



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 101 OF 2014

MARECO LIMITEDPLAINTIFF

- VERSUS -

GREEN FUTURE LIMITED.....1ST DEFENDANT

HUAWEI TECHNOLOGIES (K) COMPANY LIMITED.....2ND DEFENDANT

RULING

1. The application before me has been brought pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act, as read together with Order 40 Rules 2 and 11 and Order 51 Rule 1 of the Civil Procedure Rules.
2. The substantive relief sought by the Plaintiff was an order compelling the defendants to deposit the sum of Kshs.29,848,373/39 into an interest-earning account, to be held in the joint names of the advocates for the respective parties. It was the desire of the plaintiff that those funds should continue to be held in that account until the suit was heard and determined.
3. The plaintiff also had an alternative prayer, which was that the 2nd Defendant, **HUAWEI TECHNOLOGIES (K) COMPANY LIMITED** be restrained from implementing or carrying on further works on the project belonging to Safaricom Data Services Limited. That project is dubbed the “*Safaricom Digital City Project.*”
4. If the alternative relief was granted, the plaintiff wishes to have it remain in force until the suit was heard and determined.
5. The plaintiff asserted that the defendants had continued to illegally withhold the plaintiff’s funds amounting to Kshs.29,848,373/39.
6. As a consequence of the said illegal withholding of the money, the plaintiff contended that its day-to-day operations had been crippled.
7. Meanwhile, the 2nd defendant was alleged to be utilising the funds in the implementation of the “*Safaricom Digital City Project.*”
8. The basis of the plaintiff’s claim was that it had paid the sums in issue to **GREEN FUTURE LIMITED** after the said defendant had assigned its various invoices to the Plaintiff.
9. In consideration for the settlement of those invoices, **GREEN FUTURE LIMITED** issued Directions to **HUAWEI TECHNOLOGIES (K) COMPANY LIMITED** to pay to the Plaintiff the full amount which **HUAWEI** would have otherwise had to pay to **GREEN FUTURE**.
10. It is the plaintiff’s case that although it discharged its obligations to **GREEN FUTURE LIMITED**, the defendants had failed to remit payment to the plaintiff.
11. Instead of remitting payment to **MARECO LIMITED**, **HUAWEI** is said to be utilizing the funds in the process of implementing the “*Safaricom Digital City Project.*”

12. As far as **MARECO LIMITED** was concerned, there was no dispute about the sums owed to it. There were only excuses being bundled about between the two defendants. The plaintiff believes that the defendants' protestations were simply excuses because the 1st Defendant, **GREEN FUTURE LIMITED**, had admitted the amount owed to **MARECO LIMITED**.
13. In fact, the **GREEN FUTURE LIMITED** is said to have presented to **HUAWEI** the electronic invoices which **HUAWEI** had sought, in replacement of the hard copy invoices that had been originally presented. Therefore, **MARECO LIMITED** was of the view that **HUAWEI** no longer had any excuse for its failure to remit payment.
14. Meanwhile **GREEN FUTURE LIMITED** is said to have closed down its offices. Having moved to an undisclosed place, and because they do not have any assets which could be utilised to pay the decretal amount, the applicant expressed the view that the conduct of **GREEN FUTURE LIMITED** was indicative of a desire to evade their obligations. That was therefore described as a sound basis for the order directing the defendants to deposit the principal sum into an interest-earning account.
15. In answer to the application, **GREEN FUTURE LIMITED** blamed the plaintiff for failing to comply with the express terms of the contract, regarding the precise procedures which would have triggered the process for the payment of any money due to the plaintiff.
16. The plaintiff appeared to partially concede that it, initially, did not provide electronic invoices. However, the plaintiff hastened to add that any such failure had been regularised.
17. I have verified from paragraph 5 of the witness statement recorded by **RICHARD GOWI**, the Legal Officer of **HUAWEI** that the electronic invoices were eventually issued. This is what we said:

"I also wish to state that in the contract we had with Green Future, only E-invoices were to be presented to Huawei in the SCS (Supplies Collaboration system) which is an electronic system, and no manual invoices were to be entertained in the agreement if not duly submitted in the SCS system. Green Future, during the period of this Contract, erroneously presented to us manual invoices.

These invoices did not meet the aforementioned criteria...

The invalid invoices were therefore returned to Green Future for correction and re-issuing electronically in the SCS, and this was subsequently done."

18. Nonetheless, Huawei's position was that it did not assume any liability to the Plaintiff. As far as Huawei was concerned, the acceptance of the invoices was solely an accommodation to Green Future.
19. Meanwhile, **GREEN FUTURE** denied the allegation that it had closed its offices, and also that it was not financially sound. It was the contention of **GREEN FUTURE** that it was

"a known entity fully in operation and capable of satisfying the amount in the event that the plaintiff/Applicant eventually succeeds in its claim after full hearing of the suit".

20. Indeed **GREEN FUTURE** was categorical that there was a contract between it and **HUAWEI** which was still ongoing. To my mind, that contention was calculated to demonstrate that **GREEN FUTURE** was an ongoing concern, which had the financial ability to meet its obligations.
21. But it is interesting to note that **HUAWEI** did not share the view expressed by **GREEN FUTURE**. The Legal Officer of **HUAWEI** appears to corroborate the plaintiff's contention regarding the closure of the offices of **GREEN FUTURE**. This is what he said,

"Huawei has honoured the Master Account Receivable Factoring Agreement between us, Mareco and Green Future despite the fact that Green Future abandoned the work midway and our effort to get the management of Green Future remains futile to-date, as their offices were abandoned and we had to get other sub-contractors to finish the work as abandoned by Green Future midway at our cost".

22. In the light of the contradictory positions assumed by **GREEN FUTURE and HUAWEI**, I find that **MARECO** has a legitimate basis for being concerned. I say so because the two defendants appear to be playing a blame game, whilst also sending out inconsistent vibes.
23. If **GREEN FUTURE** has closed its offices and also lacks financial or other means to meet its obligations, that may not be a basis, in law, for directing them to deposit into an interested account, the sum of money which the plaintiff is claiming from them.
24. In fact, if one was convinced that a party did not have financial means to meet his obligations, it sounds like a contradiction to then demand that the said party must make available the money which he did not have.
25. I would go further and ask myself what such an order would benefit the applicant. I pose that question because a court does not act in vain. Therefore, if there was already knowledge, on the part of the applicant, that the respondent did not have the requisite resources, it would not appear to make much sense to direct the said respondent to make available such resources.
26. Secondly, when a court of law makes an order, it should be able to enforce it. And if the **GREEN FUTURE** did not have the money claimed by the plaintiff, I cannot understand the nature or scope of the possible default clause so as to give effect to the justice sought by the plaintiff.
27. I would like to compare this situation, in which the defendants are said to lack funds, to the situation in which a plaintiff was either outside jurisdiction or was without financial capacity.

28. In the first instance, a defendant need not demonstrate financial ability as a prerequisite for the plaintiff prosecuting the case against him. The plaintiff's decision as to whether or not to proceed with a case against a defendant who may not have assets to satisfy the Decree is pegged on the plaintiff's discretion. The plaintiff may choose to abandon the claim because he may not ultimately recover the sum awarded. In the alternative, the plaintiff may choose to proceed with the case regardless of the financial impecuniosity of the defendant.
29. I do not think that just because a defendant was unable to demonstrate his ability to meet the decretal amount, in the event that the suit was ultimately successful against him, can be the basis for shutting out the defendant from continuing to defend himself.
30. If a plaintiff was convinced that his case against the defendant was so strong that the defence put forth could not stand in its path, the plaintiff may contemplate filing an application for summary judgment. I do not think that it is good enough for the plaintiff to allude to weaknesses in the defendant's case without using a direct attack on the said defence.
31. An application for summary judgment, if made, would give to the court a clear roadmap for determining whether or not it was deserving.
32. A plaintiff also has the alternative of seeking an order for attachment before judgment. Again, the plaintiff would then be required to meet the requisite conditions, if such an order was to be granted by the court.
33. But the plaintiff appears to be seeking neither summary judgment nor an attachment before judgment. The plaintiff seems to have chosen an amorphous route. By so doing, I do not condemn ingenuity. But I think that it is prudent for a party to utilize any of the recognisable routes to achieve the desired goal.
34. When a party opts for a new way of doing things, he assumes the onus of satisfying the court about the efficacy of his approach. In this case, the plaintiff has not satisfied me that it is entitled to the order requiring the defendants to deposit the money in issue into an interest – earning account.
35. Secondly, the plaintiff has failed to prove to this court that there was any legal or factual basis for restraining **HUAWEI** from implementing the works it is obliged to undertake in the "*Safaricom Digital City Project*".
36. It could be wrong to condemn a person or company who was not a party to this suit, by having work stopped on its project.
37. Accordingly, the application dated 17th March 2014 is dismissed. The plaintiff will pay the costs of that application to the defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the 1st Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant.

Mr. C. Odhiambo, Court clerk.