



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 12 OF 2020**

**GEORGE ADANG' AHI KARANI.....APPELLANT**

**VERSUS**

**JAMII BORA BANK LIMITED**

**CREDIT REFERENCE T/A TRANS UNION .....RESPONDENTS**

*(An Appeal from the Ruling and Orders of Honourable G. Kiage (Mr), Resident Magistrate delivered and dated the 11<sup>th</sup> October, 2018)*

**JUDGMENT**

1. The Appellant was the Plaintiff in **CMCC Civil Suit No.196 of 2016**. He had sued the 1<sup>st</sup> Respondent, **Jamii Bora Bank** for wrongly enlisting him in the 2<sup>nd</sup> Respondents **Credit Reference Bureau** as a defaulter of a loan alleged to have been facilitated to him through his registered **Welfare Group, Yakaneni**. However, the Appellant withdrew his case against the 2<sup>nd</sup> Respondent on the **7<sup>th</sup> June, 2017** and proceeded with the claim against the 1<sup>st</sup> Respondent only.
2. The Appellant's case was that on or about **4<sup>th</sup> November, 2004**, through his registered **Welfare Group- Yakaneni**, he joined the 1<sup>st</sup> Respondent's microfinance bank, where he would contribute savings and get loan facilities in return.
3. The Appellant averred that in **2005**, the welfare group withdrew from the 1<sup>st</sup> Respondent's Bank and all members of **Yakaneni** were relieved from any debts and liabilities owed to the 1<sup>st</sup> Respondent.
4. On or about **April, 2016**, the Appellant applied for a loan facility at Kenya Commercial Bank, where his request was declined, reasons being that he had been blacklisted by the 2<sup>nd</sup> Respondent, the Credit Reference Bureau for an alleged default in a loan owed to the 1<sup>st</sup> Respondent.
5. The Appellant claims that he was falsely and maliciously listed at the 2<sup>nd</sup> Respondent's Credit Reference Bureau as there was no money owing to the 1<sup>st</sup> Respondent.
6. It was the Appellant's case that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' decision to list him at Credit Reference Bureau caused him distress, agony, mental torture and humiliation in the eyes of the public. He stated that his means of securing a livelihood has been cut off as he can no longer secure various jobs. He claimed to have suffered damages and sought the trial court to grant him aggravated and exemplary damages for defamation. He also sought that the court grants him costs of the suit plus interest.
7. The 1<sup>st</sup> Respondent, filed its **Statement of Defence** on **5<sup>th</sup> April, 2017** and stated that indeed they received complaints from the Appellant that he had been wrongly listed as a defaulter at the 2<sup>nd</sup> Respondent's Credit Reference Bureau.
8. The 1<sup>st</sup> Respondent stated further that via a letter dated **15<sup>th</sup> August, 2016**, sent **Yakaneni Welfare Group**, confirmed that the Appellant had erroneously been submitted to the 2<sup>nd</sup> Respondent's Credit Reference Bureau. Subsequently, the 1<sup>st</sup> Respondent on **1<sup>st</sup> June, 2016**, issued a **Notice of Amendment** to the 2<sup>nd</sup> Respondent and the same forwarded to the Appellant's **Welfare Group, Yakaneni**.
9. The 1<sup>st</sup> Respondent stated that the publishing was erroneous and not malicious for all intents or purposes and that the information relied on in the institution of the suit herein is one dated **7<sup>th</sup> March, 2016** before the **Notice of Amendment** was issued on the **1<sup>st</sup> June, 2016**.
10. In addition to the **Statement of Defence** filed on **5<sup>th</sup> April, 2017**, the 1<sup>st</sup> Respondent filed a **Notice of Preliminary Objection** on **3<sup>rd</sup> August, 2017** for determination on whether the trial court had jurisdiction to hear and determine the matter pursuant to the provisions of

**Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013** as read with **Article 159 (2) (c ) of the Constitution of Kenya.**

11. And in observance of trite law that **Preliminary Objections** once raised ought to be determined first, the trial court did just that. It heard the parties and delivered a **Ruling** on **11<sup>th</sup> October, 2018**. The trial court found that the **Preliminary Objection** filed on **3<sup>rd</sup> August, 2017** had merit and allowed the same, thus, striking out the Appellant's suit with costs to the 1<sup>st</sup> Respondent.

12. Being aggrieved by the trial court's **Ruling** delivered on **11<sup>th</sup> October, 2018**, the Appellant filed the Appeal herein through the **Memorandum of Appeal** dated **18<sup>th</sup> February, 2020**. The **Memorandum of Appeal** advanced **six (6) Grounds of Appeal** which are as follows:

a) **THAT the Learned Magistrate erred in law and fact by dismissing the Appellant's case based on a Preliminary Objection Application that did not raise any pure point of law or at all thereby arriving at a Wrong Decision;**

b) **THAT the Learned Magistrate erred in law and in fact by failing to consider, in totality, the overwhelming circumstances pertaining hereto, the Appellant's ascertainable claim and mandatory provisions of the Law as well as relevant guiding principles thereof, thereby arriving at a wrong decision;**

c) **THAT the Learned Magistrate erred in law and fact in failing to appreciate that the Appellant is entitled to Alternative Remedies under the Land Act to enable him redeem the suit property other than it being auctioned;**

d) **THAT the Learned Magistrate erred in law and fact in requiring the Appellant to prove that the Dispute Resolution Mechanism provided under the Credit Reference Bureau Regulations had been exhausted in response to the Preliminary Objection dated 2/8/2017, which question should have been better dealt with in a full trial;**

e) **THAT the Learned Magistrate erred in law and fact in disregarding the Respondent's pleading as filed, which pleadings demonstrate clearly the steps and measures taken by the Credit Reference Bureau in resolving the dispute before finally resorting to litigation;**

f) **THAT the Learned Magistrate erred in law and fact by entering judgment against the weight of evidence supplied in Court, thereby arriving at a wrong decision.**

#### **DIRECTIONS OF THE COURT**

13. On **18<sup>th</sup> September, 2020** the court directed that the Appeal be canvassed by way of written submissions. The Appellant filed his submissions on **19<sup>th</sup> October, 2020** while the 1<sup>st</sup> Respondent filed theirs on the **15<sup>th</sup> January, 2021**. I have thoroughly read through the said submissions.

#### **ANALYSIS AND DETERMINATION**

14. As the first appellate court, this court is enjoined to subject the whole of the evidence to a fresh and exhaustive scrutiny and make its own conclusions, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was well stated in the case of **Selle & Another –vs- Associated Motor Boat Co. Ltd. & Others (1968) EA 123** in the following terms:

**“...I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High 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. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270) ...”**

15. Having considered the Memorandum of Appeal, Record of Appeal and the written submissions of both parties, the issue that arises for determination is whether the **Preliminary Objection** as filed on **3<sup>rd</sup> August, 2017** was properly before the court and whether it was merited.

16. Before the trial court, the 1<sup>st</sup> Respondent raised a jurisdictional objection based on **the doctrine of exhaustion**. **The Preliminary Objection** filed on **3<sup>rd</sup> August, 2017** read as follows: -

**‘TAKE NOTICE that the 1<sup>st</sup> Defendant, Jamii Bora Bank Limited shall raise a preliminary objection to have the entire suit dismissed on the following points of law: -**

**1. THAT this Honourable Court lacks jurisdictions to hear and determine this matter pursuant to the provisions of Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013 as read together with Article 159 (2)(c) of the Constitution of Kenya.**

17. The 1<sup>st</sup> Respondent stated that the Appellant's suit was premature as at **1<sup>st</sup> June, 2016**, they had already sent a **Notice of Amendment** to the 2<sup>nd</sup> Respondent for the rectification or deletion of the Appellant's name from the list at the Credit Reference Bureau. Further, that vide a letter dated **15<sup>th</sup> August, 2016** the 1<sup>st</sup> Respondent apologized to the Appellant's **Welfare Group, Yakaneni** for any inconveniences they may have caused them and the Appellant.

18. The Appellant on the other hand, stated that the **Preliminary Objection** as raised was not properly before court and neither was it sufficient to dispose of the suit in *limine*. He stated for the Court to ascertain whether the Appellant had complied with **Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013**, the Court needed to be called upon to evaluate the evidence in that regard.

19. Under, **Regulation 35 (5) of the Banking (Credit Reference Bureau) Regulations, 2013** any aggrieved party is required to give notice of the wrong information to the Credit Reference Bureau to take steps accordingly for purposes of rectification. I have carefully perused the said provisions of **Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013** and it provides that: -

**“(5) Where the customer believes that the information contained in the database is inaccurate erroneous or outdated, the customer may notify the Bureau in writing of the information disputed.”**

It will be noted that the same is not couched in mandatory terms as the word 'may' is used.

20. It was therefore not a mandatory requirement that the Appellant writes to the 2<sup>nd</sup> Respondent requiring them to delete his name from their website. The provision under **Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013**, is one under the discretion of the Court and as per **Nitin Properties Ltd –vs- Singh Kalsi & Another case**, a **Preliminary Objection** is not enough to dispose of a suit if what is sought is at the discretion of the court.

21. The **Preliminary Objection** was however not to be read and interpreted on its own, but together with the provisions of **Article 159 (2)(c) of the Constitution of Kenya**, that requires the Courts in mandatory terms to be guided by principles of alternative forms of dispute resolution: -

**159. Judicial authority**

**(1) .....**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—**

**(a) ...**

**(b) ...**

**(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)**

**(d) ...**

22. **Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013** as read with **Article 159 (2)(c) of the Constitution of Kenya** provide for a mandatory requirement that the Appellant exhausts all available remedies before he approaches the court. A reading of **Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013** together with **Article 159 (2) (c ) of the Constitution of Kenya** therefore renders the **Preliminary Objection** dated **2<sup>nd</sup> August, 2018** having been properly before court, but only in so far as the disputed information with regard to the 2<sup>nd</sup> Respondent was concerned.

23. On whether the **Preliminary Objection** was merited, the Appellant stated that his case against the 1<sup>st</sup> Respondent was not about deletion of his name from the 2<sup>nd</sup> Respondent's list but for damages that he had been defamed by being improperly listed as a loan defaulter at the 2<sup>nd</sup> Respondent's Credit Reference Bureau. In the **Plaint** before the trial court, the Appellant also sought to be awarded aggravated and exemplary damages for defamation.

24. A perusal of the Appellant's **Plaint** as filed before the trial court, shows that he did not only complain about the delisting of his name from the 2<sup>nd</sup> Respondent's Credit Reference Bureau, but also had claims for malice and defamation and how the same had affected him as a businessman in that he has since then been unable to secure loans from other financial institutions and therefore sought for damages.

25. The 1<sup>st</sup> Respondent's Statement of Defence dated **5<sup>th</sup> April, 2017** acknowledged that they had indeed wronged the Appellant by publishing his name at the 2<sup>nd</sup> Respondent's Credit Reference Bureau, and have gone as far as showing the court the steps that they took to ensure that the Appellant was delisted. A Notice of Amendment was sent on **1<sup>st</sup> July, 2016**.

26. The Court of Appeal in the case of **Nitin Properties Ltd v Singh Kalsi & Another [1995] eKLR** stated:

**“...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”**

27. The issue on whether or not the Appellant was delisted does not seem to arise to warrant the suit being dismissed on a doctrine of exhaustion. The **Preliminary Objection** as raised ought to have dismissed part of the suit but not the whole of the suit.

28. According to the 1<sup>st</sup> Respondent, the **Preliminary Objection** dated **5<sup>th</sup> April, 2017** was based on **paragraph 11** of the **Plaint** which stated: -

**“11. Despite several demands rectify the anomaly and have the Plaintiff’s name expunged from the credit reference bureau, the defendants have ignored and/or refused to act necessitating this suit.”**

29. It is evident that the **Plaint** has other live issues that ought to have been determined by the trial court such as malice and defamation so as to establish whether the Appellant was entitled to damages as sought or not. These are issues of fact which ought to be ventilated through trial for determination.

30. For the above reasons, it is my finding that the Appeal succeeds in part and the Ruling delivered on **11<sup>th</sup> October, 2018** hereby set aside, with orders that:-

**a) the CMCC Civil Suit No.196 of 2016 be heard de novo with regard to the issues of fact in the Plaint.**

**b) Costs to the Appellant.**

It is hereby so ordered.

**DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 30<sup>TH</sup> DAY OF MARCH, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**30/3/2021**