



**REPUBLIC OF KENYA**

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

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 101 OF 2014**

**MARECO LTD.....DECREE HOLDER**

**VERSUS**

**GEEEN FUTURE LIMITED.....JUDGEMENT DEBTOR**

**HUAWEI TECHNOLOGIES.....GARNISHEE**

**RULING**

1. Before Court are Garnishee proceedings and the Notice of Motion dated 23<sup>rd</sup> November 2016 for the following Orders;-

2. A Garnishee order nisi do issue against the Garnishee directing that Kshs.30,113,388.00 belonging to the Judgement Debtor held by the Garnishee, be attached to satisfy the decree herein arising out of Civil Suit No.101 of 2014.

3. The cost of and incidental to this application be provided for.

4. Such other, further, alternative and/or incidental orders as the Honorable Court may deem just and expedient.

2. In the Supporting Affidavit of Allan Ochieng Marega, Mareco ltd (the Decree Holder), explains that is holds a Decree dated 21<sup>st</sup> day 2016 in this matter against Green Future Limited (the Judgement Debtor). It is for the sum of Kshs.27,652,470.39 plus costs and interest form 25<sup>th</sup> July 2013. That Decree remains unsatisfied.

3. The Decree Holder avers that it is aware that Huawei Technologies (k) Company Ltd (the Garnishee) is in possession and/or control of Kshs.30,113,388.00 belonging to the Judgement Debtor arising out of services rendered to it by the Judgement Debtor. It seeks the attachment of that Debt towards the partial satisfaction of the Decretal sum.

4. That Motion is opposed by the Garnishee through a Replying Affidavit of Richard Ondongo Gowi sworn on 9<sup>th</sup> February 2017. Mr. Gowi depones that on 13<sup>th</sup> January 2012, the Garnishee entered into a Work Contract with the Judgement Debtor which was a sub-contract agreement in respect to Safaricom Digital City Project Implementation. Under the terms of the Contract, payment was to the Judgement Debtor would be made upon it presenting Electronic Invoices on the Garnishee Supplier Collaboration System (SCS). That the contract work was to commence on 13<sup>th</sup> January, 2013 with a validity upto 31<sup>st</sup> December 2013. However in the Month of June 2013 the Judgement Debtor abandoned the work.

5. During the pendency of the subcontract, the Judgment Debtor entered into a Master Account Receivable Factoring Agreement which was executed between the Decree holder and the Garnishee. The nature of the Contract is explained later in this decision. That as consequence of the Judgement Debtor abandoning work, the Garnishee avers, it was forced to settle and make good claims by third parties who had been engaged in the Project. In addition, the Garnishee had to complete the work on a retender.

6. It is deponed by the Garnishee that by the time of receipt of the Garnishee order it had remitted a total of Kshs.41,513,012.42 being the total sum payable on the completed works. The sum of Kshs.41,513,012.25 was after reduction of VAT and withholding Tax of Kshs.6,490,012.

7. That notwithstanding that it had suffered heavy losses from the conduct of the Judgement Debtor, Gowi depones, the Garnishee paid Ksh.6,575,351/- in obedience to the Garnishee orders. Further that this sum was more than Kshs.4,490,770.42 which would be the only sum that remained in the Judgement Debtor's Account.

8. In effect, the position of the Garnishee is that it is the Judgement Debtor that owes it money and it cannot therefore answer to the orders.
9. The Decree/holder takes the position that the Garnishee has made unfounded allegations. In a further affidavit sworn on 8<sup>th</sup> March 2010 Mr. Marega depones that the Judgement Debtor has rendered goods, works and/or services on purchase orders issued by the Garnishee whereupon the Garnishee has issued Certificates of Completion. It is on that basis that the Judgment Debtor has raised invoices which the Garnishee has not paid to date.
10. These further allegations attracted a further response by the Garnishee. It is in a further Replying Affidavit of Mr. Gowi sworn on 15<sup>th</sup> March 2017. In a sum, the Garnishee makes the point that Certificates of Completion were issued in respect, not of the entire contracted works, but to work ascertained as completed and that some of the invoices said to be due are fake and fraudulent. The Garnishee asserts that the illegitimacy of the invoices was determined by Court in its judgement of 29<sup>th</sup> October 2015.
11. The Garnishee asserts that the Decree Holder is attempting to relitigate certain matters that were already settled by the Judgement. This shall be discussed further in this decision.
12. At the hearing, Counsel for the parties made submissions which substantially, if not entirely, revolved around their perception of the facts in this matter.
13. These proceedings are properly brought under the provisions of Order 23 of The Civil Procedure Rules. And as the Garnishee disputes liability, the Application before Court is really a trial of the liability of the Garnishee. On the burden of proof the Court was referred to the following holding of Mabeya J. in **Otieno Ragot & Co. Advocates vs. City Council of Nairobi** [2015] eKLR:-
- ‘Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not the garnishee is indebted to the Judgement Debtor. Ordinarily, the judgment creditor only makes allegations of the Garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the Garnishee to prove otherwise. In this regard, to discharge that burden, the Garnishee has to produce strong, sufficient and convincing evidence that the fund in its hands or the debt is not due or payable’.
- I agree. There is an onus on the applicant to provide prima facie evidence that the Garnishee is indebted to the Judgment Debtor. Only then does the burden of proof shift or is cast upon the Garnishee to prove otherwise on strong, sufficient and convincing evidence. One rationale for this rule would be that, ordinarily, the Garnishee has more special knowledge of its position vis-à-vis the Judgment Debtor than would the Decree Holder. Another is that a Garnishee may conceal a debt so as to help the Judgement Debtor avoid a Decree.
14. The allegation by the Applicant is that the Garnishee is in possession and/or control of Kshs.30,113,388.00 owed to the Judgement Debtor. In response, the Garnishee states that the total sum ever owed to the Judgement Debtor was Kshs.45,953,782.42. Of this amount it has paid a total of Kshs.41,513,012/=. As proof of the payment, the Garnishee prepared a schedule of payment and produced its account at Standard Chartered Bank. This amount is said to have been paid into the Judgement Debtor’s Account at Commercial Bank of Africa Upper Hill Branch A/C No.669928001. Of note worthy is that this Account was operated jointly by both the Judgment Debtor and Decree Holder. A Copy of a Power of Attorney dated 25<sup>th</sup> March 2013 to demonstrate the joint mandate is annexed to the Affidavit of Mr. Gowa.
15. It was nevertheless submitted by Mr. Karanja, appearing for the Applicant, that the Bank statements are not certified and do not narrate how the money moved. This may be so, but the Applicant would be in a position to know whether or not the money was truly paid into the Judgment Debtor’s bank A/C No.6699280011 as the Applicant also had the mandate to operate it. In the Further Replying Affidavit filed by Mr. Marega for the Applicant, he does not deny this mandate to operate the Account. And the Applicant does not directly confront the allegation of payment into the Account.
16. On my assessment of the evidence, I find that on various dates between 14<sup>th</sup> March 2013 and 29<sup>th</sup> October 2013 a total of Ks. 41,413,012.25 was paid by the Garnishee to the Judgment Debtor.
17. There is however, another argument by the Applicant that the payment made does not reflect the Garnishee’s entire indebtedness to the Judgment Debtor. To buttress this argument, the Applicant showed copies of certain invoices raised by the Judgment Debtor. These are five invoices.
18. The Garnishee’s answer to this allegation was that the invoices are fake and fraudulent and the Court affirmed this in its judgement of 29<sup>th</sup> October 2015.
19. Looking at the Complaint, the five (5) invoices, being Invoice No.00386, 00391, 00392, 00393 and 00395, were the subject of this litigation by the Applicant against the Judgment Debtor and the Garnishee (then named as the second Defendant). The Applicant had on 25<sup>th</sup> March 2013 entered into a Master Factoring Agreement with the Judgement Debtor wherein it was agreed that the 1<sup>st</sup> Defendant would from time to time sell to the Plaintiff debts owed to it for goods and services supplied to the third parties at an agreed fee of 6% of the invoice sum. The Garnishee was one such third party by virtue of a business relationship with the Judgment Debtor and would from time to time owe it money. In an agreement dated 11<sup>th</sup> March 2013, the Judgment Debtor issued an irrevocable Direction to the Garnishee to remit any payment due to it into Account No. 6699280011. This the account that was operated jointly by the Applicant and the Judgement Debtor.
20. The pith of the Applicant’s Claim was that, while it had paid the entire amount of Ksh.27,331,846.59 invoiced by the Judgement Debtor as agreed, the Garnishee had refused to make payments as envisaged in the Master Factoring Agreement.

21. The Submissions by Mr. Wangalwa of the Applicant is that paragraphs 78, 79 and 80 of the Court's Judgement settled the issue of the Claim by the Plaintiff as against the Garnishee (then the Defendant). The Court held:-

“78. Green Future has failed to demonstrate that Huawei did not settle any invoices which had been duly accepted.

79. Therefore, although Meraco paid Green Future in respect to the invoices which were assigned to Mareco, I find that Huawei was not under any legal obligation to pay Mareco, because the invoices for which Mareco paid, had never been duly accepted by Huawei.

80. In the result, the Plaintiff's claim against Huawei is without foundation. It is dismissed with costs to the 2<sup>nd</sup> Defendant.”

22. What the Court held, in effect, is that the five invoices had never been duly signed by Huawei. Indeed, the good Judge expressed himself as follows,

“69. I find and hold that Huawei was only obliged to make payment for the sums payable to Green Future. In other words, unless Green Future proved that it was entitled to some payment from Huawei, such payment could not be claimed by Mareco.

70. The fact that invoices were assigned by Green Future to Mareco, and that Mareco thereafter settled such invoices, could not without more, give rise to a liability on the part of Huawei to pay Mareco.”

23. A finding had been made that in respect to the five invoices no money was due from the Garnishee to the Judgment Debtor. It is a finding that has not been set aside. I will also have to find, for purposes of the Garnishee proceedings, that in respect to the five invoices, the Garnishee is not indebted to the Judgment Debtor.

24. I turn my attention to a sum of Ksh.6,578,351 that was paid by the Garnishee upon service of the Order nisi and pursuant to a Consent Order of 9<sup>th</sup> December 2016 entered between the Applicant and Garnishee. This was paid out after Mr. Wangalwa told Court that the Garnishee admitted owing Kshs.6,381,000 to the Judgment Debtor. The Garnishee says that this was made in haste without it factoring that it had suffered massive loss as a result of the Judgment Debtors breach of contract and it could very well have a claim against the Judgment Debtor.

25. The Applicant saw this payment being of significance from another angle. That it was a pointer that, whilst maintaining that it did not owe the Judgment Debtor any money on the controversial invoices, the Garnishee was willing to admit owing Ksh.6,381,000/=. That this would be a contradiction. In retort, the Garnishee stated that it would be sums owing on Account of completed works.

26. This Court does not see a contradiction or inconsistency, because it was never admitted by the Garnishee that the amount was due on Account of the disputed invoices. And as to the Disputed invoices, there is already a Court determination that nothing is due from the Garnishee to the Judgment Debtor on them.

27. There was another allegation that the Garnishee have faked certain payments so as to appear that it is not indebted to the Judgment Debtor. Take for instance, Kshs.1,552,722/= said to have been paid out by the Garnishee to the Judgment Debtors employees, at the request of the Judgment debtor. In answer to this the Judgment Debtor showed to Court a written Agreement dated 2<sup>nd</sup> January 2014 made between the Garnishee and the Judgment Debtor which formalized this arrangement. The Applicant thought that the Documents shown to Court were too casual and could not prove that payment was in fact made. Even if I were to agree with this argument, I note that the payments were allegedly made before the current suit was filed. There is also evidence that the Garnishee was forced to step in on behalf of the Judgment Debtor, because the employees of the Judgment Debtor had threatened to vandalize the project infrastructure. The anxiety is palpable in emails shown to Court. This Court doubts that the Garnishee would have feigned this situation to assist the Judgment Debtor evade a debt whose payment had not been formally sought by way of a Court action.

28. I reach the decision that the Garnishee has proved that it is not indebted to Judgment Debtor.

29. For the reason that the Applicant pressed on with the Garnishee proceedings even after the Garnishee had admitted some debt and had paid it, and further for the reason that the Applicant had done so on the basis of an alleged debt which had been determined by Court as not due, this Court finds and orders that the Applicant should shoulder the costs of the Garnishee proceedings.

**Dated, Signed and Delivered in Court at Nairobi this 25<sup>th</sup> day of May, 2017.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

Karanga for Decree Holder

Wangalwa for Garnishee

Alex - Court Clerk