Lusuli v Co-Operative Bank Of Kenya Limited (Civil Appeal 32 of 2020) [2022] KEHC 12548 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12548 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 32 OF 2020

PJO OTIENO, J

JULY 22, 2022

BETWEEN

HERMAN DENNIS LUSULI ..... APPELLANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. B. Ochieng (Chief Magistrate) in Kakamega CM's Civil Suit No. 57 of 2016 delivered on 4th June 2020)

JUDGMENT

1. Before the trial court was a suit by the appellant seeking general, aggravated and punitive damages against the respondent on account of the alleged defamation occasioned to the appellant by the conduct and decision of the respondent to list him with Credit Reference Bureau on account of a default to pay a debt of Kshs 2,660/=.

2. It was pleaded in the plaint that that decision was accentuated by malice on the basis that the respondent had by that date issued the appellant with a clearance certificate to the effect that he owed no liability with the respondent and that the respondent had all the opportunities to recover any sum due, from the appellant's account held with it but did not so recover; that the listing was done without demand and notice to the appellant and lastly that the respondent had failed to offer an apology for the embarrassment to the appellant.

3. To the appellant, the respondent intended to convey to any prudent persons in the society that the appellant be viewed in dim light as one unfit to access credit, unable to pay debts and therefore one unfit to hold a public office hence the publication to the Credit Reference Bureau was defamatory of the appellant for which it had suffered loss and damage and therefore entitled to the remedies sought.

4. In defending the claim the respondent filed a defence in which it only admitted having enjoyed not only an employee-employer relationship but also a bank customer-relationship and that the clearance

certificate was issued upon the termination of the employment but the appellant continued to operate the account with the respondent. The allegation of employment and rank of the appellant in current employment and desire to get a better job were denied together with the listing of the appellant as a defaulter as well as the particulars of malice set out and the effect of the words upon the appellant.

5. The respondent then erected an alternative and without prejudice pleading to the effect that listing of defaulted with the reference bureau is a statutory obligation imposed upon it and was never accentuated by malice and otherwise subject to qualified privilege under the *Banking (Credit Reference Bureau) Regulations 2008* and that the information to the bureau is private and not for public consumption only disclosable upon request. Lastly, it was additionally pleaded in the alternative that the appellant accepted owing the sum to the respondent and proceeded to make good by payment pursuant to which payment he was cleared hence no claim is maintainable against the respondent.

6. In reply to the said defense, the appellant highlighted that prior to reporting and reference to the Bureau the dictates and demands of regulation 28 of the *regulations* was never complied with by the respondent. As to the privacy of the information with the bureau the reply was that once listed the information of his impecuniosity came to the attention of institution which would have wanted to advance credit to him and those that would have offered him jobs with negative effects when the information was false.

7. On the defence that the appellant accepted indebtedness by payment, the reply given was that he was compelled to pay the undisclosed debt so as to get a clearance certificate to enable him qualify for a job interview.

8. Those pleadings were accompanied by witness statements by the respective parties as well as lists and copies of documents. For the appellant the witness statement and documents filed underscored that he did settle his indebtedness with the bank as at May 30, 2011 and was issued with a clearance certificate.

9. For the respondent the position of the appellant is accepted but a rider given that after the payment of the sum due on the credit card was paid the card was continued and clearance issued, but the bank applied interest on the June 17, 2011 in the sum of Kshs 647.19 and further bank accrued making the debt to stand at Kshs 2,599.07. That the appellant actually made a complaint on the February 27, 2012 when it was agreed that the other bank charges be waived but interest be paid.

10. The matter was listed for hearing at which each side called a witness. The appellant gave the evidence in support of his claim while for the respondent evidence was tendered by one Muchesio Richard, an employee of the bank.

11. Of importance for the evidence led is the position by the appellant that he paid the debt due on the credit card, the card was discontinued and a clearance issued, yet after such discontinuance the bank did continue to grow the debt and failed to recover the same from his two accounts operated at the bank. For the respondent, there was a confirmation that the appellant continued to operate two active accounts and that the bank was in a position to recover the debt from the appellant's accounts but did not do so and that they did not inform him of the debt prior to making the listing him with the bureau.

12. In the Judgment now appealed against, the trial court dismissed the claim on the grounds that the debt was admitted and paid; that there was no publication of the indebtedness to the public and that there was no evidence that the listing was false. The then found as a fact that the respondent never complied with the Regulations requiring notice to the appellant but discounted that failure on the basis that listing is a statutory obligation upon the bank hence it was upon the appellant to prove malice. On the basis that there was a finding that the appellant had not been defamed and lack of proof of malice

the court held that the appellant was not entitled to any damages, but, as the law demands, assessed damages of Kshs 500,000/= had the matter succeeded.

13. That decision aggrieved the appellant who preferred the current appeal in which he faults the trial court for:-

> " 1. That the lower learned court erred in law and fact by holding that the appellant had admitted being indebted to the respondent.
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> 2. That the lower learned court erred in law and fact by holding that the listing of the appellant with the Credit Bureau (CRB) was private and could not be accessed by members of the public.
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> 3. That the lower learned court erred in law and fact by holding that the fact that the respondent did not follow due process in listing the appellant with the Credit Reference Bureau (CRB) as a defaulter did not amount to malice.
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> 4. That the learned lower court erred in law and fact by proposing inordinately low general damages in the event it would have found in favour of the appellant."

14. Having perused the written submissions and oral highlights by counsel, and well reminded of the court's duty as a first appellate court, this court discerns the issues for determination to be: -

a) Whether there was a debt owed by the appellant to the respondent that would entitle the respondent to list him as a defaulter?

b) Whether the respondent made a demand and served a notice upon the appellant of the impending listing with the Credit Reference Bureau?

c) What is the need of the notice and consequence of failure to serve notice?

d) Was reference a publication that was defamatory of the appellant?

f) Was the assessed damages too low as to amount to a misery and deserve intervention by this appellate Court?

g) What orders should be made as to costs?

15. Those substantive issues aside, the respondent raised submission which challenge the competence of the appeal as far as the record is said to be incomplete and thus incompetent. In the submissions, it is contended at paragraph 3 that for the lack of a decree appealed from, the appeal is competent and ought to be struck out while relying on the decisions by the supreme Court in *Bwana Mohamed Bwana vs Silvano Buko Bonaya* (2015) eKLR as well as the High court, (Sitati j) in *Rachel Wambui Nganga vs Rahab Wanjiru Kamau*(2020) eKLR. In both, the two courts underscored the primacy of a decree appealed from in a record of appeal. The court's position on those decisions are that the Supreme Court's decision is no doubt binding on the court but it must be remembered that that court was applying its rules which are not applicable before this court while the decisions by the High Court Judge not bind this court but remain persuasive.

16. I am however not persuaded that order 42 rule 13(4) (f) mandatorily require the judgment and the decree to be part of the record. My inability to be persuaded by the decision by the High Court and on those it relied upon stems from my interpretation of the provision to refer to the record before the trial court and not a record to be compiled in the manner dictated by the *Court of Appeal Rules* and

the *Supreme Court Rules*[1]. While the rules applicable to those courts mandate the litigant to compile and file a document called the record of appeal, the *Civil Procedure Rules* impose no such obligations. The only obligation I see to be imposed is upon the court to ensure that the documents listed are on the record and the record remains the record as provided by the trial court. If the obligation is upon the court as said above, the question then is whether it can pass the test of substantial justice to defeat an appeal after the same is admitted like here, on the basis that the record is deficient.

17. Position by this court held previously, and from which nothing has changed to deserve departure, is that there being no obligation upon the parties to compile a record of appeal, the practice of compiling records of appeal before the High Court is a practice of convenience founded on no law but generally on directions by the court. Even where the obligation is imposed by a direction by the court, unless the court specifically obligates a party to file a particular document, it is enough that the materials on record satisfies the court as sufficient to help it determine the appeal. I find persuasion in *CM-CGM Kenya Ltd Vs Diamond Gate General Trading Llc* (2019) eKLR where the court said: -

> " 22. On the second limb alleging shoddy compilation of the record that equally has no legal foundation because no law provides how a record of appeal before this court must be compiled. What we now routinely call a record of appeal before the high court is a rule of convenience developed out of practice and largely copying from the *Court of Appeal Rules* but with no legal underpinning. I say no legal underpinning because order 42 rule 13(4) merely obligates the court, and not the appellant, to ensure that the enumerated documents are in the court file. That must be seen to demand that the record at trial be availed and thus contrasts with rule 87, *Court of Appeal Rules*, which obligates the appellant to prepare and serve the record and defines what must be contained therein.
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> 23. To this court those objections are in the nature of technicalities which should never sway a court of law from persisting and endevouring to hear a party's appeal on the merits. They lack merit and substance and are therefore disregarded as untenable."

18. I do find that there is no defect that would lead to an appeal being defeated on account of failure to incorporate a decree in the record of appeal filed by a party in an appeal before the High Court. But, what prejudice would visit a litigant like the respondent served with a record of appeal which incorporates no decree! Mr Otsyeno did not alleged or demonstrate any prejudice to his client by such failure. The court finds that no prejudice can visit such a litigant for a decree is just but a formal expression of the decision by the court. I have looked at the court file and noted with satisfaction that other than the bound document designated as record of appeal, there is also the complete lower court file with all the pleadings, notes taken at trial and the judgment appealed from. That to this court is all the appellate court needs to execute its mandate on this appeal.

19. If however, I was wrong on the stated position that the absence of a decree on a record of appeal before me does not render the appeal fatally defective, and even if it were to be demonstrated that the decree was important for the respondent to put up his case better, then I would still find refuge in the provisions of section 2 of the *Civil Procedure Act* which stipulates that for appeal purposes a judgment suffices for a decree. In *Kenya Petroleum Refineries ltd vs Ngayau Mutia*, (2020) eKLR, the court was faced with same question and it its determination it held: -

[1] Rule 84, court of Appeal Rules and Rule 38(2) Supreme Court Rules, 2020

15. It is indeed true that section 79G of the *CPA* strictly refers to a decree or order. But what is a decree? I seek to rely on the definition provided by section 2 of the act. The law says:

> " Provided that, for the purposes of appeal, "decree" includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up".

16. According to section 2, therefore, a decree includes a judgement and a judgement is appealable notwithstanding the fact that a formal decree has not been extracted. My view is that a record of appeal is not fatally defective simply because it lacks a decree or order. My understanding of section 2 above is that a judgement on its own without a decree or order also suffices for the purposes of an appeal."

20. On the preliminary question, I find no merit as to lead me to strike out the appeal and I must therefore proceed to the merits of the appeal.

21. The foundation of the dispute between the parties was whether or not the appellant owed the respondent a debt that had become bad and entitled the respondent to report the appellant as a defaulter. The evidence on both sides was that the appellant was at one point an employee of the respondent who left employment harmoniously having been cleared on payment of moneys owed on a credit card and the said credit card discontinued. To the appellant, the issuance of the clearance certificate was a proof of payment of every obligation owed. He added in the alternative that even if there was to arise an obligation after the clearance, the bank had the right to recover such from the accounts he operated and continued to operate, as at the date of trial, but the respondent chose, out of malice or ill-will, to report him as a defaulter. Those simple assertions were conceded by the respondent who however contended that it did apply interest of some Kshs 647 in addition to what it called bulletin charges giving an aggregate debt of Kshs 2,660. In evidence offered on behalf of the respondent at trial, Mr Michesia Richard, the Branch Manager, stationed in Kakamega, said:

> " He had a credit card and had outstanding interests on the same. He eventually offset same after his name was listed in CRB...
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> I am not aware whether it arose out of ATM, Mobile phone platform of any branch... We were in a position to recover the outstanding amount from any of his accounts. We did not do so. I can't tell when he was listed by CRB. This card was discontinued for about a year. We never informed him by way of writing about the outstanding interest due..."

22. That evidence was, other than being by a person who knew very little, if at all, of the matter, was also largely in support of the appellant's case that he had cleared his obligations, the respondent had the ability and liberty to recover any additional loan from his accounts but did not do so and lastly, that there was never a demand or notice of indebtedness served upon the appellant before he was listed with CRB.

23. More important is the fact that upon payment of the credit debt of Kshs 32,135 on the May 30, 2011 the card was discontinued. When discontinued, the facility terminated with all its obligations including the obligation to pay interests. Any further obligation on the card would have to be negotiated and the card reactivated to reignite the obligations and right appurtenant thereto. The parties having not agreed to activate the card, the court finds that there was no genuine debt that would entitle the respondent to repot the appellant to CRB as a defaulter.

24. In addition, the respondent's witness was unequivocal that there was never communication to the appellant on the application of interests and other charges on the account and that the reporting was done without any demand to pay and without the exercise of the right to recover such sums from the accounts of the appellant. That there was no contractual debt and the hurry to refer him to the Bureau is outright non-compliance with the law under regulation 50(1) (a) of the *Credit Reference Bureau Regulations 2013*. That provision stipulates:

> " 50.
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> (1) An institution shall –
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> (a) notify the customer within one month before a loan becomes non-performing that the institution shall submit to a Bureau the information on the loan immediately it becomes non-performing: Provided that for loans whose repayment interval or period is less than one month, the notice shall be served two weeks before the loan becomes non-performing;
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> (b) notify each customer, within thirty days of the first listing, that his name has been submitted to all licensed Bureaus;
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> (c) issue an adverse action notice to a customer against whom a decision has been taken or determination made, in whole or in part, that is adverse to the interests of the customer based on information obtained from a Bureau;
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> (2) The adverse action notice issued under sub-regulation (1) (c), shall be provided at the time the adverse decision or determination is communicated to the customer and shall notify the customer-
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> (a) that customer information played a role in the decision;
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> (b) the name, address and telephone number of the Bureau that provided the customer information;
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> (c) the customer's right to a free copy of the information provided by the Bureau, and
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> (d) the customer's right to dispute such information with the Bureau and, if erroneous or outdated, have it corrected.
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> (2) An institution shall be considered to have notified the customer if they send the notification issued pursuant to sub-regulation (1) to the customer's last known address or contact details by any of responsibilities of institutions.

(5) Where an institution has provided customer information to the Bureau and subsequently becomes aware that the information was inaccurate at the time it was provided, the institution will within five working days from the day the institution becomes aware of the inaccuracy, give the Bureau an amendment notice instructing it to delete the inaccurate information and replace it with the correct information...

(6) An institution shall ensure that the customer information furnished pursuant to this regulation is provided to all licensed Bureaus or to a centralised point or location from which the information can be accessed by all Bureaus..."

25. The law in these regulations in so far as they demand notice and right to dispute the allegations before the listing is done must be seen to secure the rights of the customer to be heard before an adverse action is taken against him. The duty to communicate the intention is expressed in mandatory terms thus affording no discretion on the institution whether to notify the customer or not. The same equally require that when a mistake is detected after listing, then the correction must be effected timeously and within five working days. In fact, to underscore the seriousness of the need for compliance with notice, the law sets a penalty of up to one million shillings' payable by the defaulter[2]. To this court a creature of the law, like the respondent, has no option beyond the duty to comply with the law and when it fails to comply with the law, it must bear the consequences for such an affront.

26. I do find that in referring the appellant to the reference bureau in violation of the Credit Reference Bureau Regulations, the respondent was propelled by malice, in that it was reckless without regard to whether its actions would be injurious to the appellant. One of the ingredients of the tort of defamation is that malice be proved to have propelled the publication which then tends to lower the estimation of the claimant's reputation in the eyes of the right thinking members of the society. Here I find that the deliberate failure to comply with a mandatory requirement of the law infers malice upon the respondent. See *Godwin Wachira vs Okoth* [1977] KLR 2; *J P Machira vs Wangethi Mwangi* (1998) eKLR. I do reiterate that the respondent's conduct was reckless and malicious when the fact of ability to recover the little money from the appellants account was avoided to achieve hurried and unlawful listing of the appellant.

27. That the respondent has a duty under section 31 of the *Banking Act* to share information on default by customers is not in doubt both in law and on the evidence let at the trial. It therefore follows that the sharing is by itself a publication for purposes of the law on defamation. The Court of Appeal in *Wycliffe A Swanya v Toyota East Africa Limited & Another* Nairobi CA No 70 of 2008, defined publication in the sense of defamation to mean the defamatory statement was communicated to someone other than the person defamed. Here the respondent contends and admits having shared the alleged indebtedness of the appellant to other banks and Credit Reference Bureaus. I am in no doubt that there was indeed publication and thus answer issue no (d) in the affirmative. The issue then is whether that publication is subject and protected by the defense of qualified privilege pursuant to qualified privilege under regulations 14(1) and 28(4), *Banking (Credit Reference Bureau) Regulation*, 2008.

28. That defense is, as it was at the time of filing the defense and taking of evidence, wholly unavailable to the respondent on the basis that the regulations, if they indeed created such a defense, were repealed by

[2] 50 (9) An institution which fails to comply with this Regulation may be liable to such penalty not exceeding one million shillings or such administrative sanction as the Central Bank may consider appropriate 50

regulation 56 of *Credit Reference Bureau Regulations*, 2013. Secondly, the defense of qualified privilege in terms of section 7 of the *Defamation Act* is defense peculiar to newspaper and has known and established exceptions hence is never an absolute defense. In the end, the court finds and determines that there was an untrue publication of the appellant by the respondent in the credit reference platforms, that the appellant was a defaulter, unable to pay an alleged debt of Kshs 2,660. Such an assertion is, *ipso facto*, a diminution of the appellants standing in the eyes of any reasonable member of the society especially those in the employment of the respondent who had worked with him and known him as the Head of Revenue, County Government of Kakamega.

29. It is the statutory obligation upon the respondent to give notice, which was sidestepped, contrary to the law, that the trial court apparently misconstrued to be of no consequence. In the judgment, the court said:-

> " The plaintiff's pleadings on non-service of statutory notices cited above is non contested. However, considering the fact that listing of defaulters on CRB is a statutory obligation imposed upon banks it was incumbent upon the plaintiff to prove that the defendants action was actuated by malice'

30. The above excerpt suggests that their being an obligation any listing was beyond challenge. That cannot be the law. Listing is only justifiable under the statute when done based on the fact of genuine indebtedness. When listing is done regardless of the existence of the debt, without the duty to recover the debt before listing and without complying with the law, then a court of law cannot lend its hand to it. The court must say that whatever is done contrary and violation of the law must be reversed and when injure is thereby suffered such injury must be remedied. The court therefore finds that the decision to dismiss the suit was grounded on mis-appreciation of the law and evidence and therefore a valid ground has been demonstrated to interfere with the decision so reached. The decision of the trial court dismissing the suit is set aside and in its place substituted a decision allowing the claim for general damages for defamation.

31. On the assessment of damages, being a matter wholly at the discretion of the trial court, this court can only interfere where it is demonstrated that the assessment shows an outright error in assessment where the sum is too high or too low[3] . The court does not consider the award too low as contended by the appellant and determines not to interfere. Even though I would have award a higher sum need I heard the suit, that is no basis to interfere.

32. In the end, the appeal is allowed to the extent that the order dismissing the suit is set aside and in its place substituted a decision allowing the suit with costs.

33. The appellant having succeeded, he is awarded the costs of this appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 22ND DAY OF JULY 2022.

PATRICK J. O. OTIENO

JUDGE

In the presence of:

Ms Nafule for the Appellant

Mr Otsyeno for the respondent

[3] ***Ken Odondi & others –Vs- James Okoth Ombira*** **[2013];** the Court said:- "*We agree that this Court will not ordinarily interfere with the findings of the trial Judge on an award of damages, merely because this Court may take a view had it tried the case. It would have awarded a higher or lower damages different from the award of the trial Judge."*

Court Assistant: Kulubi