



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO 4231 OF 1992**

**Consolidated with**

**HCCC NOS 4232, 4233, AND 4234, OF 1992**

**MERCEDES SANCHEZ RAU TUSSEL.....PLAINTIFF**

**VERSUS**

**SAMKEN LTD .....1ST DEFENDANT**

**ABERCROMBIE & KENT LTD .....2ND DEFENDANT**

**MOHAMMED OSMAN MAALIM .....3RD DEFENDANT**

**RULING**

By an application by a notice of motion dated 28th September, 2001, supported by an affidavit sworn by their lawyer Mr Desterio Oyatsi, sworn on the same day, the plaintiffs in the consolidated cases seek orders of this court, that they be granted leave to execute before taxation of costs against the defendants the portion of the decree passed against them in the consolidated suits where there is no pending challenge to the decree by way of review or stay of execution; and that provision be made for the costs of this application.

Execution of a decree of the High Court before costs are ascertained, is provided for under section 94 of the Civil Procedure Act (cap 21). That section provides that 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.

The principle behind this section is not far to search. When awarded costs are not agreed, it often takes a considerable time before the costs are taxed by a taxing officer. In order not to permit a judgment-debtor to hold up execution of a decree for a known sum or a sum to which there can be no sensible contest, section 94 provides that the court may permit the execution of a decree except as to so much thereof as relates to unsettled costs.

The need to have section 94 is equally obvious. As it is well-known from the definition in the Civil Procedure Act, a “decree” is a formal expression of the adjudication made by the court with regard to the questions which arose for determination and so, when a judge on the original side passes a judgment in favour of a party for a certain amount and awards costs to him, the decree being the formal expression of

that judgment must normally embody the whole of that judgment. Accordingly, to proceed to execute an aspect only of that judgment necessarily requires the permission of the court if the decree holder is afterwards going to pursue the remaining portion. That is why we have this provision with regard to cost

Till such formal expression has been given to the judgment of the court, the decree is not executable, and in order to obviate the difficulty arising in a case where the taxation of the costs would take some time, section 94 permits the decree holder, as it were to execute a “decree” which strictly does not constitute the formal expression of an adjudication inasmuch as the provision with regard to costs has not been embodied in that decree, and it is perfectly true that an order from the court for a decree to be executed is required if it is a “decree” not in the proper sense of the term as defined by section 2 of the Act. That is the rationale for section 94 making a specific order of the court necessary in a case where a decree holder wants to execute a decree which does not contain the provision for costs, and that permission is necessary because a decree cannot be drawn up and the seal of the court cannot be put upon the decree unless the provision with regard to costs is inserted in it, because it is in the judgment of which the decree is only a formal expression.

On the wording of the section the ordering of execution to be done forthwith is a matter in the sound discretion of the court when the court considers it necessary that in all the circumstances of the case the decree should be executed before awarded costs are ascertained by taxation. Is this one such case in which a court exercising its discretion judicially may properly permit the execution of the decree as the taxation of costs is awaited? What are the circumstances here?

It is agreed on all sides, that the plaintiffs are all members of one family and reside in Spain; they came to Kenya as tourists in March 1991 and while here visiting, they were involved in a serious road accident when there was collision of motor vehicles of the defendants. The plaintiffs’ head of the family died in that accident, and the plaintiffs themselves were injured seriously and had to be airlifted to Spain for treatment. These cases were filed in 1992 and judgments were not delivered until about five years later (on November 10, 1997). The plaintiffs won. Appeals against those decisions were struck out; and the defendants’ attempt to file appeals again were again rejected by the Court of Appeal. But a review by the High Court in HCCC No 4231 of 1992 was allowed, but it is being appealed by the plaintiff. On the other hand there is no challenge either by appeal or review against the judgment sums awarded in HCCC Nos 4232, 4233 and 4234, of 1992; and there is no order for stay of execution. All these facts are conceded by the defendants. Similarly, it is true that it is now more than ten years since the plaintiffs sustained the injuries. Counsel for the plaintiffs swears, among other things, that he has made efforts to recover the awarded sums without resorting to a court action but the defendants would not cooperate.

Why do the defendants resist? In his replying affidavit and in the oral presentation at the hearing of this application, Mr Peter Muhoro Kimani, counsel for the defendants, says that it is not correct that a bill of costs cannot be taxed until a pending application for review is determined, and the plaintiffs have not taken steps to have the bill of costs taxed. He says that to attempt to dissect the judgment by recovering part of the decretal amount pending appeal, cannot be justified and it would be blowing hot and cold. He adds that as it is only one judgment in the consolidated suits, it would not be proper or just to seek to enforce only part of such judgment “pending the threatened appeal” and a pending ruling on whether or not the plaintiffs can enforce the said judgment in its entirety against any of the defendants jointly or severally, i.e. whether there should be apportionment amongst the defendants.

Considering the fact that the injuries were serious, and the plaintiffs had to be airlifted to a distant land for treatment, a lot of expense and pain must have been incurred and suffered by them. The suits were then filed a long time ago, and the judgment has been outstanding for a long time since it was passed. I am not sure that the value of money and the cost of living are remaining constant or improving. Certainly the judgment-debtors are not challenging all the judgments and awards in every respect. It is mainly the apportionment of liability amongst the judgment-debtors which stands out as the bone of contention. That does not affect their liability to the plaintiffs. How the defendants want their liability spread out amongst them alone should not unduly suspend the satisfaction of the judgment upto a point which is not contested.

True, aspects of the judgments may still be in question on appeal or review application; but it would be wrong to hold as a principle, that once there is an appeal, threatened appeal, or an application for a review to apportion liability amongst judgment-debtors, no part of a judgment is executable until after determination of the review or appeal. Such a view would permit any person desirous of jamming the justice process or merely to postpone pay-day simply to lodge a notice of appeal or to file an appeal itself, or to pretend anything, and thereby deny a party the whole judgment. Likewise, a dissatisfied decree-holder, who legitimately questions a portion of a judgment should not be victimized for further pursuing what he is entitled to by seeking review. His entitlement to any part of a judgment cannot be made subject to his acceptance of the whole judgment as it stands or nothing.

The court would listen to a judgment-debtor who furnishes it with facts which would show that partial execution of a judgment without waiting for taxation of costs would entail injustice or hardship or other substantial harm to him. The court would not uphold mere technical objections for their own sake, when the justice of the case requires enforcement of a judgment without waiting for the ascertainment of costs by a taxing officer. It may be true that the judgment-holder might not have drawn up a bill of costs for taxation. But taxation need not arise where the vanquished party pays costs without being forced to. Not every time no bill is presented for taxation the decree-holder should automatically be faulted; the conduct of the judgment-debtor might prevent the drawing of the bill, or might bring about the delay, or might otherwise be reprehensible in relation to the matter. For example, spurious appeals or notices of appeal or applications, by the judgment debtor might so pre-occupy the decree-holder that the latter might not have sufficient time or resources to be fighting those bastard and simulated challenges and at the same time attend to preparations of his bills of costs.

Indeed, the very fact that the judgment-debtor is still pursuing appeals or reviews, would prevent the preparation of a reasonable bill of costs; for, until those challenges are pursued to conclusion, a bill of costs when fights are still going on at whatever level of the courts might only present a very inaccurate and deceptive picture; and might result in unnecessary and expensive piecemeal taxations – one on the judgment, and another after appeal or review. That is inconvenient and unjust. Unless the later proceedings are so intertwined with the awarded judgment award that the whole thing must be done only once, there is no good reason to hold up a party's right to an ascertainable part. There is no such indivisibility here.

For these reasons, in the circumstances of these cases, the court considers it necessary that the decree passed in its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, and the decree shall now be executed forthwith, except as to so much of it as relates to the costs. As to so much thereof as relates to the costs, the decree may be executed as soon as the amount of the costs shall be ascertained by taxation.

In reaching this decision I have also borne in mind that there is no order staying execution of the decree.

Otherwise, I order execution before taxation as aforesaid herein. The respondents shall pay the costs of this application.

Orders accordingly.

Signed and dated by me at Nairobi, this 14th day of March, 2002.

**R KULOBA,**

**JUDGE**

**14.3.2002**