



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 265 OF 2016

BETWEEN

MARECO LIMITED.....APPELLANT

AND

GREEN FUTURE LIMITED.....1ST RESPONDENT

HUAWEI TECHNOLOGIES LIMITED.....2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Ochieng, J.) dated 29th October, 2015 in H.C.C.C No. 101 of 2014)

JUDGMENT OF THE COURT

1. By a master factoring agreement (factoring agreement) dated 25th March, 2015 **Mareco Limited** (the appellant) agreed to purchase from time to time upon such terms thereunder debts owing to **Green Future Limited** (the 1st respondent) in respect of goods or services rendered to third parties. In an effort to facilitate efficient realisation of the factoring agreement, the 1st respondent vide a power of attorney of even date granted the appellant complete control of operating its bank account number [Particulars Withheld] held with the Commercial Bank of Africa. In addition, the 1st respondent directed one of its debtors, **Huawei Technologies Limited** (the 2nd respondent) through an irrevocable direction to pay executed on 12th April, 2013 to remit all payments due to it into the aforementioned account.

2. Subsequently, pursuant to the factoring agreement the 1st respondent assigned to the appellant several invoices owing and due from the 2nd respondent aggregating to Kshs.29,848,373.39. On the strength of the foregoing coupled with completion certificates from the 2nd respondent accompanying the invoices, the 1st respondent purchased the debt at Kshs.27,331,846.59. It is not in dispute that the 2nd respondent made payments into the account in question. However, according to the appellant those payments stopped. Upon making inquiries the appellant learnt that the assigned invoices had since been cancelled by the 1st respondent and fresh ones issued in their place to the 2nd respondent who it believed had settled the payments thereunder. Further, the 1st respondent had instructed the 2nd respondent to make all payments into a new account number [Particulars Withheld] held with ABC Bank without its knowledge or authority.

3. Apprehensive that the respondents had colluded to defraud it of the amounts under the assigned invoices, the appellant lodged a complaint with the police and also filed suit in the High Court against the respondents. As far as the appellant was concerned, the 2nd respondent was under an obligation to pay the amounts under the invoices and the failure to do so had occasioned it to loss and damage. In the suit the appellant sought:-

a. Kshs.27,652,470.39 being the purchase price paid to the 1st respondent on account of the assigned invoices.

b. Kshs.2,781,541,67 on account of the profit margins.

c. Kshs.6,490,263.89 for loss of investment opportunity.

d. Interest on the above.

4. Both respondents filed their respective statements of defence denying liability. At the trial, Allan John Ochieng Marega (PW1), the appellant's director insisted that the 2nd respondent having accepted the assigned invoices was obliged to pay the amounts thereunder. However, the 2nd respondent through its then legal officer, Richard Odongo Gowi (DW1) testified that the respondent had not duly accepted to make payments on the assigned invoices. According to him, the invoices in question were not valid since they had not been verified in accordance with the 2nd respondent's procedures. The 1st respondent had been informed of the same and requested to submit fresh invoices in compliance with the set procedures which it did. As it stood, the 2nd respondent had made good on all payments under the verified invoices emanating from the 1st respondent. The 1st respondent chose not to call any witness.

5. Upon weighing the evidence before the court, the learned Judge (Ochieng, J.) in a judgment dated 29th October, 2015 expressed himself in the following manner:-

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

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.

In the result, the plaintiff's claim against Huawei is without foundation. It is dismissed with costs to the 2nd defendant.

Meanwhile as regards the 1st defendant, it is liable to refund to the plaintiff the sum of Kshs.27,652,470.39 which the plaintiff paid to it.

6. It is that decision that gave rise to the appeal before us wherein the appellant complains that the learned Judge erred in law and fact by –

i. Unilaterally formulating new issues for determination which the parties were never given an opportunity to address.

ii. Departing from the issues as framed and agreed by parties.

iii. Failing to determine issues as framed and agreed by the parties.

iv. Misdirecting himself on the law, pleadings and evidence on record.

v. Holding that the 2nd respondent had settled all the invoices despite there being no evidence to

warrant such a finding.

7. The appeal was disposed by written submissions and oral highlights. Learned counsel, Mr. Karanja appeared for the appellant while learned counsel, Mr. Amollo appeared for the 1st respondent. Learned counsel, Mr. Oundo appeared for the 2nd appellant.

8. Mr. Karanja began by submitting that the appellant had filed a list of issues for determination which were subsequently adopted by the other parties. As such, the trial ought to have proceeded on the basis of those agreed issues. In his view, the learned Judge formulated his own issues which were extraneous. In particular, the learned Judge by holding that the 2nd respondent was only obliged to pay invoices that were entered into the Supplier Collaboration System (SCS) and that the unpaid invoices had never been duly accepted by the 2nd respondent introduced issues which were never raised by the parties. As a result, the learned Judge purported to determine a case which was substantially different from the one placed before him by the parties.

9. Laying emphasis on the principle that issues which fall for determination by a court ought to flow from the pleadings, the appellant relied on this Court's decisions in *Nairobi City Council vs. Thabiti Enterprises Limited [1997] eKLR* and *Kisii Central Farmers limited vs. Jeremiah Mayaka Ombui & 4 others [2014] eKLR*. He urged that the fact that the learned Judge failed to adhere to this principle was sufficient for us to allow the appeal.

10. He went on to argue that the learned Judge failed to make a determination on whether the 2nd respondent had issued the 1st respondent with completion certificates in respect of the assigned invoices and whether the appellant was entitled to damages for loss of investments. Making reference to the case of *Kukal Properties Development Ltd. vs. Tafazzal H. Maloo & 3 Others [1993] eKLR* it was argued that the failure by the learned Judge to determine the foregoing issues rendered the impugned judgment not only incomplete but also defective.

11. The appellant took issue with the learned Judge's finding that the 2nd respondent had settled all duly accepted invoices presented by the 1st respondent yet there was no evidence to that effect. The learned Judge was also faulted for disregarding the claim for profit margin and loss of investment opportunity. Mr. Karanja contended that the appellant had adduced uncontroverted evidence that it was entitled to those reliefs.

12. Mr. Amollo on his part indicated that the 1st respondent supported the appeal thus he associated himself with the submissions made on behalf of the appellant.

13. Rising to oppose the appeal, Mr. Oundo submitted that contrary to the submissions made on behalf of the appellant, there were no agreed issues on record. What was there was simply the appellant's own list of issues for determination. Nevertheless, the learned Judge was not prohibited in law from formulating issues for determination. Besides, the appellant had not established that the issues as framed by the learned Judge did not flow from the pleadings or evidence. In that regard, he relied on *G.K Macharia & Another vs. Lucy N. Mungai [1995] eKLR*. He went on to add that the issue that the 2nd respondent could only pay invoices which were duly accepted was raised in the pleadings. In fact the meaning of the phrase 'duly accepted' was argued before the learned Judge. Lastly, that there was nothing to warrant the interference with the trial court's findings.

14. We have considered the record, submissions by learned counsel and the law. This being a first appeal, our primary role as a first appellate court is to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. We are also cautious of the fact that we never saw nor heard the witnesses like the trial court. See the case of *Kenya Ports Authority vs. Kuston (Kenya) Limited (2009) 2 EA 212*.

15. It is trite that issues for determination by a court flow from the pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties and to do so would be tantamount to

acting outside its mandate. The same was succinctly put by this Court in *Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others [2014] eKLR* -

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

See also *Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR*.

16. In the case before us it is not in dispute that the appellant’s cause of action against the 2nd respondent was in respect of the assigned invoices which it believed had been accepted by the 2nd respondent. Similarly, it is not in dispute that the 2nd respondent in its defence contended that it had not duly approved the payment of the assigned invoices. It follows therefore that the issue of whether the invoices in question had been duly accepted by the 2nd respondent arose from the pleadings and evidence tendered by the parties. Consequently, we find no fault with the learned Judge considering that issue. Equally, in determining that issue the learned Judge was also bound to consider the evidence tendered by the parties as what ‘duly accepted’ entailed and to that extent he did not err in considering SCS, the procedure which the 2nd respondent stated it used in approving invoices.

17. Having perused the record we note that the 2nd respondent’s witnesses, Richard Odongo Gowi went into great detail to explain the procedure used to approve invoices issued to the 2nd respondent. The witness stated that the mere acknowledgment of receipt of an invoice issued to the 2nd respondent did not mean acceptance of payment thereunder. This is because such invoices were ordinarily received by personnel who have no authority to approve the same. Such invoices are verified by the project manager who follows a detailed process before acceptance of the invoice is communicated. The witness testified that once a local purchase order accepted by supplier is received the details therein are entered into the 2nd respondent’s electronic system, SCS and thereafter, every other event culminating to receipt and acceptance of invoices are entered and tracked therein. The 2nd respondent could only accept and make payments based on electronic invoices and not the ones produced by the appellant. We, like the learned Judge, find that the 1st respondent who had dealings with the 2nd respondent did not challenge that evidence. Furthermore, the same is confirmed by the 2nd respondent’s payment terms as outlined in appendix 2 to the subcontract agreement between the 2nd respondent and the 1st respondent on record. It reads in part:

“... The following documents should be provided:

- ***Above mentioned Mobilization Certificate signed by the representative of the Contractor;***
- ***Commercial invoice;***

- ***Purchase Order by Huawei;***
- ***Submission of Correct Invoice in SCS system.***

Huawei will pay subcontractor in 15 days upon receipt of the above correct documents.”
Emphasis added.

We also concur with the learned Judge that there was no evidence controverting that of the 2nd respondent that it had met all the payments under the duly accepted invoices.

18. On the issue of profit margin and loss of investment, we find that there was no evidence to warrant the issuance of the same.

19. In the end, we find that the appeal lacks merit and is hereby dismissed with costs to the 2nd respondent.

Dated and delivered at Nairobi this 15th day of December, 2017

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is true copy of the original.

DEPUTY REGISTRAR