



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 437 OF 2003**

**CALTEX OIL KENYA LIMITED.....PLAINTIFF**

**- VERSUS -**

**CRESCENT CONSTRUCTION CO. LIMITED.....DEFENDANT**

**RULING**

1. The defendant, **CRESCENT CONSTRUCTION COMPANY LIMITED**, is seeking an order to compel the plaintiff, **CALTEX OIL KENYA LIMITED**, to refund the sum of Kshs. 35,133,500/50.
2. It is the defendant's case that the only reason which had compelled it to pay to the plaintiff the amount in issue, was the interlocutory judgement dated 13<sup>th</sup> March 2008.
3. However, the Court of Appeal had now set aside the Ruling which had bestowed the interlocutory judgement in favour of the plaintiff.
4. The defendant has submitted that, following the decision by the Court of Appeal, and pursuant to Section 91 of the Civil Procedure Act, the High Court was now under an obligation to reverse the interlocutory Decree. It is the understanding of the defendant that the refund of the money which it had earlier paid to the plaintiff was simply a direct consequence of the reversal of the Ruling dated 13<sup>th</sup> March 2008.
5. The defendant further asserted that the refund of the money would restore the parties to their respective positions which existed immediately prior to the impugned Ruling.
6. It was on that basis that Mr. Saende, the learned advocate for the defendant, asked this court to order the plaintiff to refund the money to the defendant.
7. And as the plaintiff had declined the defendant's request for the refund, the defendant asked the court to issue a Warrant for the attachment of the plaintiff's assets, so as to enable the defendant recover the money.
8. In answer to the application, Mr. Mwaniki, the learned advocate for the plaintiff pointed out that the key issue involved in this case involved the taking of accounts between the parties.
9. It was only through the process of accounting that the plaintiff believes that the matters in issue would be resolved.

10. The plaintiff pointed out that the Court of Appeal had directed that the matters in issue be resolved by the High Court.

11. Whilst the process of accounting was outstanding, the plaintiff offered to provide a Bank Guarantee for the whole sum in issue. The further offer by the plaintiff was that the proposed Bank Guarantee would be provided within 72 hours of a court order.

12. The plaintiff said that the defendant has financial difficulties, and that therefore, the defendant would be unable to repay the sums if the case was ultimately determined in favour of the plaintiff.

13. The plaintiff's parting shot was that this case requires to proceed to full trial.

14. In a brief reply to the plaintiff's submissions, Mr. Saende advocate reiterated that once the Interlocutory Judgement had been set aside, the plaintiff had to refund the money which had been paid to it pursuant to the said interlocutory judgement.

15. Secondly, the defendant believes that the plaintiff's apprehension concerning its financial ability was misguided. The very fact that the defendant was previously able to remit payment when the plaintiff doubted its ability, is said to be sufficient proof of the defendant's ability.

16. In my considered opinion, the Judgement of the Court of Appeal in **CRESCENT CONSTRUCTION Co. LIMITED Vs CALTEX OIL KENYA LIMITED CIVIL APPEAL No. 86 of 2008**, should provide appropriate guidance to this court, on how to determine the application.

17. As the Court of Appeal noted, the parties had earlier recorded a consent order, pursuant to which the firm of **DELOITTE & TOUCHE** were appointed to be auditors in the exercise of reconciliation between the parties.

18. However, the defendant later raised concerns about the possible conflict of interest, on the part of the audit firm. Apparently, Deloitte & Touch provided Tax Compliance Services to the plaintiff, on instructions from **CHEVRON, USA**.

19. When the auditors declined to disqualify themselves from the task which the parties had assigned to them, the defendant filed an application to compel them to disqualify themselves.

20. The court set aside the consent order, through which the auditors had been appointed.

21. However, as the Court of Appeal noted in the judgement;

**“In considering the application for summary judgement, the trial Judge gave credence to the auditor's findings, taking into consideration the auditor's attitude and flexibility towards the parties especially the appellant. The learned Judge gave weight to the appellant's letter dated 9<sup>th</sup> May, 2007 which tabulated the account position as Kshs. 19,343,481.12 in favour of the respondent?.**

22. The High Court granted summary judgement on the basis of the letter dated 9<sup>th</sup> May 2007, which it considered as having constituted an admission by the defendant.

23. In its judgement, the Court of Appeal noted that whereas the trial court granted summary judgement for Kshs. 19,343,481.12, the plaintiff's claim was for Kshs. 23,405,647.27.

24. It was the opinion of the Court of Appeal that;

**“This state of affairs in itself demonstrates that the claim is not liquidated since every time the parties considered their accounts and reconciled the same, a different figure emerged. In our view, in these circumstances, where the sum claimed was neither liquidated nor clear, it**

**would only be fair that no judgement be entered at the interlocutory stage pending the conclusive determination of the account status between the parties and or upon production of tested evidence at trial?.**

25. In my considered view, these words by the Court of Appeal may have informed the plaintiff's current position, which is that the case ought to proceed to full trial.

26. The Court of Appeal also held as follows;

**“The trial Judge having found that there was clear conflict of interest on the part of the auditor and set aside the consent order referring the matter to the auditor, it was imperative, in our view, for the trial Judge not to consider anything done in the context of proceedings before the auditor?.**

27. As the letter dated 9<sup>th</sup> May 2007 had found its way to the court though the auditor's report, it should therefore not have been given consideration.

28. Furthermore, the Court of Appeal also noted that it was clear that;

**“...the contents of the letter of 9<sup>th</sup> May, 2007 did not constitute an admission as known in law, to lead to summary judgement?.**

29. In the end, the court expressed the view that this case was not suitable for either judgement on admission or summary judgement.

30. Having come to that conclusion, the Court of Appeal set aside the Ruling which led to the issuance of the interlocutory judgment in favour of the plaintiff.

31. In the absence of the judgement, there is no basis in law or in fact to justify the payment to the plaintiff, at this stage.

32. And although the plaintiff was offering to provide a Bank Guarantee for the whole sum which it had received from the defendant, I hold the considered view that such an offer cannot be a substitute to the defendant's entitlement, which is to be returned to the position it was in immediately before the trial court's order dated 13<sup>th</sup> March 2008.

33. I reiterate that in the absence of the summary judgement which had been granted in its favour, the plaintiff does not have any lawful justification for continuing to hold onto money which would never have had to be paid to it if the court had not granted interlocutory judgement in favour of the plaintiff.

34. Therefore, I allow the defendant's application dated 9<sup>th</sup> June 2016, and order the plaintiff to refund to the defendant the sum of Kshs. 35,133,500.50.

35. The costs of the application are awarded to the defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 19<sup>th</sup> day of December 2016.**

**FRED A. OCHIENG**

**JUDGE**

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

Mwaniki for Mrs. Mbugua for the Plaintiff

Saende for the Defendant

Collins Odhiambo – Court clerk.