



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO.106 OF 2002 RD**

**1. ALI LALI KHALIFA**

**2. OMAR ABADLLA MZAHID**

**3. BAMKUU ATHMANI BAMKUU**

**4. MOHAMED OMAR ATIK**

**5. AINASWE SIFA ELI MAFOLE**

**6. ABUBAKAR SALIM MOHAMED**

**7. HUSSEIN ALI BWANAMKUU**

**8. SALIMU ALI ABED**

**9. BAKARI MOHAMED SANI ..... PLAINTIFF**

**VERSUS**

**POLLMAN'S TOURS AND SAFARIS LTD**

**DIAMOND TRUST BANK (K) LTD**

**SALIM KHALID SAID ..... DEFENDANT**

**R U L I N G**

Before the court is a Chamber Summons dated the 28th January 2003 filed by DIAMOND TRUST BANK KENYA LIMITED (2nd Defendant) seeking an order to issue striking its name out of this suit pursuant to the provisions of Order 1 Rules 10(2) and 13 of the Civil Procedure Rules on the ground that it is improperly joined as a party to this suit. There are two grounds in support of this summons, namely, that the 2nd Defendant merely financed the acquisition by the Pollman's Tours and Safaris Limited of Motor Vehicle Reg. No.KAE 520H through a Hire Purchase Agreement made on 21st February 1995 and that the 2nd Defendant did not have possession, custody and/or control over the said motor vehicle nor did it exercise control over persons who had the management of the said motor vehicle on the day of the

alleged accident or at anytime during or after the hire period.

The undisputed facts are that, by a Hire Purchase Agreement made on 21st February 1995 between the 2nd Defendant, on the one hand, and Pollman's Tours and Safaris Ltd., (1st defendant) on the other hand, the 2nd defendant let to the 1st Defendant a total of twenty-four (24) Nissan E 24 'D' Micro buses at the total Hire Purchase price of KShs.52,571,374/80 payable by twenty-four (24) monthly installments of KShs.2,190,473/95 commencing on the 21st March 1995. One of such motor vehicles was Registration No. KAE 520H which was accordingly released to the custody of the 1st Defendant. It was subsequently sold to SALIM KHALID SAID (3RD DEFENDANT) by the 1st Defendant, though no transfer was effected by the Registrar of Motor Vehicles.

On or about the 21st March 1979 KALI ALI LALI, Athman Abdalla Mjahid, Abdalla Mohamed Bwanatumu, Twalib Mohamed Omar, Ali Mohamed Omar, Nicholas Kalebi Makundi, Omar Abubakar Salim, Yusuf Hussein Bwanamkuu, Tawfiq Aziz and Assa Bakari (the deceased) were lawful passengers in another vehicle Reg. No. KAH 233B which was being driven along Mombasa Malindi Road. It collided with motor vehicle Reg. No.KAE 520H, killing all the deceased. As a result of the death of the deceased, the nine (9) plaintiffs, being the legal personal representatives of the said deceased, instituted this suit through a plaint filed on 20th March 2002, claiming general damages under the Fatal Accidents Act and the Law Reform Act and claiming special damages, against the 1st, 2nd and 3rd defendants. The cause of action was based on alleged negligence of the 1st, 2nd and 3rd defendants and/or their agents.

The 2nd Defendant now seeks to be struck out from this suit on the ground that it had no interest at all in the said motor vehicle Reg. No. KAH 520H nor did it or its agents have control over its management, use of otherwise, and therefore did not owe the plaintiffs any duty of care on the date of the accident. Mr. Luseno advocate, acting for the 2nd Defendant, submitted that motor vehicle Reg. No.KAE was taken possession of by the 1st defendant on the 21st February 1995, and the mere fact that the name of the 2nd defendant is still reflected in the records of the Registrar of Motor vehicles as a joint owned with the 1st defendant is no basis for its liability.

Mr. Buti advocate, acting for the plaintiff has, however, submitted that it is wrong to hold a financier not liable under a Hire Purchase Agreement just because it no longer has an interest under the said Hire-Purchase agreement. In any case he submitted, the schedule of repayment of 24 months under the Hire Purchase Agreement shows the date of commencement was 21st March 1995 and by the 21st March 1997 the final payment must have been made. Thereafter the 2nd Defendant became one of the registered owners of the said vehicle, not under the Hire Purchase Agreement but by virtue of the fact that it is still registered as an owner by Registrar of Motor Vehicles.

Mr. Buti referred the court to a copy of the Records in the Registrar of Motor vehicles marked "HM.1" which shows the joint registered owners of motor vehicle Reg. No. KAE 520H on the date of the said accident are 1st and 2nd Defendants. He has submitted that no explanation has been given why after the 21st March 1997 this vehicle was still registered in the names of the 2nd Defendant. In the absence of any explanation then Section 2 of the Traffic Act Cap 403 Laws of Kenya applies.

In response Mr. Luseno submitted that the mere fact that the period of repayment of installments under a Hire-Purchase Agreement is limited, does not mean that at the expiry of that period the relationship of hirer and financier did not exist. He submitted that, at the time of the said accident that relationship still existed and therefore the 2nd defendant, as a mere financier of the 1st Defendant, is not liable for this accident.

The legal position is this: If it can be demonstrated that a registered owner of a motor vehicle hired it out to a third party or the said vehicle was used in the circumstances which do not allow for the doctrine of vicarious liability on the part of the registered owner, to apply, then the latter is not liable.

In **ORMROD V. CROSVILLE MOTOR SERVICES LTD (1954)2 All E.R. 753 at page 755**  
Lord Denning said:

*“The law puts a special responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly by the owner’s business or for the owner’s purpose, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.”*

In the circumstances of the present case the following facts have been proved to exist (a) The second defendant was a mere financier of the first defendant for the purposes of the acquisition of motor vehicle Reg.No.KAE 520H by the first defendant, and the second defendant’s interest in the said vehicle was merely recorded in the Registration Book or in the records held by the registrar of motor vehicles for the purpose of securing its interests under the Hire Purchase Agreement.

That interest is the balance of the loan or advances to the first Defendant. (b) At the time of the accident the said vehicle KAE 520H had been sold to the third Defendant by the first Defendant and the third defendant was thus operating matatu business (c) The second defendant had neither interest in the first defendant’s business nor in the third defendant’s matatu business. (d) The accident the subject matter of this suit, arose at the time when the said vehicle was being driven wholly for the purpose of the business of the Third defendant.

The issue for Determination in the suit will be the ownership of the said vehicle only as between the 1st and 3rd Defendants and as to their liability at the time of the accident.

For the above reasons I make a finding of law that the 2nd defendant is not a necessary party for these proceedings and is hereby struck out of this suit pursuant to the provisions of Order I Rule 10(2) and Rule 13 of the Civil Procedure Rules.

I award the 2nd defendant the costs of this application.

It is so ordered.

**Dated and delivered at Mombasa this 3rd July 2003.**

**A.G.A. ETYANG**

**JUDGE**