Marketing Africa Limited v Ecobank Kenya Limited & another (Civil Appeal 264 of 2020) [2023] KEHC 2917 (KLR) (Civil) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2917 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 264 OF 2020

JK SERGON, J

MARCH 28, 2023

BETWEEN

MARKETING AFRICA LIMITED ..... APPELLANT

AND

ECOBANK KENYA LIMITED ..... 1ST RESPONDENT

CREDIT REFERENCE BUREAU AFRICA LTD ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Order of the Chief Magistrate Court at Nairobi Milimani Magistrates Court Honourable Magistrate L. Gicheha (CM) dated the 5th day of June, 2020 in CMCC Number 4682 of 2014)

JUDGMENT

1. The appellant herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 11th August, 2014 and for judgment against the respondents in the following manner:

    i. An order that the 1st defendant within 1 day writes, communicates and delivers the relevant communication or letter to the 2nd defendant informing it that the 1st defendant is not owed any money by the plaintiff and that the 2nd defendant should immediately delist the plaintiff from its list of defaulters;

    ii. An order against the 2nd defendant compelling it to within 2 days delist and/or remove the plaintiff's name from its list of defaulters;

    iii. The sum of Kshs.4,000,000/= being loss of income incurred by the plaintiff as itemized under paragraph 29 of the plaint;

    iv. General damages;

v. Interests on (b) and (c) above at the current court rates;

vi. Costs of this suit;

vii. Any such other relief that the court may deem just and fit to grant.

2. The appellant averred in their plaint that in the course of its business of publishing the magazine Marketing Africa, they on 20th June, 2014 made resolutions to obtain various financial facilities from the Co-operative Bank of Kenya which facilities were approved by the said bank for a total amount of about Kshs.1,600,000/=.

3. The appellant further averred that when the facilities were approved, the Co-operative Bank of Kenya notified the plaintiff that it could not disburse the approved amount because it was listed with the 2nd respondent as owing the 1st respondent an amount of Kshs. 213,758.01/=. They then contacted the 1st defendant, and after negotiations, the two parties came to an agreement on a settlement sum of Kshs. 150,000/= to be paid to the 1st respondent in order for it to communicate to the 2nd respondent advising that the appellant no longer owed it any amounts of money.

4. The appellant pleaded in their plaint that the 1st respondent representatives assured their representatives that they would make the necessary communication to the 2nd respondent informing it that they had settled the entire amount owed to it and that it was no longer necessary to have listed as a default, and that they would immediately comply. The said communication would enable the 2nd respondent to de-list them, which would allow Co-operative Bank of Kenya to disburse the approved facilities to them.

5. The appellant further pleaded in their plaint that by the first week of August 2014, the second respondent confirmed that they had not heard from the first respondent regarding the settlement agreement and that they were confused as to why the first respondent had not contacted them despite their assertions that their businesses depended on the approved Co-operative Bank facilities, particularly the publication of the magazine "Marketing Africa," which was dependent on those facilities.

6. It was pleaded by the appellant that in an unexpected turn of events, the 1st respondent once more asserted that the appellant owes it Kshs.50,000/= stemming from an account opened by the plaintiff at the first respondent's Nakuru Branch. The 2nd respondent had unlawfully introduced a charge for Kshs.5,000/= on the Westminster account, and they by this point were desperate and immediately paid the Kshs.5,000/=.

7. It was also pleaded by the appellant that the 1st respondent did not look into the claim they make that the account was fraudulent because it was not opened by them, and that they should have known that the plaintiff only held two accounts with them, the Kenya Shillings Account AC. No. 0040XXXXXXX03601 and the US Dollars Account AC. No. 0041XXXXXXX03601. These accounts were both opened at the 1st respondent's Westminster branch.

8. The appellant averred urging the 1st respondent to look into the circumstances surrounding the existence of the Nakuru branch account but then the 1st respondent shifted and informed us that the required amount on the aforesaid approved facilities was already paid to the Co-operative Bank of Kenya. This was because they were still desperate to receive the aforesaid approved facilities from the Co-operative Bank of Kenya.

9. The appellant further avers the failure of the communication has completely destroyed their hopes of delivering their magazine, and they are on the verge of collapse, that the first respondent has to date

refused and neglected to make the necessary communication to the second respondent stating that it is no longer owed any money despite confirming they do not claim any amount of money from it on account of fraudulent Nakuru branch.

10. The appellant averred that they have lost customers especially those who paid for advertisements in the June issue magazine and that they have realized a colossal amount in loss and damages that runs to millions of shillings in net profit.

11. The 1st respondent and 2nd respondent entered appearance on being served with summons and filed their statement of defences dated on 8th September May, 2016 and 3rd August 2016 respectively to deny the appellant's claim. The matter proceeded for hearing and the appellant's suit was dismissed with costs.

12. Being aggrieved by the aforementioned judgment, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated 30th June, 2020 the appellant put in the following grounds:

    i. The Honourable Learned Chief Magistrate erred in fact and law by finding that the appellant was operating bank account number 0150XXXXXX03601 with the 1st respondent despite there being no actual transactions by the appellant for a period of over three years in the disputed account.

    ii. The Honourable Learned Chief Magistrate erred in law by finding that the statement of account number 0150XXXXXX03601 produced by the 1st respondent was sufficient evidence to prove that the disputed account indeed belonged to the appellant in absence of actual account opening documents.

    iii. The Honourable Learned Chief Magistrate erred in fact by failing to appreciate that the burden of proving or disproving the fact as to the existence of account number 0150XXXXXX03601 was upon the 1st respondent as it is the custodian of the bank account records and it was incumbent upon it to produce the bank account opening documents and it was not upon the appellant to prove that it not opened the disputed account, the initial burden having shifted.

    iv. The Honourable Learned Magistrate erred in fact and law by failing to hold that since there were no account opening documents for the disputed account number 0150XXXXXX03601 produced by the 1st respondent, the appellant had by giving it oral testimony had actually discharged its burden of proof and in the absence of these account opening documents had proven its case that it had not opened the disputed account with the 1st respondent.

    v. The Honourable Learned Magistrate erred in fact and law by finding that the appellant had not reported the opening of the disputed account by the 1st respondent to the police whilst disregarding the fact that the Court was the right forum for an award of general damages.

    vi. The Honourable Learned Magistrate erred in fact and law in finding that the appellant had to table evidence in form of a police report or any investigation in respect to the disputed account to prove its case.

    vii. The Honourable Learned Magistrate erred in fact by failing to consider and determine that if the 1st respondent had internally investigated the appellant's claim that it had never opened the disputed account number 0150XXXXXX03601 at the 1st respondent's Nakuru Branch

then the 1st respondent would have discovered that there were no account opening documents attached to the said account.

13. This court gave directions to the parties to file written submissions on the appeal. The appellant vide his submissions dated 8th March, 2023 gave brief facts of the matter and identified two (2) issues for determination to be as follows:

    a. Whether it was proved that account number 0150XXXXXX03601 at the 1st respondent's Nakuru branch was opened by the appellant.

    b. Whether the appellant is entitled to the reliefs sought in the appeal.

14. On the first issue, the appellant submitted that since they argued that the disputed bank account number 0150XXXXXX03601 did not belong to them and was instead formed and operated fraudulently, the first respondent had the obligation to present evidence of bank account establishment paperwork to the trial court.

15. The appellant relied on the high court case of Kenya Commercial Bank Limited v Jeremiah Mainah & 7 Others (2017) eKLR while addressing a question on an account that was in dispute appreciated the importance of the account opening documents being produced as proof of the existence of the bank account. It was held as follows:

> " The Originating Summons under prayer 1 seeks for order that the operations of the Bank Account Number 11XXXXX404 of the said Nurses Investment (K) Ltd, and others, held by the KCB Ltd, be suspended. Apparently this particular Account does not feature anywhere in the correspondence of the parties. The first defendant has submitted that, the Account number for the Nurses Investment (K) Ltd is Account number 11XXXX338 and not Account number 11XXXXX404 as stated herein. This issue can only be resolved if the Court gets the benefit of the Account opening documents relating to the two disputed accounts, to enable it resolve the Account which is sought to be suspended: whether Account number 11XXXX338 or 11XXXXX404."

16. The appellant further cited Section 109 of the *Evidence Act* Cap 80, Laws of Kenya provides as follows:

> " The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

17. It is the appellant's submissions that in order to distinguish between the legal burden of proof and the evidentiary burden, it should be noted that the legal burden of proof fell on them since they were the ones who brought the lawsuit and sought a ruling in their favor; however, the evidentiary burden shifted to the first respondent once they proved that it only had two accounts with the branch of Westminster Bank in Nairobi.

18. The appellants submitted that they didn't have an account with the 1st respondent, and in an attempt to get off the Credit Reference Bureau Africa Limited's blacklist, the 1st respondent fraudulently obtained money from the appellant.

19. On the second issue, the appellant submitted that having paid the Kshs.150,000/= and an additional Kshs.50,000/= to have the 1st respondent communicate with the 2nd respondent to delist it but failed to do so resulting to a colossal amount in loss and damages of millions of shillings in net profit breached the statutory duty it owed them since the Co-operative Bank could not approve the funds requested

by them and as a result their July and August magazines sale values were significally lower than the targets for the previous months.

20. The appellant relied on the High Court case of Namalwa Christine Masinde v National Bank of Kenya Ltd (2016) eKLR where the Court stated:

> "On damages, the plaintiff says that though later delisted to enable her get credit facility with the KCB, her image remained tainted as a financially unstable customer. She, via her advocate, submits that she has proved on a balance of probabilities that she is entitled to damages. She relies on Bryant vs. TRW Inc 689 F. 2nd 72 (1982) US Court of Appeal, 6th circuit where plaintiff was awarded damages for unlawful listing and was later delisted and mortgage approved later. She also relies on the case of Nai HCC 547/08. Also relied on the case of Hon. Ombija – J. vs KCB Ltd where he was awarded Ksh. 2.5 million for defamation arising over financial transaction embarrassment."

21. It is therefore the appellant's submissions that they are entitled to the reliefs sought as compensation for the financial embarrassment caused and damage to its reputation as a result of the 1st respondent's fraudulent act of opening and operating a bank account in their name.

22. In retort, the 1st respondent gave a brief background of the matter and identified two issues for determination to be as follows:

    a. Whether the discretion of the trial court should be interfered with?

    b. Whether the prayers sought in the appeal should be allowed?

23. On the first issue, the respondent submitted that this appeal primarily relates to account number 0150XXXXXX03601 and that the Memorandum of appeal dated 30th June, 2020 does not concern itself with the merits of the case before this court, the suit in the lower court concerned the appellant's listing with the 2nd defendant for delinquencies on its bank accounts held with the 1st respondent.

24. The appellant in arguing of this appeal relied on the case of United India Insurance Co. Ltd & 2 Others v East African Underwriters (Kenya) Ltd (1985) eKLR rephrased it as follows:

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

25. The respondent further submitted that there was no prayer in the lower court where the appellant sought a determination that it was not the owner of the account No. 0150XXXXXX03601 and that the issues the court is invited to interrogate in this court were not subject of the reliefs and orders sought before the trial court.

26. On the second issue, the 1st respondent submitted that during the hearing at the trial court they produced certified statement of accounts confirming that the accounts held by the appellant were undoubtedly overdrawn and that was the reason that the appellant made initial payment of

Kshs.150,000/= and a subsequent payment of Kshs.50,000/= to the 1st respondent to regularize its account number 0150XXXXXX03601 at Nakuru.

27. It is the respondent's submissions that the 2nd respondent acknowledged on 14th August, 2014 that the appellant's account had been fully updated and cleared and that the credit reference report showed that the appellant was able to access Co-operative Bank Limited facilities in May and July 2014. As a result, the appellant did not experience the alleged loss.

28. The respondents therefore submitted that the orders the appellant had requested had been superseded by circumstances, as evidenced by the fact that by the time the plaint was filed, the appellant had already been removed from the list of defaulters maintained by the 2nd respondent. On this the 1st respondent relied on the case of Eric V.J Makokha & 4 Others v Lawrence Sagini & 2 Others (1994) eKLR where the court held as follows

> " There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."

29. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower court and satisfy itself that the decision was well-founded. In Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

30. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. I find two issues falling for determination namely;

    a. Whether the discretion of the trial court should be interfered with?

    b. Whether the appellant is entitled to the reliefs sought in the appeal.

31. On the first issue, the respondent submitted that the court gave full consideration to the 11th August 2014 appellant's complaint and the alleged account number 0150XXXXXX03601. The trial court stated in its ruling that the reason he was not cleared with CRB after paying what was owed in Account No. 0040XXXXXXX03601 was because the said account had a dispute that had been initiated in Nakuru and had a debit of Kshs.53,000/=.

32. On the other hand, the appellant stated that the trial court relied on the statements of account and that the 1st respondent should have provided evidence of bank account opening forms with regard to the disputed bank account number 0150XXXXXX03601 at the Nakuru branch. The said account was not their account and that it was fraudulently opened.

33. I agree with the 1st respondent that the account was allegedly formed fraudulently, but the appellant who made that claim made no attempt to submit it to the police and instead chose to pay the Kshs. 53,000/=.

34. It was the duty of the appellant having failed to provide evidence in the form of a police report or other investigation to support their claim that they did not open the said account or were not responsible for paying the said Kshs. 53,000/= costs to maintain the account but did pay the said amount, the first respondent is not entitled to damages.

35. The appellant argued that the first respondent had not produced bank opening statements to demonstrate that the appellant had opened an account at their Nakuru branch, despite the fact that it had only opened two accounts with the first respondent and that the account opening forms for those two accounts had been produced.

36. According to the appellant, that the 1st respondent had the onus of tabling before the trial court evidence of bank account opening forms in respect to the disputed bank account No. 0150XXXXXX03601 at the Nakuru branch.

37. Further to that, it is clear that the appellant alleges that the account number 0150XXXXXX03601 did not belong it and curiously insisted that the 1st respondent should have been the one to proof that the said account did not belong to them.

38. It is clear that he who alleges must prove and in this case, it was the duty of the appellant to prove that indeed the account in Nakuru branch was not theirs and that they had only two accounts with the 1st respondent. That the burden of proof was on the appellant to prove his case is in doubt. Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

> "Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist."

39. It follows that the initial burden of proof lies on the 1st respondent, the appellant in this appeal, but the same may shift to the respondents, the appellant in this appeal depending on the circumstances of the case.

40. I agree that the Court of Appeal's position in Daniel Toroitich Arap Moi –vs- Mwangi Stephen Muriithi & Another [2014] eKLR espouses the correct legal position that:

> "It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side."

41. The 1st respondent in the trial court produced before the court the appellant's corporate account opening forms dated 16th September, 2011 and at the same time there was no prayer at the lower court where the appellant sought a determination that it was not the owner of the said account No. 0150XXXXXX03601.

42. The question then is what amounts to proof on a balance of probabilities. Kimaru, J (as he was then)in William Kabogo Gitau –vs- George Thuo & 2 Others [2010] 1 KLE 526 stated that:

> " In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely that not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

43. On the second issue, according to the appellant, the 1st respondent lost clients and money since they didn't inform the second respondent that they were delisting them. The 1st respondent, on the other hand, acknowledged that they had sent a letter on August 8, 2014, confirming that the account had been cleared and that plans were being made to update the credit report's status in accordance with Banking Regulation 2008, and that communication was sent to the 2nd respondent via letter on August 13, 2014.

44. I agree with the 1st respondent that indeed the Credit report had demonstrated that the appellant was able to access facilities with Co-operative Bank Limited in May and July 2014 therefore the appellant did not suffer any loss as it alleges.

45. I also noted from the actions by the appellant in pursuing the resolution of dispute in court was in contravention and breach of provisions of Regulations 20 (5), (6), (7) and (8) of the Banking (Credit Reference Bureau) Regulations 2008 and that had no basis of bypassing this mandatory provisions anchored in law prior to filing the plaint and the same ought not to be allowed by the court.

46. In the case of Paul Mogaka Magoma v Gianchore Tea Factory Co. & 2 others [2016] eKLR where it was held: -

> " The applicant has not demonstrated to this court that he exhausted the company's internal mechanism of dispute resolution before coming to court. Furthermore, he did not also demonstrate that he had any difficulties or reservations exploring the dispute resolution mechanism provided for by the company's resolutions. Courts have severally held the position that they would be reluctant to enter into the arena of disputes arising from the internal management of companies especially where there are provisions for internal mechanisms to deal with such disputes."

47. In the case of Okiya Omtatah Okoiti & another v Kenya Power & Lighting Company Limited (KPLC) & 4 others [2020] eKLR where the court was emphatic that: -

> " It is trite that where procedures and processes exist for resolution of disputes such processes must be exhausted first, before a party can approach court."

48. I therefore do hold that the trial magistrate arrived at the correct decision therefore her decision cannot be faulted.

49. In the end, I find the appeal to be without merit, it is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 28TH DAY OF MARCH, 2023.

.....

J. K. SERGON

JUDGE