



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 112 of 1998**

**BELINDA CASH.....PLAINTIFF**

**VERSUS**

**COAST BUS COMPANY.....DEFENDANT**

**RULING**

Before me is a Notice of Motion dated 20<sup>th</sup> April 2006 and expressed to be brought under Order 21 Rule 45 (2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking order that leave be granted for the plaintiff decree-holder to execute against Mohamed Nawaz Mirza a partner in or the proprietor of the defendant herein. In support of the application Kenneth Alison Frazer has sworn an affidavit giving grounds.

The facts that gave rise to this suit as gathered from the affidavit evidence briefly may be stated. On 27<sup>th</sup> April 1995 the plaintiff Belinda Cash was travelling in motor vehicle registration No. KAC 045C from Nairobi to Mombasa. She was issued with a receipt dated 27<sup>th</sup> April 2005 which indicated that she sat on seat number H3.

The said bus was involved in an accident as a result of which she sustained injuries. The said bus was insured by M/s United Insurance Co. Ltd. The plaintiff sued the defendant Coast Bus Company seeking damages. The plaintiff notified Ms United Insurance Co. Ltd who were the insurers of the said accident motor vehicle who appointed an advocate to deal with the case. The suit was heard and the plaintiff was awarded Sh. 3,690,972.00 damages all inclusive.

The plaintiff after obtaining judgment notified the United Insurance Company the insurer to satisfy the judgment against the persons insured under Section 10 of the Insurance (Motor Vehicle Third Party Risks) Act Cap 405 only to find that the said Insurance Company had been placed under Statutory Management and a moratorium declared over payments to its creditors for a period of 12 months and hence this application for leave to execute against Mohamed Nawaz Mirza the only serving partner of the defendant company. In response to the notice of motion Mohamed Nawaz Mirza has sworn an affidavit giving grounds why the plaintiff's Notice of Motion should be dismissed. He avers that the bus registration number KAC 045C in which the plaintiff travelled belonged to Coastline Safaris Co. Ltd and not Coast Bus Company and the receipt issued to the plaintiff shows clearly that that was the position; that a search at the Registrar of Motor Vehicles shows that the said accident bus was registered under the name of COASTLINE SAFARIS & CFC LTD and copy of the log book annexed to the Replying affidavit shows that the registered owner of the said bus was Coastline Safaris & CFC of P.O. Box 72833 Nairobi; that the advocate appointed by Ms United Insurance Co. Ltd to defend the suit on behalf of the defendant firm did not throughout the pendency and determination of this suit inform the defendant of the progress of the matter that the advocate appearing for the defendant firm at the instance and instructions of Ms United Insurance Co. Ltd proceeded and conducted the defence of this suit under a mistaken belief that the defendant firm was the insured of the motor vehicle reg. No. KAC 045C; that the defendant firm is not the owner of the bus Reg. No. KAC 045C as alleged in paragraph 3 of the plaint or at all; that the said bus was owned and exclusively used and operated by M/s Coastline Safaris who were the registered owner and in fact issued the plaintiff with the ticket for travelling and receipt No. 0478 produced herein by the plaintiff as having been issued to her for the journey from Nairobi to Mombasa on the 27<sup>th</sup> April 1995 respectively; that the defendant firm was not the insured of the motor vehicle Reg. No. KAC 045C and in fact in a letter dated 16<sup>th</sup> October 1995 addressed to the plaintiff's advocates and annexed to the

affidavit of Mr. Kenneth Alison Frazer in support to the plaintiff's Notice of Motion dated the 26<sup>th</sup> April 2006 M/s United Insurance Co. Ltd clearly indicated their insured for the motor vehicle Reg. No. KAC 045C as Ms Coastline Safari; that it is manifestly clear from the foregoing facts that the proceedings herein were undertaken and judgment entered herein against the defendant under a mistaken view that the defendant firm is the owner of the motor vehicle Reg. No. KAC 045C and that it was the insured thereof with M/s United Insurance Company Limited and which facts are not at all true; that most of the issues raised herein would have been brought to the attention of the court had I been served and availed an opportunity to defend this suit and/or had the Advocate appointed by M/s United Insurance Company Limited involved us in the determination for this suit; that I am advised by my advocate on record and which advise I verily believe to be true that the defendant firm is not liable to discharge the decree herein and that I ought to have been a party herein at the inception of the suit to enable me properly defend the suit subsequent to any proper personal service of the summons to enter appearance herein upon me; and that I have since filed an application seeking to set aside the judgment entered herein against the defendant firm on the basis, inter alia, of absence of service of the summons to enter appearance herein upon myself and/or any other principle office of the defendant firm.

The plaintiff was travelling in motor vehicle Reg. No. KAC 045C which was involved in an accident as a result of which he sustained serious injuries. The said bus belonged to Coastline Safari. She was issued with a bus fare received which indicated that the said bus belonged to Coastline Safari. There was a copy of log book obtained from the Registrar of Motor Vehicles which indicated that the registered owner of the accident motor vehicle was Coastline Safaris.

There was also a letter from M/s United Insurance Co. Ltd which stated that the insured was Coastline Safari. But despite all these glaring evidence the plaintiff decided to sue the defendant Coast Bus Company who have denied to be the registered owners of the accident bus and this is supported by documentary evidence. And this is so despite the fact that the plaintiff had legal representation.

For the foregoing reasons and having regard to the peculiar circumstances of this case I have reached the conclusion that the plaintiff sued a wrong defendant and therefore this application has no merit and it is rejected.

In the result, the application is dismissed with costs to the Respondent.

Dated and delivered at Nairobi this 26<sup>th</sup> day of February 2008.

**J. L. A. OSIEMO**

**JUDGE**