

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Misc Civ Appli 156 of 2004

MARY SYOMBUA MUTUA APPLICANT

VERSUS

TASHRIFF BUS SERVICES

UNITED INSURANCE CO. LTDRESPONDENT

R U L I N G

The Notice of Motion dated 30/9/04 is filed by one Mary Syombua Mutuku seeking orders that Busia HCC 11/03 be transferred from that registry to Machakos High Court for hearing and disposal. Costs are also prayed for.

The application is brought pursuant to Section 3 A Civil Procedure Act. The grounds upon which the application is brought are found in the body of the application and further supported by an affidavit.

The application proceeded to hearing exparte because though the court was satisfied that counsel for the defendants was served, there was no appearance and no papers had been filed in response to this application. The brief background of this matter is that Wycliffe Mutuku Nguyo, the husband of the applicant was killed in a road traffic accident involving a public service vehicle in which he was traveling and the defendant/respondent's bus KAH 117J. The plaintiff filed a suit HCC No. 144/98 at this court against Tashriff Bus Service. The defendants filed an appearance with no defence. The matter was heard and judgement was entered for plaintiff on 5/2/02 after a trial. Costs were taxed at 107,580/=; award was 661,760/= plus costs. A decree was drawn and Notice to Show Cause was issued on 27/1/03 against the proprietors of the defendant to pay 879,975/= or be committed to civil jail. The Notice to Show Cause was served on 14/2/03 and Warrant of Arrest was issued on 18/6/03 and the court bailiff one Sila Jackson travelled to Mombasa to effect the Notice to Show Cause but instead on 7/8/03 Mrs Nzei counsel for applicant received an order of stay from Busia High Court registry though she had not been served with any proceedings in respect of the Busia Case No. 11/03. Applicant's counsel then sent somebody to Busia to peruse the file and got copies of the proceedings in the Busia court in which the defendant was moving court for a declaratory order that the United Insurance to meet the obligation in HCC 144/98 as insurers of the defendants in HCC 144/98, Tashriff Buss Services.

All the material placed before me shows that the accident in which the plaintiffs/applicant husband perished was near Machakos along Nairobi – Mombasa Highway at Lukenya. H.C.C 144/98 was properly filed before this court.

It is also apparent that the declaratory suit in Busia arises from the Machakos suit HCC 144/98. Since the Respondents are not here, the court has no idea why the Respondents went to file the declaratory suit so far away in Busia when the case had been determined in Machakos High Court. Busia H.C.C 11/03 was filed on 15/4/03. It is after Notice to Show Cause had been issued by this court on 27/1/03. The only conclusion that this court can reach is that the filing of the declaratory suit in Busia was done in bad faith with a view of frustrating the execution process in Machakos HCC 144/98 and it was very mischievous. Having one case in Busia and another in Machakos will result in extra and unnecessary costs, inconvenience and may result in conflicting and embarrassing orders being made by the two courts. It is only fair that the two suits be heard in one court. The cause of action arose within Machakos area. The applicant hails from that area. The defendant had

an office in Nairobi and the proprietors are said to live in Mombasa. In my considered view, it is only fair that HCC 11/03 Busia registry be transferred to this court. The court notes that the jurisdiction of the two courts is similar but in the interests of justice, this court orders that HCC 11/03 be withdrawn and transferred to Machakos High Court for hearing and disposal. The Respondents will bear the costs of this application as they opted to go so far to file this suit when they were aware of the existence of 144/98 filed in this court in 1998. I hereby order that HCC 11/03 be and is hereby transferred to Machakos High Court for hearing and disposal.

Respondents to bear the costs of this application.

Dated at Machakos this 25th day of January 2005

R.V. WENDOH

JUDGE