



REPUBLIC OF KENYA



Said v SBM Bank (Civil Appeal 35 of 2020) [2022] KEHC 11645 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 11645 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA**

CIVIL APPEAL 35 OF 2020

MN MWANGI, J

APRIL 28, 2022

BETWEEN

ABDULSWAMAD SAID APPELLANT

AND

SBM BANK RESPONDENT

RULING

1. The application dated December 16, 2021 was filed by the appellant on December 17, 2021. It is anchored on the provisions of Articles 36, 40 and 159(2) of the Constitution of Kenya, Sections 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 6(1) of the Civil Procedure Rules, 2010. The appellant seeks the following orders –
 - (i) Spent;
 - (ii) That the Hon Court be pleased to grant orders directing the respondent to delist the appellant from negative listing with Metropolis Credit and all such other Credit Listing Companies and all other such credit listings for a period of 30 days; and
 - (iii) That the costs of this application be provided for in the appeal.
2. The Notice of Motion is premised on the affidavit of Abdulswamad Said, the appellant herein. The respondent on February 9, 2022 filed a replying affidavit sworn by Kevin Kimani Advocate.
3. In the supporting affidavit sworn by the appellant on December 16, 2021, he averred that he had been listed with the Metropolis Credit Company and that the Court had made an order for him make a deposit of Kshs 11,393,375.00 as security in favour of the respondent, of the agreed principal owed and due, which is not an issue.
4. He further averred that the respondent had proceeded to negatively list him with Metropolis Credit Limited, hindering him from access to all forms of credit from any financial institution.



5. The appellant deposed that he qualifies for a credit facility with the National Bank of Kenya in the form of equity release of up to Kshs 12,000,000.00 but he has been unable to access the same due to the negative listing with Metropolis Credit Limited.
6. In the replying affidavit by the respondent, its deponent Kevin Kimani, the Legal Manager of the respondent deposed that referral of positive or negative information of a party to Credit Reference Bureaux (CRB) is a legal and statutory requirement under the Banking Act and CRB regulations.
7. It was also deposed that prior to the listing, the respondent issued a notice to the appellant pursuant to the Regulation 50(1)(a) of the Credit Reference Bureau Regulations, 2013.
8. He further deposed that the appellant is a defaulter and owes the bank and has not made good of any of his promises, and as such, the negative credit listing is not only warranted but statutory and legal.
9. The respondent's deponent averred that the appellant had admitted being in default and delisting from the Credit Reference Bureau only takes place upon clearance of the debt owed. He contended that the Court has no powers or authority discretionary or otherwise, to delist the appellant temporarily or otherwise as per his proposition.
10. The respondent stated that the appellant was applying delaying tactics by filing a plethora of applications rather than preparing a Record of Appeal and having directions for the appeal given.
11. It was averred that the present application is simply meant to prolong the status of the loan the subject of CMCC No 123 of 2019 - *Abdulswamad Said v SBM Bank (K) Ltd* that has been pending in Court since the year 2019.
12. In written submissions filed on February 21, 2022 by the law firm of AA Said and Co Advocates, which had instructed Mr Ogendo in this appeal, it was submitted that at the lower Court, the appellant was directed to make a deposit of the sums agreed by both parties as security for being granted orders for stay of execution.
13. The appellant's Counsel stated that the appellant had been negatively listed on the Credit Listing Bureau for the last three years or so for defaulting in the servicing of a facility procured from the respondent bank. He also stated that the appellant is required to deposit Kshs 11,392, 375.00 as security in the instant appeal.
14. Mr Ondego indicated that the appellant had qualified for a credit facility with the National Bank of Kenya in the form of equity release of up to Kshs 12,000,000/= but the negative listing was holding the appellant hostage in adhering to the directions given, which impairs the appellant's right to be heard and to a fair hearing.
15. He submitted that under Article 22 of the Constitution a Court may grant appropriate relief including interim orders to secure and preserve the appellant's household properties.
16. It was submitted that the cause of action accrues from the provisions of Order 42 Rule 6(2) and Order 22 Rule 2(3) of the Civil Procedure Rules and that under the latter provisions, this Court can exercise its discretion by requiring security or conditions to be imposed on the Judgment debtor, as a Court deems fit.
17. Mr Ogendo indicated that the applicant is incapable of discharging the conditional stay of execution, as he was negatively listed by the respondent bank with a Credit Listing Bureau barring it from procuring any such facility.



18. Mr Ogendo submitted that the appellant had committed to the respondent bank to utilize the said amount by depositing it in Court, on the condition that the respondent temporarily delists the appellant from the negative listing for 30 days, with an undertaking to deposit such sums in Court.
19. Mr Ogendo was of the view that situation that the applicant has found himself in was novel as he is required to deposit security but it can only be obtained through a facility and that requires the appellant to be delisted from the Credit Listing. He cited the case of *Jedidah Wanjiru Wairimu v Simon Karogha Njoroge & 3 others* [2021] eKLR, to show that whoever is listed in a Credit Reference Bureau cannot be taken as a person worthy of granting a loan or doing business with. The appellant urged this Court to order suspension of the appellant's negative listing so that he can secure a facility from DTB (sic).
20. On the issue of costs, Mr Ogendo relied on the case of *Reid, Hewitt & Co v Joseph*, ALR 1918 cal 717 and *Myers v Defries* [1880] 5 Ex D 180 and prayed for costs of the application.
21. The respondent's submissions were filed on February 9, 2022 by the law firm of Onyango Oballa & Partners Advocates. Ms Onyango who was instructed by the said law firm to represent the respondent stated that the respondent is statutorily obligated under Section 3(3) of *Banking Act* to share credit information on non-performing loans.
22. She further stated that the respondent forwarded the names and details of the non-performing loans held by the appellant in accordance with the law. It was submitted that Regulation 18 of the Credit Reference Bureau Regulations outlines the kind of information an institution can share with Credit Reference Bureaux.
23. Ms Onyango also submitted that Section 50 of the *Credit Reference Bureau Regulations*, 2013 places responsibility on institutions to provide accurate information and resolve complaints arising from Credit information sharing activities. She referred to Rule 25(1) of the said *Regulations* which provides for the manner in which such information shall be communicated to a Credit Reference Bureau.
24. The respondent's Counsel indicated that the appellant had not exhibited any evidence to show that the listing was wrong and he did not dispute the accuracy of or inaccuracy of the listing. She also indicated that he did not receive the statutory 30 days pre-listing notice.
25. She expressed the view that it was a waste of precious judicial time to prosecute the present application. She submitted that it would be improper, unlawful and illegal for the Court to order the respondent not to discharge its obligations even temporarily. She relied on the case of *Arenen Holding Ltd v Diamond trusts Bank Kenya Ltd* HCCC No 439 of 2016, where the Court held that it would be improper for the Court to order the defendant to stop discharging its obligations. She prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION

The only issue for determination is the applicant should be temporarily delisted from the Credit Reference Bureau.

26. It is not disputed that the appellant was listed by the respondent with a Credit Reference Bureau when he failed to honour repayment of a loan that had been advanced to him by the respondent. Subsequently, a case was filed by the respondent before the lower Court where Judgment was entered against the appellant. He then sought stay of execution. The said Court granted a conditional order for stay of execution but the appellant failed to comply with the same.



27. Since then, the appellant has moved to this Court through several applications. The present one seeks an order for his temporary delisting from the Credit Reference Bureau so that he can get some equity release in the sum of Kshs 12,000,000/=.
28. According to the exhibit marked AS - 3 attached to the appellant's affidavit, he had applied for the said equity release for purposes of erecting and development on LR Mombasa/Block XVII/113 registered under the name of Freemars Investments Limited, a sister company of Shela Limited.
29. In the affidavit in support of the application, the appellant averred that the equity release was to be given by National Bank of Kenya. In the submissions filed by his Advocate, he referred to the bank which was to give the said equity release as DTB. That notwithstanding, this Court concurs with the submission made by Ms Onyango to the effect that banks are required to share credit information on non-performing loans under the provisions of Section 31(3) of the *Banking Act*.
30. When the respondent shared the appellant's credit information with the Credit Reference Bureau, it acted within its mandate. Credit Reference Bureaux on their part under Regulation 18(1) and (2) of the *Banking (Credit Reference Bureau) Regulations*, 2013, may share customer information including positive and negative credit information.
31. Regulation 25(1) of the said *Regulations* states as follows -
- “A credit information provider furnishing negative information to a Bureau regarding credit extended to a customer or arising from a product or service rendered to a customer shall, in writing or through electronic means, issue to the customer a notice of intention to submit the negative information within thirty days before submitting of the negative information to a Bureau or within such shorter period as the contract between the credit information provider and the customer may provide.” (emphasis added).
32. Regulation 25(2) of the *Banking (Credit References Bureau) Regulations*, 2013, provides thus-
- “A credit information provider shall not furnish any information relating to a customer to any Bureau if the credit information provider knows or has reasonable cause to believe that the information is inaccurate. (emphasis added).
33. In this application, it has not been shown by the appellant that the credit information furnished to the Credit Reference Bureau by the respondent was inaccurate
34. In the case of *Arenen Holding Ltd v Diamond Trust Bank Kenya Ltd* [2017] eKLR, Judge F Ochieng stated as follows in regard to the application of Regulation 18 of the *Credit Reference Bureau Regulations* –
- “[43]. It must be noted that regulation 18 of the *Credit Reference Rules* imposes an obligation on the defendant to report to the Credit Reference Bureaus, about their customer rating;
- [44]. Therefore, it would be improper for the Court to Order the defendant to stop discharging its obligations.”
35. It is clear to this Court that the appellant was properly listed with Metropolis Credit Limited and he did not deny having been given 30 days' notice of the intended listing. The notice was given so that he could make good the loan repayment, which was not done.



36. In the said circumstances, this Court declines to grant the prayer sought for the delisting of the appellant from Metropolis Credit Limited. Instead, the appellant is directed to file his Record of Appeal within 45 days from today to enable the fast tracking of the hearing of the appeal.
37. The application dated December 16, 2021 is hereby dismissed for lack of merit. Costs are awarded to the respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 28TH DAY OF APRIL, 2022.

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kerubo holding brief for Ms Onyango for the respondent

Mr. Ogendo for the appellant/applicant

Mr. Oliver Musundi – Court Assistant.

