



**REPUBLIC OF KENYA**

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

**Civil Suit 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**

**1.** On 6<sup>th</sup> February 2012 the High Court (Odunga, J) ordered as follows:

*“I grant unconditional leave to the defendants to defend the suit to the limited extent of Kshs 240,000,000. Save for the foregoing, the notice of motion dated 11<sup>th</sup> May 2011 succeeds with costs”.*

**2.** The notice of motion dated 11<sup>th</sup> May 2011 had been taken out by the plaintiff. It sought summary judgment against the defendants as prayed in the plaint. The plaint in turn was for a claim of Kshs 721,489,273.78 with interest from 1<sup>st</sup> January 2011 at 14% p.a and US \$ 654,119.01 at varying rates of interest and costs. The net effect of the Court’s order of 6<sup>th</sup> February 2012 was to grant the plaintiff final judgment of Kshs 481,489,273.78 and US \$ 654,119.01. The plaintiff, by a notice of motion dated 14<sup>th</sup> January 2013, seeks to execute that decree before taxation of costs.

**3.** The principal grounds are set out in the deposition of Ronald Mworira sworn on 14<sup>th</sup> January 2013. He depones that the decree is final and that the plaintiff should enjoy the fruits of the partial judgment. The defendants’ application for stay of execution has been refused by the Court of Appeal. On 13<sup>th</sup> December 2012, the High Court directed that taxation of costs should await the remainder of the suit as the plaintiff was at liberty to apply for execution under section 94 of the Civil Procedure Act. The plaintiff has thus presented this motion under section 94 of the Act for leave to execute the decree at this stage.

**4.** The motion is contested. There are filed grounds of opposition dated 11<sup>th</sup> March 2013 as well as a replying affidavit of Lalji Rabadia sworn on even date. In a synopsis, the defendants’ case is that the

remainder of the suit for Kshs 240,000,000 has not been heard on merits. That accordingly, the decree is preliminary. The interests of justice would thus be better served by declining the motion to await the determination of the defendants' appeal at the Court of Appeal and the remainder of this suit. The defendants see no prejudice to the plaintiff in that wait. They also contend that no sufficient reasons have been put forward to warrant execution before taxation.

5. The defendants submitted that the plaintiff has already sold moveable and immovable assets of the defendants and recovered part of the decree in the sum of Kshs 140,000,000. Since the Court of Appeal may finally overturn the partial judgment, the interests of the defendants will be gravely compromised. Lastly, the defendants referred to another suit HCCC 732 of 2010 Kajulu Holdings Limited Vs Commercial Bank Limited in which the right of the bank to recall the debt has been impugned. The defendants' position in the end is that the motion is unmerited.

6. I have heard the rival submissions. I take the following view of the matter. Section 94 of the Civil Procedure Act 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”.*

7. The language of the statute is clear and unequivocal. A decree holder is at liberty, with leave of the court, to execute a decree before costs are ascertained. I do not agree with the defendants that the present decree is preliminary. In a sense, it is not a decree upon final judgment in the suit: but to the extent of the order of Court of 6<sup>th</sup> February 2012, it is a *final decree* on the sum of Kshs 481,489,273.78 and US \$ 654,119.01 and costs thereof. The determination of the remainder of the suit of Kshs 240,000,000 will not alter that fact in the decree of the High Court. I however agree with the defendants that the Court of Appeal may in Nairobi Civil Appeal No 63 of 2012 Lalji Karsan Rabadia and others Vs Commercial Bank of Africa overturn the decree. I say so because the appellate court has stated the appeal is arguable. But that court, in its wisdom, declined to grant the defendants a stay of execution of the present decree.

8. This is what the court said: *“We agree with Mr. Fraser that the Respondent being an established bank, if, in execution of the decree, it recovers any amount from the applicants it will be able to refund it if the appeal succeeds. We also agree with him that the applicants will not be committed to civil jail unless the respondent demonstrates to court that the applicants have means of satisfying the decree but have simply refused to pay or that, in an effort to evade execution, they have disposed or are disposing off their assets. In the circumstances, we find that although the applicants have an arguable appeal, they have failed to show that if stay is not granted, their appeal will be rendered nugatory. Consequently we find no merit in this application and we accordingly dismiss it with costs”.*

9. To my mind the defendants' assertion that the present motion *“is intended to scuttle the possible (sic) outcome of the defendants' appeal”* is inconsistent with the finding of the Court of Appeal. That court has found that in that event, the defendants have a solid remedy against the bank. I am alive that the appeal is due to be heard on 10<sup>th</sup> July 2013. Secondly, it would be to turn logic onto its head for the defendants to say *“wait a minute, let the plaintiff wait until costs are taxed”*. The taxation of the costs awarded to the plaintiff can only be an added burden to the defendants. Freezing the decree would only offer a temporary and costly relief considering the item of interest. I commiserate with the defendants. They have had their moveable and immovable assets sold in part payment of the decree. It was submitted that the sale was by mutual consent. The old adage goes that you should not hit a man in the teeth when he is down. But the appellate court declined that plea and I am ill placed to re-open it. It is nearly 14 months since the decree of the High Court was issued. The decree holder is thus prejudiced from reaping the fruits of its judgment.

10. Lastly, I have perused the ruling of the High Court of 10<sup>th</sup> June 2011 in Civil case 732 of 2010 Kajulu Holdings Limited Vs Commercial Bank of Africa Limited. The court granted an injunction to the plaintiff

restraining receivers appointed by the bank from interfering with the plaintiff's business. I have not seen a clear finding by that court that the plaintiff here was not entitled to the judgment it has obtained. And I did not expect to find such a finding in an interlocutory ruling for injunction. All that the court said was that "*the demand by the defendant to be paid colossal amount of money within a period of ten days is not only unreasonable but high handed and without justification*". That was one of the reasons why the court granted the injunction. But that suit remains unheard and there is thus no final determination on that issue. But even assuming that that fact was proved, it would not *ipso facto* obliterate the decree in this suit. Only the Court of Appeal can do it in the end.

11. For all the above reasons, I am persuaded to exercise my discretion in favour of the plaintiff. There is no sufficient reason put forth to prevent the plaintiff from executing its partial decree. In the result, I grant leave to the decree holder as follows: The decree dated 6<sup>th</sup> February 2012 may be executed forthwith, except as to so much 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. I also award the plaintiff costs of this motion.

It is so ordered.

**DATED and DELIVERED at NAIROBI** this 9<sup>th</sup> day of May 2013.

**G.K. KIMONDO**  
**JUDGE**

**Ruling read in open court in the presence of**

Mr. K. Fraser for the Plaintiff/Decree holder.

Ms. P. Ombunga for Mr. Amuga for the Defendant/Judgment debtor.

Mr. Collins Odhiambo Court Clerk.