



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 101 OF 2014**

**MARECO LIMITED ..... PLAINTIFF**

**- VERSUS -**

**GREEN FUTURE LIMITED.....1<sup>ST</sup> DEFENDANT**

**HUAWEI TECHNOLOGIES (K) COMPANY LIMITED..... 2<sup>ND</sup>  
DEFENDANT**

**JUDGEMENT**

- 1.** The suit herein pits **MARECO LIMITED**, the plaintiff, against **GREEN FUTURE LIMITED** (*the 1<sup>st</sup> Defendant*) and **HUAWEI TECHNOLOGIES (K) COMPANY LIMITED** (*the 2<sup>nd</sup> Defendant*).
- 2.** It is the plaintiff's case that on 25<sup>th</sup> March 2013 it entered into a Master Factoring Agreement with the 1<sup>st</sup> Defendant. Pursuant to that Agreement the 1<sup>st</sup> Defendant would sell to the plaintiff, debts owing to the plaintiff for goods or for services which the plaintiff had supplied to third parties.
- 3.** As between the plaintiff and the 1<sup>st</sup> Defendant, the Agreed Fee was 6% of the invoice sum.
- 4.** It was the plaintiff's further case that on 11<sup>th</sup> March 2013, the 1<sup>st</sup> Defendant issued an Irrevocable Direction to Pay, to the 2<sup>nd</sup> Defendant. It was a term of that Direction to Pay that the 2<sup>nd</sup> Defendant would remit any and all payments due to the Bank Account No. **6699280011**, at the Commercial Bank of Africa, Westlands Branch.
- 5.** At paragraph 7 of the plaint, it was asserted that on 25<sup>th</sup> March 2013, the 1<sup>st</sup> Defendant issued the plaintiff with an Irrevocable Power of Attorney to operate the account.
- 6.** At paragraph 8 of the plaint, it was asserted that on 12<sup>th</sup> April 2013, the 2<sup>nd</sup> Defendant duly accepted the Directive.
- 7.** It was the plaintiff's case that during the month of June 2013, the 1<sup>st</sup> Defendant assigned to the plaintiff various invoices which were due and owing from the 2<sup>nd</sup> Defendant. The total value of the said invoices was said to have been **Kshs. 29,848,373.39**.

8. The plaintiff said that it duly paid to the 1<sup>st</sup> defendant the sum of **Kshs. 27,331,846.59**.
9. Having made the said payment to the 1<sup>st</sup> defendant, the plaintiff expected payment from the 2<sup>nd</sup> defendant.
10. However, the 2<sup>nd</sup> defendant had neglected, omitted, refused or otherwise failed to remit payments to the plaintiff. It was for those reasons that the plaintiff brought these proceedings.
11. The plaintiff's claims are founded on the defendants' breach of Agreements and the 2<sup>nd</sup> defendant's failure to remit the assigned sum.
12. For the avoidance of doubt, the plaintiff explained that the difference between the value of the invoices (**being Kshs. 29,848,373.39**) and the sum which the plaintiff paid to the 1<sup>st</sup> defendant (**being Kshs. 27,331,846.59**) constituted the profit margin which the plaintiff was entitled to.
13. Therefore, the plaintiff's claim was for:
- a. **Kshs. 27,652,470.39 which was the purchase price paid to the 1<sup>st</sup> defendant;**
  - b. **Kshs. 2,781,541.67 which was the profit;**
  - c. **Kshs. 6,490,263.89 on account of Damages for loss of Investment opportunity;**
  - d. **Interest on (a) and (b) at Court rates from 25<sup>th</sup> July 2013 until payment in full;**
  - e. **Costs of the suit;**
  - f. **Such other, further, incidental or alternative relief as the Court may deem just and expedient.**
14. At the trial, the plaintiff called one witness, **ALLAN JONAH OCHIENG MAREGA**, who was a director of **MARECO LIMITED**
15. Allan (PW1) said that on 25<sup>th</sup> March 2013 the plaintiff and the 1<sup>st</sup> defendant signed a **MASTER FACTORING AGREEMENT**, pursuant to which the 1<sup>st</sup> defendant would, from time to time, sell to the plaintiff debts.
16. PW1 also said that the 1<sup>st</sup> defendant opened a Bank Account which it mandated the plaintiff to run. That arrangement was intended to help in the smooth running of the arrangement between the parties.
17. The 1<sup>st</sup> defendant opened the Bank Account **No. 6699280011** at the Commercial Bank of Africa, Westlands Branch.
18. PW1 testified that on 25<sup>th</sup> March 2013, the 1<sup>st</sup> defendant granted to the plaintiff, the mandate to operate the account. The mandate was given in the form of a Power of Attorney.
19. It was also the testimony of Allan that the Irrevocable Direction to pay was issued by Green Future Limited (*the 1<sup>st</sup> defendant*) to Huawei Technologies (K) Company Limited (*the 2<sup>nd</sup> defendant*) on 11<sup>th</sup> March 2013.
20. Allan testified that Huawei accepted the Irrevocable Direction on 12<sup>th</sup> April 2014: that is the date specified in the Witness Statement. However, the document actually bears the date 12<sup>th</sup> April 2013.
21. Having satisfied itself that the Huawei would settle the invoices drawn up by the Green Future Limited, the plaintiff paid to Green Future Limited, a total of **Kshs. 27,331,846.59**.
22. When Allan was cross-examined by Mr. Kounah, the learned advocate for Green Future Limited, he said that Green Future Limited was enjoined to the suit as a defendant because they were a party to the

Agreement dated 25<sup>th</sup> March 2013. It was the contention of the plaintiff that Green Future Limited had a responsibility to assist Mareco Limited to collect the outstanding sum from Huawei.

23. Allan also explained that pursuant to clause 6.3 of the Agreement, a Fee of 6% was calculable based on the outstanding principal amount. He added that the sum of **Kshs. 2,781,541.67** was the 6% for the first 90 days.

24. Therefore the claim for **Kshs. 6,490,263.89** was said to constitute the 6% for the period of 7 months, according to Allan. The period of 7 months constituted the length of time until the plaintiff filed the suit herein.

25. Thereafter, the interest would be calculated by the plaintiff every 90 days.

26. Mr. Wangalwa, the learned advocate for Huawei also cross-examined Allan.

27. Allan said that Huawei was a party to the Agreement dated 25<sup>th</sup> March 2013, even though Huawei had not signed that Agreement.

28. Allan emphasized that Huawei was obliged to honour all payments by crediting money into the specified bank account. The obligation to pay was said to relate to invoices which Huawei had “*duly accepted*”.

29. When Allan was asked to clarify the meaning of the phrase “*duly accepted*”, he said that Huawei was deemed to have duly accepted invoices when there had been;

**a) Receipts from Huawei;**

**b) Signatures on invoices; and**

**c) The invoices were stamped.**

30. Allan testified that he was not aware about what constituted Huawei’s understanding of the phrase “*duly accepted*”. He even said that he had not read any writings on the invoices which specified that invoices were to be sent electronically.

31. On its part, Huawei insisted that an invoice was only deemed to have been “*duly accepted*” if it had been relayed electronically.

32. However, both Mareco and Huawei were in agreement that in order for an invoice to be paid by Huawei, there had to be Certificates which had been signed by the Engineers of Huawei. Furthermore, the sums reflected on such signed Certificates had to correspond with the invoices raised by Green Future.

33. In this instance, Green Future said that Huawei made some payments into the account which had been specified for that purpose. However, when no further payments were forthcoming, Mareco lodged a criminal complaint with the police. The said complaint was made against Green Future.

34. When Huawei asked PW1 why the complaint was lodged against Green Future, Allan said that Mareco had suspected that there had been fraud perpetrated by Green Future against Mareco.

35. Mareco was suspicious that Green Future had opened another bank account, to facilitate payment by Huawei to Green Future. If such a thing had happened, Mareco would have been defrauded as it had already paid Green Future, and therefore Huawei should not have made any payments to Green Future unless Mareco gave its prior assent.

36. Allan said that he had also suspected that Huawei did remit payments to an account identified by Green Future, to the exclusion of Mareco. However, when Allan was put to task, to identify any

payments which Huawei made to an account other than the one which had been specified, Allan said that Mareco did not have evidence of any such payments.

37. According to Allan, if there was any disputes over invoices, such disputes would need to be resolved between the defendants. Nonetheless, the plaintiff insisted that even in the face of any disputes over invoices, Huawei would have to settle the invoices.

38. In this case Allan was unaware of any complaints by Green Future against Huawei.

39. After Allan testified, the plaintiff closed its case.

40. Thereafter, the 1<sup>st</sup> defendant, **GREEN FUTURE** made a decision that it would not call any evidence.

41. On its part, **HUAWEI** called one witness, **RICHARD ODONGO GOWI (DW1)**. He used to work as a Legal Officer at Huawei.

42. Richard confirmed that Huawei and Green Future had signed a contract in which Green Future was one of the many sub-contractors in the Safaricom Digital City Project. Pursuant to that contract, Green Future was to lay fibre along selected routes within the Nairobi County.

43. Shortly after the work commenced Green Future informed Huawei of their financial position, which necessitated the assignment of invoices to a financier, as a way for Green Future raising the required finances for the project.

44. In his signed Witness Statement, Richard said that Mareco, Green Future and Huawei signed a Master Account Receivable Factoring Agreement.

45. However, in the understanding of Richard, that Agreement did not give rise to any liability on the part of Huawei. He explained that the Agreement simply provided accommodation to Green Future, without creating any liability on the part of Huawei, for non-compliance.

46. Richard testified that Huawei honoured the Agreement. He added that although Green Future tried to open a new account without reference to Mareco, Huawei never channeled any payments through that unauthorized account.

47. The most significant aspect of Richard's evidence was that Green Future had an obligation to present only E-invoices to Huawei, in the Supplier Collaboration System (**SCS**), which was an electronic system.

48. Richard testified that no manual invoices were to be entertained. Green Future did provide some manual invoices, which Huawei acknowledged at the point of presentation. But Huawei insisted that the manual invoices could not be accepted by it, as the invoices were not valid.

49. Essentially, therefore, Huawei is saying that it was not obliged to pay for invoices which were invalid.

50. Secondly, Richard testified that the invoices in issue were those that had been pending for between 108 and 136 days. As Huawei was supposed to make payments within the period between 15 and 30 days of the issuance of invoices, Huawei insisted that it could not be expected to settle such old invoices.

51. Finally, Richard reiterated that Huawei could only be compelled to settle invoices which it had accepted. He then explained that the acceptance of invoices entailed the receipts of invoices, and then having them stamped as an acknowledgement that the invoices had reached Huawei. A stamped copy of the invoice was then handed over to the supplier for their records.

52. Meanwhile, the person who had received the invoice would send it to the Project team, who had the capacity to verify the invoices before determining whether or not the invoices were acceptable. In order for an invoice to be accepted, there had to be a match between the Local Purchase Order and the invoice.

53. The process of ascertaining whether or not there was a match was conducted electronically as the particulars of the Local Purchase Order would have already been entered onto the electronic system called the **SUPPLIER COLLABORATION SYSTEM (SCS)**.
54. It is the case for Huawei that the invoices in issue were never entered into the SCS. Therefore, as the invoices did not go through the process which would have verified their authenticity, Huawei's position was that the invoices were invalid.
55. Huawei insisted that they could not be expected to settle invalid invoices.
56. During cross-examination by Mr. Kounah, the learned advocate for Green Future, Richard said that Huawei paid all the invoices which were duly accepted. Indeed, Richard made it clear that Green Future had never raised any complaints with Huawei about any invoices which were unpaid.
57. To support its case, Huawei said that the invoices between pages 83 and 87 of the plaintiff's Bundle of Documents were paid in full. It was noted that one of the features which those particular invoices had in common was that they were signed by both Green Future and Huawei. Secondly, there were 2 signatures of Huawei, who included their site supervisor.
58. From the evidence in record it is clear that Huawei was aware of the Factoring Arrangement between Mareco and Green Future.
59. The plaintiff testified that it paid for **Kshs. 27,331,846.59** to Green Future. As Green Future decided not to call any witness, the evidence tendered by Mareco remained unchallenged in that respect.
60. Green Future asserted, in its submissions, that it fulfilled its contractual obligations to Huawei. However, as Green Future did not produce any evidence, there is no proof at all of the assertion by Green Future.
61. Contrary to the submissions of Mareco and also of Green Future, that Huawei did not dispute the plaintiff's assertions, the position of Huawei was that it was only obliged to pay for the invoices which were presented to Huawei in the Supplier Collaboration System (**SCS**). As all invoices presented electronically through **SCS** were paid by Huawei, they insisted that they did not owe the plaintiff any money.
62. To my mind, the fact that Mareco enjoined Green Future to this suit, as a defendant is significant.
63. It is even more significant when it is borne in mind that Mareco had reason to believe that Green Future was defrauding it, leading to Mareco filing a criminal complaint against Green Future.
64. If Mareco was confident that the payments made by it to Green Future were founded upon authentic supporting documents, I would have expected Mareco to have sued Huawei only.
65. And if Green Future had a good basis upon which to found their contention that Huawei was liable to pay Mareco in respect to the invoices which Green Future had assigned to Mareco, I would have expected Green Future to join hands with Mareco to nail Huawei.
66. The document which connects Mareco to Green Future and to Huawei is the Irrevocable Direction to Pay dated 11<sup>th</sup> March 2013.
67. Although it is dated 11<sup>th</sup> March 2013, Huawei only signed it on 12<sup>th</sup> April 2013.
68. Pursuant to that document, Green Future issued irrevocable instructions and authority to Huawei to;

**“Remit any and all payments that are to be made to GFL into the following account by electronic funds transfer:**

**Account Name: Green Future Limited**

**Bank Name: Commercial Bank of Africa Ltd**

**Account Number: 6699280011 [KES]**

**Branch: Westlands Branch**

**Sort Code: 07000”**

69. I find and hold that Huawei was only obliged to make payment for the sums payable to Green Future. In other words, until and 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.

71. If Mareco paid for invoices before verifying with Huawei whether or not Huawei had duly accepted such invoices, then Mareco was taking a risk, as Mareco would not have become aware whether or not Huawei would pay to Mareco such money as shown on the face of the assigned invoices.

72. In the submissions of Mareco, it is clear that the Completion Certificates issued by Huawei are those at pages 83 to 87 of the plaintiff's documents. Those are the very same certificates in relation to which Huawei testified that they remitted payment. To my mind, that confirms that in respect to the invoices which Huawei duly accepted, payments were made.

73. Was Huawei right or wrong to have insisted that the phrase “*duly accepted*” implied that which was processed through the Supplier Collaboration System (SCS)?

74. The first answer to that question is that because Green Future did not challenge the evidence of Huawei in that respect, the said evidence is un-challenged.

75. Secondly, I find that in the Purchase Orders issued by Huawei, there are the following Notes;

**“1. This Purchase Order is governed by relative Term & conditions in Agreement or other valid document of understanding signed by HUAWEI and the Supplier.**

**2. The PO No. & the line No. Must appear on each invoice and bill of lading relating to this PO. Two copies of the invoice are requested.**

**3. Supplier is requested to confirm acceptance of new Purchase Order by altering the PO state on SCS within 2 days or according to the procurement contract condition.**

**4. Queries relating to this Purchase Order shall be raised to HUAWEI's attention within 48 hours. In case of no response within 48 hours, this Purchase Order will be assumed to have been accepted by Supplier unconditionally.**

**5. If any information in an outstanding PO changes, the final PO sent by Buyer and confirmed by both parties on SCS shall be taken as final and binding”.**

76. Those Notes demonstrate that right from the stage when the Purchase Order is being issued, the Supplier Collaboration System (SCS) had been introduced into the procedures and systems governing the contract between Green Future and Huawei.

77. I therefore find, in line with the evidence tendered by Huawei that even the invoices had to be presented electronically, through the SCS.

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

79. Therefore, although Mareco 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.

81. Meanwhile, as regards the 1<sup>st</sup> defendant, it is liable to refund to the plaintiff the sum of **Kshs. 27,652,470.39** which the plaintiff paid to it.

82. The 1<sup>st</sup> defendant will also pay to the plaintiff;

a) **Costs of the suit; and**

b) **Interest on the decretal sum at court rates, from 25<sup>th</sup> July 2013 until payment in full.**

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of October 2015.**

**FRED A. OCHIENG**

**JUDGE**

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

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant

Collins Odhiambo – Court clerk