REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 112 OF 1998

BELINDA CASH ..... PLAINTIFF/APPLICANT

VERSUS

COAST BUS COMPANY .....DEFENDANT/RESPONDENT

RULING

The plaintiff moved the court by Notice of Motion dated 3rd August, 2005 and filed on 5th August, 2005. The application came under certificate of urgency, for hearing under the Court's vacation rules; it was originally intended for hearing ex parte, even though service was effected upon the respondent.

The purpose of the application is summarized in the certificate of urgency:

> "…. **the plaintiff would wish to proceed with execution before taxation of costs to recover damages and expenses incurred since 27th April, 1995 as awarded in the judgment of 8th October, 2004. There are no early dates for taxation of costs, and waiting for the costs to be taxed before execution will delay execution and is prejudicial to the plaintiff."**

The plaintiff prayed that she be granted leave to execute the decree before taxation of her costs against the defendant. She also prayed that the costs of this application be provided for.

What were the supporting grounds? Firstly, that the cause of action had arisen on 27th April, 1995; secondly, that judgment in favour of the plaintiff had been entered on 8th October, 2004; thirdly, that the earliest date given for taxation is 23rd November, 2005 which is belated; fourthly, that the defendant has to date made no payment in settlement of the judgment sum; fifthly, because a long wait for taxation before execution will greatly prejudice the plaintiff; sixthly, because it is only fair that the court

allows execution to proceed before taxation of costs, so that the plaintiff may recover compensation for the serious injuries she suffered and for the expenses incurred since 1995; and lastly, because no prejudice will be suffered by the defendant if execution is issued before taxation of costs.

In reply, *Mr. James Ndirangu Waweru* from the firm of advocates having the conduct of this matter on behalf of the respondent, on 8th August, 2005 swore an affidavit which was filed on 9th August, 2005. The content of these depositions may be set out in summarized form.

The deponent avers that his firm had been instructed by M/s United Insurance Co. Ltd. on 18th March, 1998 to come on record and take up the matter on behalf of the defendant since they, M/s United Insurance Co. Ltd, had been the insurers of motor vehicle registration No. KAC 045 C which was involved in an accident on 27th April, 1995 in which the plaintiff herein was travelling as a passenger. The deponent's firm duly informed their instructing client after judgment was delivered on 8th October, 2004; and by a letter dated 26th October, 2004 they were instructed to file an *appeal*. It is deponed that the plaintiff and/or her advocates on record had, at all material times, been aware that M/s United Insurance Co. Ltd had been the insurers and had even threatened to file a declaratory suit against the insurers. The deponent avers that on *15th July, 2005* the said United Insurance Co. Ltd. was placed under statutory management by the Commissioner of Insurance, in exercise of his powers under the Insurance Act (Cap. 487, Laws of Kenya). On *25th July, 2005* the deponent's firm informed the defendant (Coast Bus Company) that M/s United Insurance Co. Ltd had been placed under statutory management; the firm also sought the defendant's instructions to continue acting. This information was also copied to the statutory manager appointed by the Commissioner of Insurance, with a request that the statutory manager should also give his further instructions. The deponent avers that his firm has, to-date, *not received* any further instructions or communication from either the defendant or the statutory manager (Kenya Reinsurance Corporation Ltd) – and this makes it difficult for the firm to continue acting for the defendant. Consequently, the firm of advocates is currently making arrangements to withdraw from acting for the defendant.

This matter was heard before me during the August 2005 vacation when the applicant was represented by *Ms. Mugaa*, while the defendant was represented by *Mr. Waweru*.

Learned Counsel, *Mr. Waweru* said he found himself in a predicament, as he in effect, had no instructing client; M/s United Insurance Co. Ltd who had instructed *Mr. Waweru's* law firm, had since been placed under statutory management. The plaintiff's application for early taxation was coming up at a time when there were no instructions from the defendant or from the insurer; and learned counsel was urging that taxation should be held in abeyance until 23rd November, 2005 when it had earlier been scheduled to take place; and this may give the opportunity for counsel to have received instructions.

Ms. Mugaa contested the claim that counsel for the defendant had no instructions; had that been indeed the case, then *Mr. Waweru* could not have sworn the replying affidavit; so he must be acting on instructions. This is an intriguing point. *Mr. Waweru* said he had no instructions; he said he *hoped* to have instructions by 23rd November, 2005 when taxation was earlier scheduled to take place; he said his firm was making arrangements to withdraw from acting for the defendant. This is contradictory. In principle, such a contradictory position taken by counsel or his client, cannot be allowed, by the confusion to perception which it wreaks, to stand in the way of the execution of *clear court orders*. Today such orders have conferred specific sights, for enforcement, upon the plaintiff. Therefore I must take the position that the defendant has not, at this stage, presented a cogent argument such as would stop the plaintiff's application.

Learned counsel, *Ms. Mugaa,* submitted that counsel for the defendant is to be deemed to have instructions, unless there is an order from this court granting him leave not to act. The appointment of a statutory manager, *Ms Mugaa* submitted, did not by itself have the effect of withdrawing the instructions which the defendant had given to its advocates. The effect of appointment of a statutory manager, *Ms. Mugaa* submitted, was only to inhibit *further* payment by the insurance company.

Learned counsel submitted that the nature of the plaintiff's application was that it was for *execution* – which cannot be carried out unless taxation is done. The plaintiff's concern is that waiting for a prolonged period, before taxation, will be prejudicial to her rights.

Learned counsel, *Mr. Waweru* conceded that the commencement of statutory management at the defendant's insuring firm, *did not* withdraw the instructions given to counsel by the defendant. But he then contended that he would be acting so as to bind a defendant who was not involved in the trial – and so he needed fresh instructions. Counsel said he came to know of the appointment of the statutory

manager (which took pace on 15th July, 2005) only on 18th July, 2005 and since then he had been unable to establish contact with the statutory manager.

My ruling on this initial point was as follows:-

> **"The records on the Court file show that learned counsel has proper instructions. He has filed a quite detailed replying affidavit replete with validating annexures."**

Learned counsel, *Ms Mugaa*, drew the Court's attention to the content of S.94 of the Civil Procedure Act (Cap. 21). It provides 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 the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation."**

Learned counsel noted that the progress towards taxation had been slow. Judgment had been given on 8th October, 2004; the bill of costs had been filed on 8th April, 2005 and the date of taxation had been set for July, 2005 but it did not take place; and at the moment, the earliest possible taxation date will be 23rd November, 2005. Counsel urged that even as the taxation of costs remained pending, execution should forthwith be effected for the decretal sum. A delay of one year since judgment, it was urged, would be prejudicial to the plaintiff.

While noting that the defendant now has an insurer who is placed under statutory management, and that the statutory manager has already issued a twelve-month moratorium, and the meaning of that moratorium is that the statutory manager will not be making payments; counsel submitted that, so far as the plaintiff's claim is concerned, a demand had been made on the insurer *when judgment was given*, and there had been no stay of execution. Yet no payment has, to date, been received from the insurer. In these circumstances, counsel submitted, it was important that the plaintiff do proceed with execution *against the defendant*.

Ms. Mugaa joined issue with counsel for the defendant, on the claim in his replying affidavit that

responsibility for delay in taxation of the bill of costs was to be ascribed to the plaintiff. In her words: "**If there has been delay in having the bill taxed, it has been occasioned by the need to have the *decree* settled**." The decree was approved on 11th March, 2005 and the bill of costs was filed in April, 2005 – which filing was delayed because the file could not be traced; the defendant was having the file proceedings typed, to enable it to lodge an appeal.

Learned counsel, *Mr. Waweru*, maintained that the plaintiff had been part of the delay in having the taxation finalized. Taxation had not proceeded before the Deputy Registrar on 22nd July, 2005 and a new date, 23rd November, 2005 had been given. Counsel submitted that early execution as proposed by the plaintiff would prejudice the defendant, for it would in effect be a *double* execution; there would be a preliminary decree, involving additional execution on costs. He also submitted that since the plaintiff's application of 3rd August, 2005 carried no supporting affidavit, it had no evidence to show the prejudice likely to be suffered by the plaintiff if execution is not conducted at this stage, and so the plaintiff must wait until 23rd November, 2005. Learned counsel contended that the application offended Order L, rule 3 of the Civil Procedure Rules which stipulates:

> **"Every notice of motion shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served."**

Mr. Waweru submitted that the plaintiff had produced nothing to lead the court to determine *what prejudice* was likely to be suffered by the plaintiff.

Besides, learned counsel submitted: "**Any prejudice would be assessed also on the basis of the prejudice to be suffered by the defendant**". He submitted that the defendant stood to suffer prejudice if the plaintiff was allowed to execute the decree at this stage. Counsel submitted that since, as of now, there was a moratorium on payments by the insurer, consequently the plaintiff might proceed directly against the defendant; yet the defendant had not been heard on the claims being made. Counsel urged that the statutory manager should be allowed to acquaint itself with the pending matters, and execution at this stage should not take place.

Mr. Waweru urged that the instant matter should be allowed to go to taxation in November 2005 so that the true and clear picture of the defendant's indebtedness to the plaintiff can be known; and this

would facilitate the working out of the decretal sum and the arrangement of the mode of payment. He urged that the plaintiff's prayers be refused.

In her reply, learned counsel, *Ms Mugaa* restated the point that the plaintiff's demand had been made on the insurers well before the appointment of the statutory manager; and it would be harmful to the plaintiff's interests to wait on the statutory manager as he settles in his office. It would not be the case, counsel submitted, that proceeding with execution of the decretal sum alone, at this stage, would be prejudicial to the defendant. The plaintiff, counsel submitted, was entitled to the fruits of her judgment without waiting long for taxation of costs. It could not, moreover, be said with certainty that taxation will certainly take pace as scheduled, on 23rd November, 2005.

It is quite clear from the papers filed, and from the clarity of submissions by counsel, that they are duly instructed by their clients; and that counsel for the defendant, too, was fully instructed. It is to be taken, in the circumstances, that the defendant very well knows that judgment has been given in favour of the plaintiff which vests specific rights of enforcement in the plaintiff. The core rights of the plaintiff, in this regard, are in the *decree* of the court, which, strictly speaking, can be enforced as soon as the same is extracted. Counsel for the plaintiff has submitted that the costs – assessment process has proved so circuitous as to compromise the plaintiff's rights issuing from the judgment and decree. It is permissible under S.94 of the Civil Procedure Act (Cap. 21) to take the decree and the costs in separate stages. Being myself conscious of the gravity of the original claim, which ended in the judgment of 8th October, 2004 I have to remark the appropriateness of early execution of the decree. I have not found the defendant's position to carry sufficient weight to justify refusal of the plaintiff's application. I have, besides, noted that the insurer was promptly served with the decree of the Court soon after judgment was delivered, and quite ahead of the subsequent development in which the insurer has been placed under statutory management. I will, therefore, allow undelayed execution of the court's decree, ahead of the taxation of costs.

Specifically I will make the following orders:

1. **Leave is hereby granted to the plaintiff to execute the decree before taxation of costs, against the defendant.**
2. **The defendant shall bear the costs of this application.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 26th day of September, 2005.

J.B. OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

For the plaintiff/applicant : Ms Mugaa, instructed by

M/s Hamilton Harrison & Mathews, advocates

For the defendant/respondent : Mr. Waweru, instructed

by M/s K. Mwaura & Co. Advocates