



REPUBLIC OF KENYA



**Nyambori v Stanbic Bank Limited & another (Commercial Case E799 of 2021)  
[2023] KEHC 1353 (KLR) (Commercial and Tax) (24 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1353 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E799 OF 2021  
A MSHILA, J  
FEBRUARY 24, 2023**

**BETWEEN**

**DICKSON SIMON NYAMBORI ..... PLAINTIFF**

**AND**

**STANBIC BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CREDIT REFERENCE BUREAU AFRICA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Background**

1. The Notice of Motion dated February 7, 2022 was brought pursuant to section 1A, 1B and 3A of the *Civil Procedure Act*; Order 2 Rule 15, Order 2 Rule 7, Order 51 (1) of the *Civil Procedure Rules*, regulations 34 (1) and 37(5) of *Banking (Credit Reference Bureau) Regulations 2020*. The Application was supported by the sworn affidavit of Kenneth Mawira and the applicant sought the following orders;
  - a. The suit against the 1<sup>st</sup> defendant be struck out with costs.
  - b. The Costs of this Application be borne by the plaintiff.

**Applicant's case**

2. It was the applicant's case that this suit was instituted before the plaintiff had followed the mandatory procedures and is therefore premature and should be struck out.
3. The plaintiff failed to comply regulation 35(5) of the *Banking (Credit Reference Bureau) Regulations 2013* now Regulation 37(5) of the *Banking (Credit Reference Bureau) Regulations 2020* which



provides for a mandatory procedure to be followed by an aggrieved customer who finds an error in reporting by a financial institution to the CRB as a first recourse before coming to court.

4. The information was true as sent to the Credit Reference Bureau. Nevertheless, since the Plaintiff is arguing that the information published about him was erroneous, he was required to invoke the procedure of rectification under the Regulation 37(5) of the [Banking \(Credit Reference Bureau\) Regulations 2020](#). The Claim as filed has not shown whether the Plaintiff followed the aforesaid section to rectify the information on his creditworthiness.
5. The applicant added that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked.
6. The applicant relied on the case of [Daniel Gachania Githaiga v Credit Reference Bureau Africa Ltd & 2 others](#) [2013] eKLR, where the court upheld the doctrine of exhaustion of mandatory remedies and redress mechanisms by holding that a suit filed by a plaintiff against a financial institution and Credit Reference Bureau instituted before the plaintiff had followed the mandatory procedures in the Credit Reference Bureau Regulations was premature and ought to be struck out. The court referred to Regulation 20 of the [Banking \(Credit Reference Bureau\) Regulations 2008](#), which has since been imported to Regulation 35 of the [Credit Reference Bureau Regulations, 2013](#) and later Regulation 37(5) of the [Banking \(credit Reference Bureau Regulations 2020\)](#).
7. Further, the Applicant submitted that the Plaintiff's claim for damages for defamation is fatally defective for failure to particularize the defamation as required by Order 2 Rule 7 of the [Civil Procedure Rules](#). Order 2 Rule 15(1) of the [Civil Procedure Rules, 2010](#), allows the court to strike out pleadings on the grounds of failure to disclose a cause of action. A cause of action has been defined as "An act on the part of the Defendant which gives the Plaintiff his cause of complaint."
8. Under Order 2 Rule 7 of the [Civil Procedure Rules 2010](#), a plaintiff in a defamation suit who alleges that alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, shall give particulars of the facts and matters on which he relies in support of such sense. In this regard the plaint is thus in breach of this provision since it seeks general damages for defamation against the defendants without providing any particulars of the defamation.
9. It was the Applicant's argument that by failing to particularize the defamation in the plaint renders the suit defective and should be struck out under Order 2 Rule 15 of the [Civil Procedure Act](#) since it discloses no cause of action against the 1<sup>st</sup> Defendant/Applicant.

### **Respondent's case**

10. It was the Respondent's case that the 1<sup>st</sup> Defendant's Application has been brought to court under the provisions of Order 2 Rule 15 of the [Civil Procedure Rules](#). It can further be noted at paragraph 6 of the 1<sup>st</sup> Defendant's Supporting Affidavit that the Applicant seeks the striking out of the suit on the basis that no cause of action has been disclosed against the 1<sup>st</sup> Defendant.
11. There is therefore no doubt that the relief the 1<sup>st</sup> Defendant is seeking against the Plaintiff in its Application dated 7<sup>th</sup> February 2022 is premised on the provisions of Order 2 Rule 15 (1)(a) of the [Civil Procedure Rules](#) that provides for the striking out of suits for non-disclosure of a cause of action.
12. It was the Respondent's argument that an Application seeking reliefs under the provisions of Order 2 Rule 15 (1)(a) of the [Civil Procedure Rules](#) must not have an affidavit or any evidence annexed/ supporting it as is clearly provided for under Order 2 Rule 15(2) of the [Civil Procedure Rules](#) that says



"no evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made".

13. The 1<sup>st</sup> Defendant not only relied on an affidavit in support of the application but has also attached evidence in the form of a letter dated 17<sup>th</sup> April 2020, the instant application is therefore incurably defective for noncompliance with the mandatory provisions of the law and the same ought to be struck out in limine.
14. The 1<sup>st</sup> Defendant alleged that the Plaintiff's suit is allegedly premature as it failed to comply with Regulation 35(5) of the [Banking \(Credit Reference Bureau\) Regulations 2013](#) which is now Regulation 37(5) of the [Banking \(Credit Reference Bureau\) Regulations 2020](#).
15. The 1<sup>st</sup> Defendant has in its Submissions at page 2 paragraph 4 argued that its application is premised on the omnibus Order 2 Rule 15 of the [Civil Procedure Rules](#). The courts have in the past held that an application under the omnibus Rule cannot succeed. The Plaintiff indeed complied with the Regulation and the same is expressly admitted by the 1<sup>st</sup> Defendant at Par.5b of its Supporting Affidavit. The Respondent submitted that the issue of compliance with the Regulation is a substantive issue that ought to be determined at full trial and not summarily through an application. It was the Respondent's contention that the Plaintiff exhausted all dispute resolution mechanisms available before the institution of this suit.
16. On whether the Plaintiff complied with Order 2 Rule 7 of the [Civil Procedure Rules](#), the Respondent submitted that the 1<sup>st</sup> Defendant is misguided in its interpretation of the contents of the Plaintiff as the Plaintiff has not made any pleading on defamation to warrant particularization as required under Order 2 Rule 7 of the [Civil Procedure Rules](#).

### Issues for Determination

17. The Court has considered the Application, the response therewith and the parties' written submissions and frames only one issue for determination;
  - a. Whether the suit against the 1<sup>st</sup> Defendant be struck out with costs?

### Analysis

18. It was the Applicant's argument that the Respondent failed to comply with Regulation 35(5) of the [Banking \(Credit Reference Bureau\) Regulations 2013](#) now Regulation 37(5) of the [Banking \(Credit Reference Bureau\) Regulations 2020](#) which provides for a mandatory procedure to be followed by an aggrieved customer who finds an error in reporting by a financial institution to the CRB as a first recourse before coming to court.
19. The above-mentioned provision provides;
  - "(1) Where the customer knows or has reason to believe that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the bureau in writing of the information disputed."
20. It suffices to say that the Regulation is not couched on mandatory terms and is it misleading to argue that this provision provides for a mandatory procedure to be followed.
21. The Applicant herein contended that suit was instituted before the Plaintiff had followed the mandatory procedures and is therefore premature and should be struck out. Further, that by failing to particularize the defamation in the plaint, the suit defective and should be struck out under Order



- 2 Rule 15 of the *Civil Procedure Act* since it discloses no cause of action against the 1<sup>st</sup> Defendant/Applicant.
22. Order 2 Rule 15 of the *Civil Procedure Code* deals with striking out of pleadings, which provides as follows: -
- “(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-
  - (2) It discloses no reasonable cause of action or defence in law; or
  - (3) It is scandalous, frivolous or vexatious; or
  - (4) It may prejudice, embarrass or delay the fair trial of the action; or
  - (5) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
23. Order 2 Rule 15(2) of the *Civil Procedure Rules* provides that no evidence is admissible on an application under sub-rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence. The Applicant herein attached evidence in the form of a letter dated 17<sup>th</sup> April 2020 to prove that the suit raises no cause of action against the Applicant.
24. In *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, Madan JA, stated:
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
25. Does the suit disclose a reasonable cause of action? Going by the definition of the term “reasonable cause of action” in the *DT Dobie case (supra)*, there is a complaint specifically against the Applicant in the plaint. A general reading of the Plaint this court is satisfied that it reveals that the Applicant contributed towards the consequences suffered by the Respondent as a result of the Applicant’s actions or inactions.

### **Findings and Determination**

26. This court makes the following findings and determinations;
- i. This court finds the Applicant’s Application to be devoid of merit;
  - ii. The application is therefore dismissed with costs to be borne by the applicant.
  - iii. Mention before the Deputy Registrar on the 2.3.2023 for case management.
- 27 Orders Accordingly.

**DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. A. MSHILA**



## **JUDGE**

In the presence of;

Onyango for the Plaintiff/Respondent

Mrs. Lemba holding brief for Kisinga for the 2<sup>nd</sup> defendant

Lucy - Court Assistant

