



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Civil Suit 169 of 2007**

**JUSTUS KAVISI KILONZO .....APPLICANT**

**VERSUS**

**1 COAST BROADWAY COMPANY LTD**

**2 DIAMOND TRUST BANK (K) LTD .....DEFENDANTS**

**R U L I N G**

Before me is an application dated 18.12.2007 and filed on 20.12.2007 by the 2<sup>nd</sup> defendant, Diamond Trust Bank Kenya Limited. The application is seeking one main order that the Plaint dated 5.7.2007 be struck out as against the 2<sup>nd</sup> defendant and the plaintiff's suit be dismissed as it is misconceived, and bad in law as the owner of a vehicle subject to a Hire Purchase Agreement for the purpose of third party liability is the person in possession thereof only and not the party who has let out the vehicle as the 2<sup>nd</sup> defendant did in this case.

The application is supported by an affidavit sworn by one Habil Waswani the 2<sup>nd</sup> defendant's Company Secretary. In the affidavit, it is deponed that, the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant entered into a Hire Purchase Agreement with respect to motor vehicle registration Number KAS 772 M and both were registered as co-owners of the said vehicle. It is further deponed that the 2<sup>nd</sup> defendant was only registered as a co-owner of the said motor vehicle in its capacity as a financier thereof but the possession, control, direction and management of the said vehicle was at all material times with the 1<sup>st</sup> defendant, its agents, servants and or employees. It is also deponed on advise of Counsel that the owner of a motor vehicle subject to a Hire Purchase Agreement for purposes of third party liability is the person in possession thereof. In the premises, it is the 2<sup>nd</sup> defendant's view that the plaint as against it is frivolous, vexatious and amounts to abuse of the process of the court.

The plaintiff opposes the application and in that regard he has sworn a replying affidavit in which he has deponed that before instituting his suit his advocates had sought and obtained a copy of the records in respect of the said vehicle from the Registrar of Motor Vehicles which records show that the defendants are co-owners of the said vehicle and are therefore both vicariously liable for the negligent acts of their authorized driver, servant and/or agent. In the plaintiff's view the 2<sup>nd</sup> defendant's application is based on a fallacy and should be dismissed.

The application was canvassed before me on 9.7.2008. I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter.

The basis of joining the 2<sup>nd</sup> defendant to these proceedings is its co-ownership of the said motor vehicle. In the 2<sup>nd</sup> defendant's statement of defence, the co-ownership is admitted. But the same is explained in paragraph 2 thereof. In that paragraph, the 2<sup>nd</sup> defendant avers that it is registered as co-owner of the said vehicle only as financier thereof under a Hire Purchase Agreement dated 19.8.2004. Otherwise the possession, control direction and management of the said vehicle was at all material times with the 1<sup>st</sup> defendant, its servants and or employees. The plaintiff has not filed a reply to that defence to rebut the 2<sup>nd</sup> defendant's averment regarding its status vis-à-vis the said vehicle. It must therefore be taken that the said averment is factually correct. That position is also not denied by the plaintiff in his replying affidavit filed in opposition to this application. I have also noted that the 1<sup>st</sup> defendant has not denied the 2<sup>nd</sup> defendant's said status.

In the premises, I am of the view that despite the registration of the 2<sup>nd</sup> defendant as co-owner of the said motor vehicle, as a financier of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant is not a necessary party to these proceedings. To use the language of Etyang J (now retired), in Mombasa HCC Number 106 of 2002: ALI LALI KHALIFA & OTHERS –VS- POLLMAN'S TOURS & SAFARIS & 2 OTHERS (UR), the 2<sup>nd</sup> defendant has demonstrated that it hired out the said motor vehicle to the 1<sup>st</sup> defendant and the said vehicle was used by the 1<sup>st</sup> defendant in circumstances which do not allow for the doctrine of vicarious liability to apply to the 2<sup>nd</sup> defendant.

I am alive to the fact that striking out any pleadings should be the last resort of any court and should be resorted to only in plain and obvious cases. In my view however, this is a plain and obvious case where save for the mere registration of the 2<sup>nd</sup> defendant as a co-owner of the said motor vehicle, the 2<sup>nd</sup> defendant cannot be liable to the plaintiff vicariously. The upshot, is that the 2<sup>nd</sup> defendant's application dated 18/12/07 is allowed as prayed and the plaint is struck out as against the 2<sup>nd</sup> defendant and the plaintiff's suit is dismissed as against it.

With regard to costs I have come to the conclusion that there was no way the plaintiff would have known the status of the 2<sup>nd</sup> defendant before the defence was delivered. The joining of the 2<sup>nd</sup> defendant was therefore not without basis. In the circumstances the order that commends itself to me is that each party shall bear its own costs of the suit and the application.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JULY 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of: Amange fore the 2<sup>nd</sup> defendant

**F. AZANGALALA**

**JUDGE**

**25<sup>TH</sup> JULY 2008**