Narima Capital Company Limited v Credit Bank Limited (Civil Suit 11 of 2018) [2023] KEHC 26914 (KLR) (Civ) (15 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26914 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 11 OF 2018

CW MEOLI, J

DECEMBER 15, 2023

BETWEEN

NARIMA CAPITAL COMPANY LIMITED ..... PLAINTIFF

AND

CREDIT BANK LIMITED ..... DEFENDANT

JUDGMENT

1. This suit filed on 12.01.2018 by Narima Capital Company Limited (hereafter the Plaintiff) against Credit Bank Limited (hereafter the Defendant) and is founded on the tort of defamation. The Plaintiff seeks general, aggravated, and exemplary damages.

2. It was averred that sometime on or about 8.11.2017 the Plaintiff had applied for an overdraft loan facility from Bank of Africa (the Bank) only to receive a response through the letter dated 30.11.2017 declining to process its request on grounds that the Plaintiff had been blacklisted with the Credit Reference Bureau (the CRB) and that the Bank could only proceed to advance the loan facility upon receiving confirmation of the Plaintiff's delisting from the CRB. Further that, on inquiry with the Defendant, the Plaintiff was advised regarding an outstanding loan balance in the sum of Kshs. 1,671.08 on the Plaintiff's account number 00210xxxx (the subject account) for which no demand had been previously made by the Defendant.

3. The Plaintiff averred that the action taken by the Defendant in submitting its name for listing with the CRB amounted to defamation, since it conveyed inter alia that the Plaintiff was a habitual loan defaulter and a company of questionable credit standing. The Plaintiff further pleaded that the Defendant's negligent and/or malicious actions caused it embarrassment in the eyes of the Bank and that despite several demands being made, the Defendant neglected and/or failed to facilitate the delisting of the Plaintiff's name from the CRB, hence the suit.

4. On 12.02.2018 the Defendant filed its statement of defence denying the key averments made in the plaint and liability. The Defendant further averred that while it admitted that the Plaintiff held the subject account, the said account remained unfunded at all material times but despite this knowledge, the Plaintiff proceeded to bank a cheque on 1.03.2017, which was dishonoured, leading to the accrual of banking charges. That the Plaintiff was duly notified and undertook to regularize the account but did not. That subsequently, the Plaintiff banked five (5) similar cheques in respect of the subject account, resulting in the account being overdrawn because of the accumulation of unpaid cheque charges. The Defendant averred that in any event, it is legally obligated to provide the CRB with relevant credit information concerning its customers. The Defendant therefore urged the court to dismiss the suit with costs.

5. In its reply to the defence dated 20.02.2018, the Plaintiff joined issue with the Defendant and reiterated the contents of its plaint.

6. During the trial, one of the Plaintiff's directors, namely, Belinda Wanzia Kyalo testified as PW1. Having adopted her witness statement dated 12.01.2018 as part of her evidence-in-chief she produced the Plaintiff's list and bundle of documents dated 12.01.2018 and its supplementary list and bundle of documents dated 20.02.2018 as P. Exh. 1 a-d; f-g, and P. Exh. 2 a-c respectively. She stated that the Plaintiff is engaged in the business of advancing loans to its clientele.

7. The witness further stated that upon applying for a loan overdraft facility in the sum of Kshs. 1,200,000/- from the Bank on 8.11.2017 the Plaintiff was informed of its listing with the CRB and consequent rejection of its application. That the directors learned from the CRB that the Defendant was responsible for forwarding its name for listing, pursuant to a purported outstanding loan in the sum of Kshs. 1,671.08/- but later the Plaintiff discovered that the sums arose from several overdrawn entries arising out of an unpaid cheque, and related penalties.

8. The witness testified that the parties herein exchanged email correspondences in respect of the purported loan and listing with CRB, and that the Defendant ignored the Plaintiff's request to remove its name from the CRB's listing. And that as a result of the blacklisting, the Plaintiff's creditworthiness was negatively impacted, and it lost business in the process.

9. In cross-examination, PW1 confirmed that the Defendant informed the Plaintiff of the bounced cheques and penalties arising therefrom. In re-examination, she asserted that save for the penalty in the sum of Kshs. 500/- the Defendant did not communicate any further penalties owing from the Plaintiff. This marked the close of the Plaintiff's case.

10. For the defence, James Gitonga Muthee, who was the Branch Manager of the Defendant at all material times, testified as DW1. His evidence-in-chief was based on his witness statement dated 19.10.2018 and the Defendant's bundle of documents dated 3.12.2018 produced as D. Exh. 1-6. According to his testimony, the Plaintiff was a long-standing customer of the Defendant, holding various bank accounts with it, including the subject account. That on the material dates, the Plaintiff deposited certain unpaid cheques into the subject account attracting penalty charges. He produced the dishonoured cheques as D. Exh. 1.

11. DW1 further testified that the Plaintiff received communication on the dishonoured cheques and resulting penalty charges from the Defendant through the correspondence produced as D. Exh. 3, and that in any event, the Defendant is obligated to forward credit information in respect of its customers with the CRB, and not the Deendant, which is responsible for the classification. That, consequently, the Defendant in no way defamed the Plaintiff as purported. He stated that the overdrawn status of

the subject account rendered it a non-performing account, but that the Defendant eventually set off the overdrawn account with funds from a separate account held by the Plaintiff.

12. In cross-examination, the witness testified that whenever a cheque was unpaid, the Defendant's agents/ employees sent out a notification message to the contacts provided under the Plaintiff's details in the application form (namely Belinda Kyalo and David Mulwa) which was produced as D.Exh. 6. That the subject account was a normal account as opposed to an overdraft account, and the unpaid cheques were drawn from the subject account.

13. The witness further testified that the outstanding arrears arising out of the penalty charges were eventually set off from a different account held by the Plaintiff explaining that the process of setting off ordinarily takes place after 90 days of an account being overdrawn. He stated that regular communication was made to the Plaintiff regarding the status of the unpaid cheques.

14. During re-examination, DW1 explained that the set off process cannot be undertaken before an account is deemed as non-performing. He stated further that the obligation to share customer information with the CRB by a bank arose from a statutory duty and applies to all accounts, and not particular customers.

15. At the close of the trial, parties filed written submissions which by and large rehashed the evidence at the trial. Submitting on whether the claim for defamation had been proved, the Plaintiff's counsel whilst citing the definition of the term 'defamation,' in *Black's Law Dictionary* 8th Edition argued that the ingredients of defamation had been established by the Plaintiff. Counsel submitted that in the present instance, the Defendant had no basis for causing the Plaintiff's name to be blacklisted with the CRB since the subject account was not overdrawn or in deficit at the time of.

16. Counsel further submitted that the Defendant did not act in good faith, having failed to demonstrate communication purportedly made concerning any irregularities with the subject account to the Plaintiff at all material times, or to alert the Plaintiff of the risk of blacklisting if there was non-compliance with the regularization of the subject account. He argued that in the circumstances, the Defendant's action of submitting the Plaintiff's name to the CRB and which resulted in the latter's blacklisting, was defamatory. Asserting further that the Plaintiff suffered embarrassment and damage to its repute in the eyes of its bankers. He cited the decision in *Allan K.N. Mbugua v Royal Media Services Limited* [2007] eKLR concerning the right of a person to a good name and reputation. On those grounds, the court was urged to grant the reliefs sought in the plaint.

17. On the part of the Defendant, counsel anchored his submissions on the decisions rendered in *Jacob Mwamto Wangora v Hezron Mwando Kirorio* [2017] eKLR regarding the ingredients of defamation. And submitting that the ingredients of defamation had not been established. Counsel reiterating the pleadings and evidence of DW1 pertaining to the overdrawn status of the subject account as well as the correspondence between the parties herein concerning the regularization thereof.

18. Counsel further submitted that owing to the Banking Circular No. 1 of 2014 issued by the Central Bank of Kenya (CBK), the Defendant, like all other financial institutions was mandated to provide full credit information on all its customers, monthly. That in the circumstances, any information which was disseminated to the CRB cannot amount to defamation on the part of the Defendant. Counsel also cited the decisions in *Selina Patani & another v Dhiranji V. Patani* [2019] eKLR and *Khasiani v Barclays Bank of Kenya Limited & another* (Cause 926 of 2016) [2022] KEELRC 1487 (KLR) (10 June 2022) (Judgment) to argue that the Plaintiff failed to demonstrate the manner in which the alleged defamatory publication was published to a third party/third parties. Here asserting that the Plaintiff did not call any other witness to shed light on the manner in which the Plaintiff suffered injury to

its reputation, as alleged. Counsel pointing out further that no false or malicious information was divulged by the Defendant concerning the Plaintiff.

19. He therefore asserted that the Plaintiff was not entitled to any damages. Relying on the case of *Bank of Baroda (Kenya) Limited v Timwoods Products Limited* (2008) eKLR as well as the case of *Board of Trustees National Social Security Fund v Judy Wambui Muigai* [2017] eKLR, counsel submitted that the Plaintiff did not demonstrate that the Defendant acted in an arbitrary or oppressive manner warranting an award of aggravated or exemplary damages respectively. In the end, the court was urged to dismiss the Plaintiff's suit with costs.

20. The Court has considered the pleadings, the evidence on record and the parties' respective submissions. The applicable law as to the burden of proof is found in Section 107, 108 and 109 of the *Evidence Act*. The Court of Appeal in *Mumbi M'Nabea v David M.Wachira* [2016] eKLR while discussing the standard of proof in civil liability claims in our jurisdiction had this to say:

> " In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya provides as follows:
>
> > "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists." The above provision provides for the legal burden of proof.
>
> However, Section 109 of the same Act provides for the evidentiary burden of proof and states 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."
>
> The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:
>
> > "Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

21. The same court in *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 noted that:

> " [T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim."

22. This suit is founded on the tort of defamation. In *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10, a defamatory statement is defined as :

> "....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business".

23. Additionally, Gatley on *Libel and Slander* 6th Edn. states that:

> "A man commits the tort of defamation when he publishes to a third person words (or matter) containing an untrue imputation against the reputation of another."

24. The rationale behind the law of defamation was spelt out by the Court of Appeal in *Musikari Kombo v Royal Media Services Limited* [2018] eKLR as follows:

> "The law of defamation is concerned with the protection of a person's reputation. Patrick O'Callaghan in the *Common Law Series: The Law of Tort* at paragraph 25.1 expressed himself in the following manner:
>
> > "The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'As a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour. It supplies a temporal sanction ...' Defamation protects a person's reputation that is the estimation in which he is held by others; it does not protect a person's opinion of himself nor his character. 'The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit' and it affords redress against those who speak such defamatory falsehoods..."

25. In *Selina Patani & Another v Dhiranji V. Patani* [2019] eKLR the Court of Appeal succinctly stated that the law of defamation is concerned with the protection of a person's reputation, that is, the estimation in which such persons are held by others. The court went further on to spell out the ingredients of defamation by stating:

> "In rehashing, we note the ingredients of defamation were summarized in the case of *John Ward v Standard Ltd*. HCC 1062 of 2005 as follows:
>
> a. The statement must be defamatory.
>
> b. The statement must refer to the plaintiff.
>
> c. The statement must be published by the defendant.
>
> d. The statement must be false."

26. To succeed in its claim therefore, the Plaintiff was required to establish the above ingredients on a balance of probabilities. Based on the material and evidence at the trial, it is undisputed that the publication/report regarding the Plaintiff was made to the CRB by the Defendant. The Defendant herein admitted that it submitted the Plaintiff's name/credit details to the CRB at all material times.

27. The questions falling for determination are whether the Plaintiff has proved that the report was false and defamatory. As the evidence on these aspects is related, the court proposes to deal simultaneously with the two questions. Order 2 Rule 7(1) of the *Civil Procedure Rules* provides as follows:

> "(1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense."

28. In this case, no particulars of the alleged defamatory words or their ordinary meaning or otherwise were set out in the plaint. A defamatory statement is defined in *Halsbury's Laws of England* 4th Edition Vol. 28 paragraph 10 as:

> "....a statement which tends to lower a person in the estimation of right-thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business."

See also the Court of Appeal definition of a defamatory statement in *SMW v ZWM* (2015) eKLR.

29. The Court stated in *Elizabeth Wanjiku Muchira v Standard Ltd* [2011] eKLR that whether a statement is defamatory or not is not so much dependent on the intentions of the defendant but on the "probabilities of the case and upon the natural tendency of the publication having regard to the surrounding circumstances. If the words published have a defamatory tendency it will suffice even though the imputation is not believed by the person to whom they are published."-*Clerks & Lindsell on Tort* 17th Edition 1995-page 1018."

30. In *Musikari Kombo* (*supra*) the Court of Appeal stated that:

> " The test for whether a statement is defamatory is an objective one. It is not dependent on the intention of the publisher but on what a reasonable person reading the statement would perceive. In Halsbury's Laws of England 4th Edition Vol. 28 at page 23 the authors opined:
>
> > "In deciding whether or not a statement is defamatory, the court must first consider what meaning the words would convey to the ordinary man. Having determined the meaning, the test is whether, under the circumstances in which the words were published, a reasonable man to whom the publication was made would be likely to understand them in a defamatory sense."

31. The only person who testified in support of the Plaintiff's case was PW1. Defamation involves imputations that tend to cause injury to the reputation of a person, and a successful plaintiff must demonstrate the defamatory nature of the publication and resultant injury to his or her reputation or standing, and not merely rely on his/her own estimation of herself and the effect of the defamatory statements to that estimation.

32. The Plaintiff while asserting that the publication to the CRB occasioned damage to the its reputation, and resulted in denial of loan facilities with the Bank did not deem it necessary to call a witness from the said Bank or any person who became privy to the offending publication, to demonstrate the defamatory sense in which they perceived the publication.

33. In *Patani's* case (*supra*), the Court of Appeal stated that: -

"

> "26. The other issue for our consideration is whether the Judge erred in finding it was imperative to call a third party to prove the appellants claim for defamation. In principle, defamation is actionable per se. This does not mean the ingredients of the tort must not be proved. It simply means you must prove the elements of the tort of defamation; what need not be proved is the damage suffered. If no damage is proved, a claimant may be entitled to nominal damages. In this case, the legal issue is whether the appellants proved there was publication to a third party and injury, or damage suffered to their reputation.
>
> 27. The evidence on record is the testimony by the 2nd appellant that her boss read the letter. The alleged boss was never called to testify. No other third party was called to testify as to the publication and injury to reputation. As to whether the appellant's character and reputation was destroyed, there is no evidence on record from a third party stating that as a result of reading the impugned letter, the appellant's reputation and standing in society was injured. It is in this context that we agree with the learned Judge that a person's own view about his/her reputation is not material in a claim for defamation; there must be evidence from a third party to the effect that the standing and reputation of the claimant has been lowered as a result of the defamatory publication. In the absence of third party evidence, we find no error of law on the part of the Judge in arriving at the determination that the appellants did not prove their claim for defamation. (Emphasis added)

See also *Daniel N. Ngunia v K.G.G.C.U. Limited* (2000) eKLR; *SMW v ZWM* (2015) eKLR; and *Hezekiel Oira v Standard Limited & Another* (2016) eKLR.

34. From the record, it is not in dispute that the Plaintiff held several accounts including the subject account with the Defendant. It is apparent from the evidence presented, more so P.Exh. 2a (an account statement in respect of the subject account, for the period between 1.2.2017 and 14.2.2018) and D. Exhibit 2 being the statement of account for the period between 27.2.2017 and 31.1.2018, that at all material times, unpaid cheques were issued against the subject account, and which resulted in unpaid cheque charges or penalties. Further, from the evidence tendered, communication of the unpaid cheque charges was made to the Plaintiff by the Defendant, with a request that the former regularizes the subject account, as documented in the email correspondences dated 7.3.2017 and 10.3.2017 produced as P. Exhibits 2b and 2c respectively.

35. It is evident from the contents of the emails that the unpaid cheques resulted in the subject account being overdrawn, as demonstrated through the evidence of DW1. The Plaintiff did tender credible evidence to the contrary. Hence, it appears more plausible than not that the credit information which was forwarded to the CRB by the Defendant was a true representation of the status of the subject account and was not false.

36. It was the Defendant's case that the decision to forward the customer credit information to the CRB did not relate solely to the Plaintiff, but to all its customers, pursuant to the Banking Circular No. 1 of 2014 issued by CBK (D. Exh.5) which, according to the Defendant, mandated the sharing of all credit information pertaining to the customers of banks and other financial institutions, with the CRB.

37. Flowing from the foregoing, the court agrees with the Defendant's assertion that it was under a statutory duty to forward the Plaintiff's details to the CRB. Concerning publication of customer information Section 31 of the *Banking Act* Cap. 488 Laws of Kenya which provides that:

> "(2) Except as provided in this Act, no person shall disclose or publish any information which comes into his possession as a result of the performance of his duties or responsibilities under this Act and, if he does so, he shall, for the purposes of section 49, be deemed to have contravened the provisions of this Act.
>
> (3) Notwithstanding the provisions of this section—
>
> (a) the Central Bank may disclose any information referred to in subsection (2) to any monetary authority or financial regulatory authority, within or outside Kenya, where such information is reasonably required for the proper discharge of the functions of the Central Bank or the requesting monetary authority or financial regulatory authority fiscal or tax agency, fraud investigations agency;
>
> (b) the Deposit Protection Fund Board institutions licensed under this Act and institutions licensed under the *Microfinance Act*, 2006 (No. 19 of 2006), institutions licensed under the Sacco Societies Act, 2008 (No. 14 of 2008), institutions registered under the *Co-operative Societies Act* (Cap. 490), public utility companies and any other institution mandated to share credit information under any written law shall, in the ordinary course of business and in such manner and to such extent as the Cabinet Secretary may, in regulations, prescribe, exchange such information on non-performing loans as may, from time to time, be specified by the Central Bank in guidelines under section 33 (4):
>
> Provided that the sharing of information with institutions outside Kenya shall only apply where there is a reciprocal arrangement;
>
> (c) the Central Bank and institutions licensed under this Act and institutions licensed under the *Microfinance Act*, 2006 (No. 19 of 2006) may, in the ordinary course of business, in such manner and to such extent as the Cabinet Secretary may, in regulations prescribe, exchange such other information as is reasonably required for the proper discharge of their functions.
>
> (4) Without prejudice to the generality of subsection (3)(b) or (c), regulations under that subsection may provide for the establishment and operation of credit reference bureaus, for the purpose of collecting prescribed credit information on clients of institutions licensed under this Act, and institutions licensed under the *Microfinance Act*, 2006, and the *Sacco Societies Act*, 2008, and public utility companies and any other institution mandated to share credit information under any written law and disseminating it amongst

such institutions for use in the ordinary course of business, subject to such conditions or limitations as may be prescribed."

38. Moreover, the information forwarded by the Defendant to the CRB and concerning the Plaintiff was protected under the CRB Regulations 2013, mandating the Bureau to protect the confidentiality of a customer's information as received, and to only release such information to

    (a) the customer concerned,]

    (b) the Central Bank,

    (c) a requesting subscriber and

    (d) a third party as authorized by the customer, or as required under the law.

39. In that regard, the English court in the case of *Adam v Ward* (1917) AC 309 held that:

> " A privileged occasion is, in reference to qualified privilege an occasion where the person who makes the communication has an interest or duty, legal, social or .... to make it to the persons to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it. This reciprocity is essential."

40. The Defendant had a legal duty to forward the Plaintiff's credit information, including that of other customers to the CRB, while the latter, as well as the Bank, had a corresponding duty and or interest to receive such information. In the circumstances, the defence of qualified privilege, in the absence of proof of malice by the Plaintiff was properly taken by the Defendant. In any event, whilst the Plaintiff demonstrated that its request for an overdraft facility with the Bank was declined on account of the Plaintiff's negative listing on the CRB, the decision and mandate to blacklist persons lay with the CRB and not the Defendant, the latter's role being limited to sharing customer credit information with the CRB.

41. In view of the foregoing, the court finds that the Plaintiff has failed to establish the ingredients of defamation to the required standard. Consequently, the suit must fail and is hereby dismissed with costs to the Defendant.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 15TH DAY OF DECEMBER 2023.

C.MEOLI

JUDGE

In the presence of

For the Plaintiff: Mr. Kuloba

For the Defendant: Mr Gakunga