



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO 676 OF 2009
VIOLET JEPTUM RAHEDI.....PLAINTIFF
VERSUS
ALBERT KUBAI MBOGORI.....DEFENDANT

R U L I N G

1. The Defendant in this case was convicted of the manslaughter of the Plaintiff's late husband. The Plaintiff then brought the present suit for damages under the Law Reform Act, Cap 26 and the Fatal Accident Act, Cap 32. Judgment was entered on 14th October 2013 after trial in her favour for the total sum of KShs 12, 311,401/00 plus costs and interest.

2. The Plaintiff has now applied by **notice of motion dated 28th November 2013** for the main order that she be allowed to execute the judgment against the Defendant before taxation of the costs. In the alternative the Plaintiff seeks an order that the Defendant do deposit the decretal sum in court. The application is basically made under **section 94** of the **Civil Procedure Act, Cap 21**.

3. The main grounds for the application are rendered as follows –

“(c) Since the death of the deceased, and during the pendency of the suit herein as well as the criminal proceedings, the Plaintiff has struggled to provide for and cater for the upkeep of herself and her children, and has expended all her financial resources.

(d) The Plaintiff and her children urgently require the decretal amount to cater for their general upkeep as well as for the children's university education.”

There is a supporting affidavit sworn by the Plaintiff which depones to the factual basis for those main grounds.

4. The Defendant has opposed the application by his **replying affidavit filed on 21st January 2014**. The grounds for objection emerging therefore include -

(i) That the Plaintiff in her evidence at the trial stated that she was

gainfully employed as a secretary.

(ii) That he has instructed his counsels to appeal against the entire judgment, and that towards that end he duly filed a notice of appeal.

(iii) That the order sought would be highly prejudicial to him.

(iv) That in any event the Plaintiff has not demonstrated why the order sought should be granted.

5. I have considered the submissions of the learned counsels appearing. Learned counsel for the Plaintiff provided a number of cases where the court has exercised its discretion under section 94 of the Civil Procedure Act. Every case will depend on its own particular circumstances.

6. The discretion in Section 94 aforesaid is rendered as follows –

“Where the High court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.”

7. I tried this case myself, and it was apparent how drastically the death of the Plaintiff’s husband affected the Plaintiff and their two children financially. The family was leading a very good middle class life, complete with the children pursuing the rather expensive sport of lawn tennis. The family was depending to the greater extent on the income that the Plaintiff’s deceased husband derived from his wine and spirits business. The Plaintiff was not able to continue with the business, and she sold off the stock left behind by her husband.

8. I am satisfied that the Plaintiff cannot provide, with her secretary’s income, the standard of living that her husband provided her and the children. Her plea that she is in financial distress is not an outlandish claim.

9. I note that there is no stay of execution of decree and none has been sought. An intention to appeal against the judgment, or even an appeal already duly filed, cannot be a good reason to refuse the application at hand. Whether execution is pursued before or after taxation of the Plaintiff’s costs the Defendant’s obligation to satisfy the decree will always be there, unless the judgment is overturned on appeal, an unlikely event on the issue of liability, given the circumstances of this case. It is also not lost on me that it may take a while, in the ordinary course of business, for that taxation to take place.

10. I am satisfied that it is necessary that the Plaintiff be permitted to execute the decree before taxation of her costs of the suit. I will therefore allow the application as sought in prayer (2) with costs. It is so ordered.

DATED AT NAIROBI THIS 18TH DAY OF MARCH 2014

H P G WAWERU

JUDGE

DELIVERED THIS 21ST DAY OF MARCH 2014