



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

**MILIMANI LAW COURTS**

**Civil Case 1211 of 2000**

**CRESCENT CONSTRUCTION CO. LTD.....PLAINTIFF**

**- VERSUS -**

**KENYA PORTS AUTHORITY .....1<sup>ST</sup> DEFENDANT**

**KENYA REVENUE AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**RULING**

**1.** By a Notice of Motion application dated **18<sup>th</sup> April 2012** and filed under **Order 21, Rule 12** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The Plaintiff/Applicant seeks orders as follows:-

**1.** That this application be certified urgent and heard *ex-parte* in the first instance and on priority in view of its urgent nature and service of the same be dispensed with at the first instance.

**2.** That pending the hearing and determination of this application *inter-partes* a stay of execution of the decree issued pursuant to the Judgement delivered on **28<sup>th</sup> March 2012** be and is hereby granted.

**3.** That in the alternative, the orders of stay granted on **28<sup>th</sup> March 2012** be and are hereby extended until the hearing and determination of this application.

**4.** That an order be and is hereby made direction that the decretal amount in the sum of **Kshs.85,454,842/-** due and payable by the Plaintiff to the 2<sup>nd</sup> Defendant pursuant to the judgement delivered herein on **28<sup>th</sup> March 2012** in favour of the 2<sup>nd</sup> Defendant be offset with the sum of **Kshs.52,000,000/=** being Withholding Tax due and payable by the 2<sup>nd</sup> Defendant to the Plaintiff as at **December 2009**.

**5.** That an order be and is hereby made directing that the balance of the decretal amount after the set off in **prayer (4)** above be further offset with any other withholding tax and/or any other sums due and payable by the 2<sup>nd</sup> Defendant to the Plaintiff after **December 2009**.

**6.** That in the event that the Judgement is not satisfied by the said set-ff, the Plaintiff be and is hereby allowed to liquidate the balance of the decretal sum thereafter, after the set-off in prayer **(4)** and **(5)** by way of quarterly monthly installments of **Kshs.2,000,000/=** beginning mid **July 2012** until payment in full.

7. That the costs of this application be provided for.

2. Prayers 1, 2 and 3 were dispensed with at the *ex-parte* stage leaving for present determination prayers 4 – 7 of the said application. .

3. The application is based on the many grounds stated therein namely:-

1. That the Plaintiff is not able to settle the entire decretal amount for *inter-a-alia* the following reasons:-

a. That the Plaintiff is a local construction company carrying on its business within the Republic of Kenya and is mainly engaged in various contracts with the Government of the Republic of Kenya which contracts are currently ongoing. As such, the bulk of the consideration for the said contracts is still held up by the Government until such contracts are completed.

b. That further to the foregoing, in view of the fact the Plaintiff is engaged with the said Government in various contracts, the contractual sums for such are only paid piecemeal by the said Government for each specific and/or individual contract and only upon completion.

c. That most of the contracts in which the Plaintiff is engaged in are long term contracts which may take several years to be completed hence considerable delay payment and/or release of the contractual sums for the said contracts.

d. That the Government operates on an annual budget and therefore payment for projects and/or contracts such as the ones engaged in by the Plaintiff can only be factored in the said budget once every year upon completion.

2. That further, the Plaintiff is not able to settle the entire decretal amount at once given the nature of the contractual engagements that the Plaintiff is involved in and owing to the current adverse economic climate which has also led to difficulties in the Plaintiff's cash flow.

3. That as at **10<sup>th</sup> December 2009**, the 2<sup>nd</sup> Defendant herein owed and continues to owe the Plaintiff a sum of **Kshs.52,000,000/=** being withholding tax refund and it is therefore fair, just and realistic that the said amount owed by the 2<sup>nd</sup> Defendant be set-off against the decretal amount.

4. That currently there is an on-going audit by the 2<sup>nd</sup> Defendant's representatives and/or officials which has also so far indicated more monies owing to the Plaintiff by the 2<sup>nd</sup> Defendant on account of withholding tax.

5. That in the event that the 2<sup>nd</sup> Defendant proceeds with execution in respect of the said judgement and in view of the foregoing, the Plaintiff's operations will be completely crippled and thereby adversely affect its performance in respect of the many on-going projects from which the Plaintiff anticipates payment so as to satisfy the judgement herein after the said set-off or even without.

6. That it is therefore fair and just in the circumstances that the Plaintiff be allowed to liquidate the said amount in the manner aforesaid.

4. The application is supported by affidavit of **MOHAMED ASHRAFT** dated **18<sup>th</sup> April 2012** and its annexures.

5. Briefly, the history of the application is that a Judgment was entered by this court in favour of the 2<sup>nd</sup> Defendant/Respondent on **28<sup>th</sup> March 2012** in the total sum of **Kshs.82,454,842/=** with interest at court rates from the date of the decree until payment in full. The Plaintiff/Applicant does not dispute the said Judgement and has not preferred an appeal against the same. The Plaintiff/Applicant's main contention is that Judgement sum is too large to be paid all at once, and further that the 2<sup>nd</sup> Defendant

herein owed and continues to owe the Plaintiff a sum of **Kshs.52,000,000/=** being withholding tax refunds and that it is therefore just and realistic that the said amount owed by the 2<sup>nd</sup> Defendant be set-off against the decretal amount. The Applicant in an attempt to prove this claim annexed to its supporting affidavit a document marked “**MA2**” being a copy of a letter dated **10<sup>th</sup> December 2009** from the 2<sup>nd</sup> Defendant to the Plaintiff. Apart from **Kshs.52,000,000/=** the Applicant submitted that there is currently an ongoing audit by the 2<sup>nd</sup> Defendant which has so far indicated more monies owing to the Plaintiff by the 2<sup>nd</sup> Defendant on account of withholding tax. The Plaintiff is therefore apprehensive that in the event the 2<sup>nd</sup> Defendant proceeds with execution in respect of the said judgement the Plaintiff’s operations will be completely crippled and this will adversely affect its performance in respect of the many ongoing projects from which the Plaintiff anticipates payment so as to satisfy the judgement herein after the said set-off or even without.

6. In opposing the application the 1<sup>st</sup> Defendant filed grounds of opposition on **16<sup>th</sup> May 2012** while the 2<sup>nd</sup> Defendant opposed the same vide a replying affidavit dated **30<sup>th</sup> May 2012** with its annexures. In their grounds of opposition the 1<sup>st</sup> Defendant has submitted that the Applicant seeks orders for a “blanket” stay which is unmerited and amount to abuse of the court process. They further submitted that the orders if granted will in effect unfairly deny the 1<sup>st</sup> Defendant from promptly recovering the costs awarded to it through the said judgement.

In their replying affidavit the 2<sup>nd</sup> Defendant has totally denied that there are any outstanding refund claims of **Kshs.52,000,000.00** or at all due to the Plaintiff/Applicant from the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Defendant further submitted that the Plaintiff’s alleged claim of an outstanding refund of **Kshs.52,000,000/=** has never been audited for determination as to whether it is payable to the Plaintiff or not.

7. I have carefully considered the application and the opposing submission of the parties. For me the only issues I raise in order to determine the application, are as follows:-

(1) Whether there is before the court a clear unequivocal evidence that the 2<sup>nd</sup> Defendant owes the Plaintiff the alleged sum of **Kshs.52,000,000** to be off-set against the Judgement.

(2) Whether there is evidence before the court of the Plaintiff/Applicant financial accounts and records showing the Applicant’s financial position and outlay to enable this court make a decision on payment by installments as prayed.

8. To address the first issue, the 2<sup>nd</sup> Defendant, has clearly denied owing the Plaintiff the alleged **Kshs.52,000,000/=**. Because the existence of any such refund has been categorically denied, I must look at evidence before me to establish if, despite the denial, the alleged refund does indeed exist. The nearest communication to that effect is annexure “**MA2**” by the Applicant, which is a letter dated **10<sup>th</sup> December 2009** addressed by the 2<sup>nd</sup> Defendant to the Plaintiff. It is a short letter which in part reads as follows:-

**“RE: WHT-REFUND**

Please take note that your tax refund which has resulted from withholding tax amounting to **Kshs.52,000,00/=** is being processed and in due course, we shall communicate.

We do appreciate your patience.”

This letter was written in **2009**. It is almost **3 years** since, and there appears to have been no further communication effective enough to translate the contents of that letter into available cash. My understanding of the said letter is that there was further actions in the process required before a final product could be availed. Indeed the Applicant’s counsel Mr. Nyachoti agreed that there is an audit

process going on which will in due course confirm the said sum of **Kshs.52,000,000/=** or even more. That submission means that there is before this court no unequivocal admission by the 2<sup>nd</sup> Defendant of the alleged refund, and that the alleged refund, if at all it exists, has not crystallized and there are still issues to be determined in regard thereof. Clearly, the promise “*We shall communicate*” contained in the aforesaid letter dated **10<sup>th</sup> December 2009** has not been reached. I am satisfied that there is no evidence of alleged refund claims for **Kshs.52,000,000/=** or any other amount before this court. The 2<sup>nd</sup> Defendant is currently entitled to enjoy a judgement which has accrued of over **Kshs.82,000,000/=**. It would be a clear travesty of justice to offset a sum which has not accrued against a judgement which is clear and perfect in all its properties and characteristics.

**9.** To address the second issue, i.e. whether the Plaintiff can be allowed to settle the decretal sum by installments, it is prudent for the Applicant to put facts, figures and statements of account before the court so as to enable the court see the financial position of the Applicant in order to consider an application to satisfy a judgement by installment. Court record does not show a single financial statement, a statement of account showing various commitments of the Applicant, its financial outlay, outgoings or income. The request to pay by installments is simply made by unsupported documents. It is very difficult for this court to exercise its discretion on behalf of the Applicant with such scanty or no information. Even the affidavit of support does not state the various financial obligations of the Applicant, its income for the preceding years, a chart flow of how it will suffer should it fail to secure the order etc. Surely, the Applicant does not expect to secure an order from this court by simply stating that “*I fear*”.

**10.** In the upshot I dismiss the Notice of Motion application dated **18<sup>th</sup> April 2012** in its entirety. The costs of the application shall be borne by the Plaintiff/Applicant.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**  
**PRESENT:**

*M/s Kimenyi for the Plaintiff*

*M/s Wokabi for the 1<sup>st</sup> Defendant*

*Nyaga for the 2<sup>nd</sup> Defendant*

*Teresia – Court Clerk*