



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 437 of 2003**

**CALTEX OIL (K) LIMITED.....PLAINTIFF**

**VERSUS**

**CRESCENT CONSTRUCTION CO. LTD.....DEFENDANT**

**R U L I N G**

The Defendant has by Chamber Summons dated 9<sup>th</sup> October, 2008 expressed to be brought under order XX rule 11(1) order XLI rule 4 and order L rule 1 of Civil Procedure Rules and section 3A of Civil Procedure Act sought the following orders:

2. THAT a Stay of Execution of the judgment of the court dated 13<sup>th</sup> March, 2008 and or of such a decree as may be extracted herein be granted pending the inter partes hearing of the Defendant's application herein.
3. THAT the Honourable Court be pleased to Order that the Defendant/Applicant does pay and or liquidate the judgment and or decree sum herein by way of monthly installments of KES.500,000.00 till payment in full.
4. THAT the court be at liberty to make such other order that it deems appropriate to grant.

The grounds for the application include the following

- (a) The Judgment in the sum of Kshs.19,343,841.12 was on the 13<sup>th</sup> day of March, 2008 entered summarily in the Plaintiff's favour against the Defendant.
- (b) The Plaintiff's party and party costs were taxed on the 26<sup>th</sup> September, 2008 and the Plaintiff may at any time extract the decree and proceed with the execution of the same.
- (c) THAT the defendant is willing to pay and or liquidate the decree sum so far passed against him in installments of Kshs.500,000.00 till payment in full.
- (d) THAT the failure by the Defendant to pay the decree sum herein in lump sum has been occasioned by facts beyond its control for the defendant is owed substantial amounts of money to the tune of kshs.166,180,982.00 by various debtors notable among them being the Government of Kenya through its Ministry of Local Government.
- (e) THAT moreover Charterhouse Bank Limited, the Defendant's/Applicant's erstwhile bankers now

under statutory management are holding a sum of Kenya shillings 165,000,000.00 in the defendant's account at the said bank and the said defendant cannot gain access to the same.

(f) THAT if the plaintiff is allowed to execute the judgment against the defendant, it will suffer irreparable loss for the application herein will not only be rendered nugatory but the Defendant's business will be seriously disrupted the Defendant be forced to cease operating its business thereby rendering many Kenyans unemployed.

The application is supported by the affidavit sworn by the Defendant's Administration Manager, Mark K. Kezegule. I have considered its contents.

The application is opposed. The Respondent through the Chief Corporate Counsel of Chevron Kenya Limited, Edith Malombe, swore a replying affidavit dated 14<sup>th</sup> November, 2008. I have considered the contents of this affidavit.

I have considered the application together with submissions by both counsel.

Regarding the application for stay it is the Respondent's contention that the application is *res judicata* as it was the basis of an application for stay pending appeal which was dismissed by the Court of Appeal. Mrs. Mbugua for the Respondent submitted that the issues conversed in the instant application were same ones conversed and counsel referred to paragraph 14 of the Applicant's affidavit and to the Notice of Appeal marked 'EM2' in Respondent's affidavit.

Mr. Saende in response to the issue of stay being *res judicata* relied on the ruling from the Court of Appeal. Counsel contended that even though stay was sought, the Court of Appeal did not deal with that point choosing to dismiss the application on grounds the appeal was not arguable.

On the issue of stay I am satisfied same is *res judicata*. It was an issue before the Court of Appeal, a court of competent jurisdiction to determine that issue. The issue was considered in that by finding that the appeal was not arguable, the Court of Appeal effectively found the prayer for stay unmerited. It did not need to state it in so many words.

The only substantive prayer left for consideration is for payment of the judgment and decree by installments. The court has unfettered and wide powers in its sole discretion to grant an Applicant leave to pay the decretal sum by installments. The court must be satisfied that there are good grounds shown by the Applicant to warrant the order sought. The grounds should be *bona fide* and the Applicant must be seen to have come with clean hands.

The Applicant has advanced several reasons why its application should be granted. One of the reasons advanced is that it is unable to meet the entire debt because it is waiting for the release of millions of shillings held by the Government and in arbitral process; secondly that its money is being held with Chatter House Bank to the tune of 165 million.

Mrs. Mbugua vehemently opposes the application. Counsel has drawn courts attention to the fact that the Applicant has offered to pay installments of Kshs.500,000/- since 2001 and yet no payment has ever been paid. Counsel observed that in between taking the Respondents to Court of Appeal and back, the Applicant's annexures disclose that it has had Kshs.112 million paid to it but yet it could not use it to settle the decretal sum or pay any part of it.

Mrs. Mbugua relies on an investigation report carried out under the Respondent's instructions in which some of the assets owned by the Applicant are shown.

The power to grant a judgment debtor to liquidate the decretal sum by installments is a discretionary one. Being discretionary, the court must have an assurance that the Applicant has come with clean hands and that its *bona fides* are not questionable.

In this case the Applicant has not brought any statements or any accounts to demonstrate that indeed it has liquidity challenges and is genuinely unable to pay. All the Defendant has shown is that it is awaiting various payments from various quarters including the Government.

I have considered the conduct of the Applicant in this case. It has, since judgment was entered against it, filed several applications before this court and in the Court of Appeal. Further, it has not demonstrated willingness to pay the debt. If anything, the Applicant has engaged the Respondent and the Court in a manner which clearly shows that it is bent on delaying and/or avoiding the payment of the decretal sum in the case. I find therefore that the Applicant's *bona fides* are questionable and that the application is without merit.

Having reached this conclusion, I decline to grant the prayers sought. The application dated 9<sup>th</sup> October, 2008 is dismissed with costs.

Dated at Nairobi this 5<sup>th</sup> day of December, 2008.

**LESIIT, J.**

**JUDGE**

**Read, signed and delivered, in the presence of:**

Mr. Saende for the Applicant

Mrs. Mbugua for the Respondent

**LESIIT, J.**

**JUDGE**