



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.28 OF 2015

RURAL TECHNOLOGY ENTERPRISES LTD PLAINTIFF

V E R S U S

ECOBANK KENYA LIMITEDDEFENDANT

JUDGMENT

(1) Before this Court is the Suit instituted by way of the Plaint dated **23rd January 2014**, by which the Plaintiff **RURAL TECHNOLOGY ENTERPRISES LTD** sought the following for Judgment against the Defendant for:-

- “(a) **General Damages**
- (b) **Exemplary Damage**
- (c) **Costs”**

(2) The Defendant **ECOBANK KENYA LIMITED** opposed the suit through their Defence dated **2nd March 2015** by which they prayed that the Plaintiffs suit be dismissed in its entirety and that costs be awarded to the Defendant.

(3) Together with its Defence, the Defendant filed a Notice of Preliminary Objection seeking orders to have the entire suit struck out arguing that the same was time-barred. In a Ruling delivered by **Hon. Lady Justice Olga Sewe** on **22nd July 2016**, the court held that the suit was **not** time-barred. However the Court found and held that **CHARLES MWANGI GITUNDU** and **ROSE MWIYERIA RUGOIYO** (the **2nd** and **3rd** Plaintiffs) were wrongly enjoined as parties to the suit. The Court ordered that the names of the **2nd** and **3rd** Plaintiffs be struck out. Accordingly the suit proceeded with only one (1) Plaintiff. The hearing of the suit commenced before this Court on **2nd March 2020**. The Plaintiff called one (1) witness in support of its case and the Defendant also called one (1) witness.

THE EVIDENCE

(4) **PW1 CHARLES MWANGI GITUNDU** was the Managing Director of the Plaintiff Company. **PW1** relied entirely upon his written statement dated **23rd January 2015** as evidence in chief. **PW1** told the Court that at all material times the Plaintiff was a customer of the Defendant Bank and operated a Current Account Number **00400xxxxxxxxxx**. **PW1** told the Court that the said Account was opened procedurally and a deposit of cash **Kshs. 3,000/-** plus a cheque deposit of **Kshs. 10,000/-** was made into the Account. Thereafter the Plaintiff never operated the Account. That at no time did the Bank ever advance to the Plaintiff any loan or credit facility of any kind.

(5) **PW1** told the Court that on **16th December 2013** without any reasonable basis the Defendant submitted to the **Credit Reference Bureau** (hereinafter ‘**CRB**’) default information against the Plaintiff which information was captured by the **CRB** under Reference Number **00400xxxxxxxxxx**. That the Defendant Bank informed the **CRB** that the Plaintiff had defaulted in the repayment of a loan facility advanced to it by the Defendant Bank. The witness was especially aggrieved that the listing of the Plaintiff with the **CRB** was on account of a debt of only **Kshs. 24.66**. He complained that the Plaintiff was never officially notified of that debt by the bank nor were they granted an opportunity to pay off the same.

(6) The Plaintiffs position was that in submitting this information to **CRB** the Defendant acted unreasonably, maliciously and unlawfully because-

- (a) **The Plaintiff has never been a beneficiary of a loan facility or any credit facility from the Defendant.**

(b) The Defendant did not at any one time demand from the Plaintiff any sums due from them to it.

(c) The Plaintiff's account was in credit upon being opened and the statements issued by the Defendant in respect of the said account show that no withdrawals whatsoever were made and that the Defendant was the sole beneficiary of the Plaintiffs money by way of charging maintenance fees.

(7) The Plaintiff contends that the false information relayed by the Bank to the **CRB** was calculated to depict the Plaintiff as lacking in financial integrity, incapable of meeting their financial obligations, having no proper accounting systems and lacking any credit worthiness. That the Plaintiff was portrayed as an entity to be shunned and avoided by all and sundry. **PW1** stated that as a result of this false and / or erroneous listing of the Plaintiff with the **CRB**, the **Co-operative Bank of Kenya** whom the Plaintiff had approached for a facility declined to renew an overdraft facility which the Plaintiff held with them due to the negative report with the **CRB**. That as a result the Plaintiffs business has been subjected to losses. That despite demand being made for corrective measures the Defendant failed to rectify the situation. As a result the Plaintiff filed this suit seeking to be awarded general and exemplary damages.

(8) **DW1 MAWEU SYOVO** a Relationship Officer at the **Westmenster Branch** of the Defendant Bank testified for the Defendant. He relied entirely upon his written statement dated **24th January 2018**. **PW1** confirmed that the Plaintiff was indeed a customer of the Bank having opened a Corporate Account Number **00400xxxxxxxxxx**. **DW1** also confirmed that the Defendant had **not** advanced any loan to the Plaintiff. **PW1** states that the Plaintiffs account was in debit due to banking charges which had remained unpaid. That the Defendant had an obligation to refer the names of any defaulters to the **CRB**. **DW1** denies that the Defendant defamed the Plaintiff and states that no evidence has been adduced to prove any losses suffered by the Plaintiff Company as a result of the reference to the **CRB**. **DW1** asserts that the Plaintiff has no cause of action against the Bank and urges the Court to dismiss the present suit in its entirety and award costs to the Defendant.

(9) At the close of oral evidence parties were invited to file their written submissions. The Plaintiff filed its written submissions dated **1st July 2020** whilst the Defendant filed submissions dated **8th September 2020**.

ANALYSIS AND DETERMINATION

(10) I have carefully considered all the material placed before me in this matter. The **Evidence Act**, places the burden of proof of any fact on the person who wishes to rely on the same. **Section 107** of the **Evidence Act** provides as follows:-

“Burden of proof

1) Whoever desires any Court to give Judgment as to any legal or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

(11) The two issues which arise for determination in this suit are as follows:-

- (1) Whether the Defendant was entitled to refer the Plaintiffs name to the Credit Reference Bureau as a loan defaulter.
- (2) Whether the Plaintiff is entitled to damages for Defamation.

(i) Reference to the Credit Reference Bureau

(12) The Defendant does not deny the fact that it referred the Plaintiffs name to the **CRB** as a loan defaulter as per the Credit Reference Bureau Corporate Report dated **4th February 2015**. (see **pages 11-12** of the Defendant's Bundle of Documents filed on **3rd March 2015**). The Plaintiff submits that this action on the part of the Defendant was both malicious and uncalled for given that the amount due was only **Kshs. 24.66** and the bank had not called upon the Plaintiff to make good this sum. Further the Plaintiff contends that in view of the fact that its account was not operational (dormant) no bank charges ought to have been levied against the said account.

(13) On its part the Defendant submits that under the terms of its contract with the Plaintiff the Bank was entitled to debit any outstanding bank charges from the balance held in the Plaintiffs account and that therefore the reference by the Plaintiff to **CRB** by the Bank was correct as the Plaintiffs account was in arrears (debit) with respect to the banking charges payable on the account.

(14) The Application for opening a Corporate Account filled out by the Plaintiffs is annexed to the Plaintiffs Bundle of Documents filed on **3rd March 2015**. At **page 3** of that application is the extract of Board Resolution dated **12th March 2010** by the Plaintiff Company authorizing the opening of the Account. **Clause 7(iii)** of the said Resolution reads as follows:-

“The Company understands and agrees

(i) ...

(ii) ...

(iii) The company understands that any sum standing to the debit of the Current Account shall be liable to the interest

charges at a rate fixed by the Bank from time to time. The Bank is authorized to debit from the Account the usual banking charges, interest, commissions etc.” [own emphasis]

(15) The fact that a bank account is dormant does not mean that said account will not attract bank charges for maintenance of the Account. This is an account which was opened in the year **2010** It remained dormant for a period of about **three (3) years**. The Bank was fully entitled to debit the Plaintiffs account with the usual bank charges and in the event that the Account went into debit then the Bank was entitled to charge interest at the normal Bank rates.

(16) In the circumstances it is not surprising that the Plaintiffs account went into debit. The fact that the Plaintiff did not take out a loan facility with the Bank is neither here nor there. The fact that the account was in debit no matter how small the amount meant that monies were owed to the bank. Indeed given the very minute sum involved the Bank ought to have contacted the Plaintiff to make good this amount. On the other hand the Plaintiff equally had a duty to check on the status of its account and make good any arrears due to the Bank. To open an account and just abandon the same is not good business practise. I find that the Defendant was entitled to debit the bank charges due to it from the Plaintiffs Account and where due to interest accrued the account fell into arrears then the Defendant was perfectly entitled to refer the Plaintiff to the **CRB**.

(17) Further there is no evidence that the Plaintiff availed himself of the Statutory remedy provided by **Regulation 35(5)** of the **Banking (Credit Reference Bureau) Regulations 2013** which sets out the procedure to be followed by a customer who is aggrieved by his reference to the **CRB Regulation 35(5)** provides:-

“Where the customer believes that the information contained in the database is inaccurate, erroneous or out-dated, the customer may notify the Bureau in writing of the information disputed.”

(18) There is no evidence that the Plaintiff ever wrote to the **CRB** to dispute and/or challenge the Reference made by the Defendant. In the case of **DANIEL GACHANJA GITHAIGA –VS- CREDIT REFERENCE BUREAU AFRICA LTD & 2 OTHERS [2013]eKLR** the Court held as follows:-

“Finally, in my view, the application is premature as the procedure for correction and/or deletion of a customer’s information shared with the 1st Defendant is clearly and intricately provided for under Regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008, which procedure *inter-a-lia* requires a customer to notify the 1st Defendant in writing that he disputes the reference, after which the 1st Defendant carries out investigations and decides whether to delete or retain the reference. The Plaintiff has not invoked and/or exhausted the aforesaid procedure, and therefore this application is premature.” [emphasis mine]

(19) Similarly in **JAMLICK GICHUHI MWNAGI-VS- KENYA COMMERCIAL BANK LTD & ANOTHER [2016]eKLR** it was held:-

“In relation to the right to correction it was submitted that the courts in Kenya have rightfully found that where a party fails to pursue the statutory reliefs provided under Regulation 20 of the Banking Regulations 2008 then they cannot bring a suit to claim damages and that this suit was brought prematurely having by-passed the statutory provisions. In this contention reliance was placed on the case of *Nairobi HCCP No. 17 of 2013 – Amy Kagendo Mate –vs- Prime Bank Limited & Credit Reference Bureau Africa Limited* where Ngugi J. held as follows:

“In the present case, the petitioner complains and seeks a declaration, *inter alia*, that the 2nd respondent has violated her rights under the Constitution by maintaining in its database and disseminating ‘inaccurate, outdated and untruthful credit information regarding the Petitioner and without due notice to her of the same...’

The petitioner has not pleaded that she invoked the provisions of Regulation 20, and what the outcome thereof was. On the pleadings before me, it appears that the petitioner sought the assistance of this court after by-passing the statutory remedy which is intended to address her grievances with respect to the information held by the 2nd respondent. I would therefore agree with the 2nd respondent that this petition is improperly before me on this point.”

(20) The Plaintiffs failure to make use of this mandatory procedure event was aggrieved by the Reference to the **CRB** means that the suit is premature. The Plaintiff ought to have pursued this statutory remedy before filing suit against the Bank. This is in line with the Doctrine of **“exhaustion of remedies”** which provides that a party ought to first pursue (exhaust) other statutory remedies **before** approaching the Courts. In **GEOFFREY MUTHINJA KABIRU & 2 OTHERS –VS- SAMUEL MUNGA HENRY & 1756 OTHERS [2015]eKLR** this doctrine was pronounced as follows:-

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts... This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.” [See page 68 of the Authority at page 60 to 69]

(21) Finally I find that although it may have been petty for the Bank to make the reference to the **CRB** in respect of a debt of only **Kshs. 24.66** it was certainly **not** illegal and/or unprocedural for them to have done so. It is further my view that this is a matter that may well have

been resolved amicably without expending the limited time and resources of the judicial system if the Plaintiff had availed itself of **Regulation 35(5)**. I find that the Defendant was fully entitled to refer the Plaintiff to the **CRB**.

(ii) **Defamation**

(22) The Plaintiff alleges that in referring its name to the **CRB** the Defendant defamed the Plaintiff and that as a result the **Co-operative Bank of Kenya** declined to renew an overdraft facility which the Plaintiff held with said Bank leading to financial losses. The Plaintiff therefore seeks both exemplary and general damages for this Defamation.

(23) The Defendant denies having defamed the Plaintiff and asserts that negative report to **CRB** was true and cannot amount to defamation. **HALSBURYS LAWS OF ENGLAND 3RD EDITION** defines the tort of Defamation as follows:-

“A defamatory statement is a statement which if published and concerning a person is calculated to lower him in the estimation of right-thinking men or 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 or her office, profession, calling, trade or business.”

(24) In **PHINEAS NYAGAH –VS- GITOBU IMANYARA [2013]eKLR** Hon. Justice Odunga discussing the tort of Defamation observed as follows:-

“Defamation is a tort and is defined as the publication of a statement which, tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has tendency to injure the reputation of the person to whom it refers by lowering him in the estimation of the right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the plaintiff attributing to him any form of disgraceful conduct such as crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the plaintiff alone is not enough because defamation is an injury to one’s reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the plaintiff’s reputation. The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.”

(25) In order to prove the tort of Defamation there must be proof of the publication of injurious material to a party other than the Plaintiff. In this case the negative report was published **only** to the **CRB**. Under **Regulation 19** of the **Banking (Credit Reference Bureau) Regulation 2013** a suit cannot be sustained against a Bank for loss or damage caused by a report made in good faith in pursuance of said Regulations.

(26) In the case of **ALICE NJERI MAINA –VS- KENYA COMMERCIAL BANK [2018]eKLR** the Court held:-

“In diverging confidential information of a customer, a bank may not be in itself defamatory, courtesy of the Credit Reference Bureau Regulations 2013, under the Banking Act. Section 26 states that:

(i) A Bureau shall protect the confidentiality of a customer information received in terms of these regulations and shall only report or release such customer information.

1. to the customer concerned
2. to the Central Bank
3. to a requesting subscriber
4. to a third party as authorised by the customer concerned, or
5. As required by law.

19. Regulation 19(1) further states that:

“a suit cannot lie against the Central Bank, Bureau, an institution of chairpersons --- or any other person authorised under these Regulations --- for loss or damage caused or which is likely to be caused by anything, which is done or intended to be done in good faith in pursuance of these regulations or guidelines issued hereunder.”

The above provisions, in my considered view are applicable if the “thing” complained of was done in good faith. Where the institution is found to have been reckless and negligent and in breach of the institutions duty of care to the customer, then, a suit for negligence and sequential damage will lie. The onus lies on the plaintiff to prove that the bank or institution did not act honestly and was actuated by malice.

I do not think that the published listing of the plaintiff to authorised institutions as stated in the Regulations cited above was defamatory to her character. No unauthorised persons got that information. The publication is authorised under Statute, the Banking Act. It can therefore not be defamatory unless the plaintiff publized the same to unauthorised persons including “right thinking members of the society” and no proof was tendered.” (emphasis mine)

(27) The Plaintiff alleges that due to the negative listing by the Defendant, the **Co-operative Bank of Kenya** of which the Plaintiff was also a client declined to renew to the Plaintiff Overdraft Facility causing financial loss to the Plaintiffs business. It is trite that he who alleges must prove. The Plaintiff did not call any witness form the Co-operative Bank to confirm firstly that the said Bank had actually declined to renew the Plaintiffs overdraft facility and secondly whether such refusal was influenced by the negative listing at the **CRB**. The Defendant itself did **not** publish any information regarding the Plaintiff to Co-operative Bank.

(28) Further the Plaintiff claims to have suffered financial losses due to the alleged refusal by **Co-operative Bank** to renew its Overdraft facilities. No details of the alleged financial losses are provided. The Plaintiff have not called an Accountant to testify on their behalf nor have they annexed the Companys audited accounts to prove any losses. I find that the Plaintiff has not proved firstly that the report lodged by the Defendant with the **CRB** influenced the decision of **Co-operative Bank** not to renew the Plaintiffs Overdraft facility. Secondly Plaintiff has not proved that its business incurred any losses as a result of said refusal. In the absence of proof of injury or loss no damages are payable.

(29) Finally I find no merit in this suit. The same is hereby dismissed in its entirety with costs to the Defendant.

Dated in **Nairobi** this 12TH day of **FEBRUARY, 2021**.

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MAUREEN A. ODERO

JUDGE