



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 109 of 2011**

**COMMERCIAL BANK OF AFRICA.....PLAINTIFF**

**VERSUS**

**LALJI KARSAN RABADIA.....1<sup>ST</sup> DEFENDANT**

**CHANDRAKANT LALJI RABADIA.....2<sup>ND</sup> DEFENDANT**

**PRAVIN JADVA RABADIA.....3<sup>RD</sup> DEFENDANT**

**RULING**

On 6<sup>th</sup> February 2012 I entered summary judgement in this suit in respect of part of the plaintiff's claim against the defendants with costs. By a subsequent ruling dated 21<sup>st</sup> March 2012 I held that the said decision gave rise to both preliminary and final decree under the explanation to the definition of "decree" under section 2 of the Civil Procedure Act.

Apparently, the defendants being aggrieved by the said decision filed a Notice of Appeal to the Court of Appeal pursuant to which they sought an order for stay of execution. That application was heard and the Court of Appeal while holding that the intended appeal was arguable declined to stay the execution holding that there will be no prejudice to the defendants if the decree is executed.

When the plaintiff attempted to tax its costs a preliminary objection was raised on behalf of the defendants on the ground that the bill was premature and the costs ought not to be taxed piecemeal. After hearing the objection I upheld the objection since I was of the view that it would not constitute an optimum utilisation of the limited judicial time and contrary to the aims of the overriding objective to allow the taxation of costs to proceed piecemeal. I however held that since the plaintiff had succeeded in part of its claim, unless that success was set aside on appeal or review, the plaintiff ought to be able to enjoy the fruits accruing therefrom without any unnecessary delay. In arriving at this finding I was of the view that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. It was my view that if the plaintiff in this case had no option available to it of securing the sum already decreed in its favour I would have had no hesitation in holding that a procedure that bars a litigant from accessing the sum decreed to it is unjust.

Immediately on delivery of the said decision **Mr Fraser**, learned Senior Counsel for the Plaintiff made an oral application under section 94 of the Civil Procedure Act for leave to execute before taxation. It is this oral application that is the subject of this ruling.

According to **Mr Fraser** since the Court of Appeal declined to grant stay of execution there is no reason why the Court should not allow the plaintiff to execute before the costs are taxed.

**Mr Amuga**, Counsel for the defendants, however, opposed the application. According to **Mr Amuga** the plaintiff should be directed to make a formal application in order for the Court to have sufficient material with which to enable the Court exercise its discretion in its favour. In counsel's view the defendants ought to be given an opportunity to show why it is not necessary to so execute. According to him there are several issues such as payments made to the plaintiff, the fact of receivership of the principal debtor. In light of the finding by the Court of Appeal that there is a good appeal, the decision whether or not to execute before taxation cannot be determined orally, he contended.

I have considered the foregoing. In **F Boero & Co (EA) Ltd. Vs. Habib Mohamed [1954] 27 LRK 25, Cram, Ag.J** dismissed an oral application made under the said section. That application similarly arose from a successful application for summary judgement. The learned Judge, while dismissing the oral application was of the view that if the application had been made in accordance with the rules, it would have succeeded on the merits. In **Rebah Muniafu vs. James Nganga Nairobi HCCC No. 2736 of 1990, Shah, J** (as he then was) on 30<sup>th</sup> May 1994 was similarly of the view that whereas section 94 aforesaid gives the High Court discretion to allow execution before taxation, there has to be an application to the High Court (there being no specific mode provided under section 94) by Notice of Motion as provided for in order 50 rule 1 [now Order 51 rule 1] of the Civil Procedure Rules. The learned Judge went further to hold that Order 50 applications (procedurally) have to be served on the other side unless otherwise stated by the Court for which special and good reasons must exist. This position was restated by the Court of Appeal in **Bamburi Portland Cement Co. Ltd. vs. Imranali Chandbhai Abdulhussein Civil Appeal No. 83 of 1995**. In that case **Shah, JA**, held:

**“I would like to end by making some pertinent observations as regards the execution of the decree. Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter partes. Order 21 r 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under section 94 of the Act. Rule 7(4) is clearly ultra vires section 94 of the Act because the section reserves that power exclusively to the High Court”.**

This position seems to have had the supported by **Kwach, JA** when he said:

**“Like my brother Shah J.A., I continued to be deeply concerned about the ruthlessness with which decrees issued by the superior court in Mombasa are being executed. Whether one is a victor or the vanquished justice must strive to maintain a soft spot for the weak. I particularly agree with his views on Order 21 r. 7(4) of the Civil Procedure Rules”.**

Following the Court of Appeal decision which is binding upon me I am similarly of the view that whereas the Court is properly entitled to entertain an oral application for leave to execute before taxation at the time of the delivery of the judgement or ruling, where the application is made thereafter it ought to be made by Notice of Motion in the usual manner. Accordingly, the Plaintiff is directed to make a formal application under section 94 aforesaid.

**Dated at Nairobi this 17<sup>th</sup> day of December 2012**

**G V ODUNGA  
JUDGE**

Delivered in the presence of:

Mr Fraser for the Plaintiff  
Mr Amuga for the Defendants