog or other animal, as follows:

“any person in whose custody, possession or charge it is, also any person in whose house or premises it is kept or found unless such last-mentioned person shall prove that it does not belong to him and is not in his custody, possession or charge.”

15. Clearly, the question of whether or not the 2nd Defendant was the owner of the dog in question within the context of the Control and Diseases of Animals Act is one which need a full inquiry by way of trial. It is not enough that the dog attack happened on the 2nd Defendant’s premises.

16. Thirdly, the Claimants allege that the Defendants failed to warn premises users of the danger of a vicious dog: see paragraph 9(b) of the Statement of Claim. Neither the sworn statement nor the skeleton arguments in support of the application address this issue.

17. For the foregoing reasons, the Court is satisfied that there are relevant disputes between the Claimants and the Defendant about facts and arguable questions of law. Accordingly, the application for summary judgement and judgment on admission is denied with costs to the 2nd Defendant.

Pronounced in Court this 31st day of October 2024 at Lilongwe in the Republic of Malawi.



Kenyatta Nyirenda
JUDGE