



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO.17 OF 2014

JEDIDAH WANJIRU WAIRIMU.....PLAINTIFF

VERSUS

SIMON KAROGHA NJOROGE.....1ST DEFENDANT

NATIONAL AFRICA COMMERCIAL BANK.....2ND DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD.....3RD DEFENDANT

AFRICA PROVIDENT BANK.....4TH DEFENDANT

JUDGMENT

1. At all material times, the Plaintiff and the 1st defendant, who are adults were carrying on business and resided at Nakuru.
2. The 2nd, 3rd and 4th defendants are Limited Liability Companies registered under the **Companies Act, Cap.486 Laws of Kenya**, and licenced to carry on banking business.

The 3rd Defendant carries on business of Credit Reference Bureau (CRB) while the 4th Defendant carries on business of Micro-financing under the **Banking Act, Cap.488, and Laws of Kenya**. On the 23.7.2012, the 1st Defendant assisted the Plaintiff to obtain a loan of Kshs.300,000/= from **Real People Micro-Finance** where he was worked as a loans officer. The two were/are relatives.

3. By an **Amended plaint dated 18.10.2019**, the Plaintiff claims to have fully repaid the said loan by the 4.2.2014, and closed the account loan account. However, the Plaintiff states that about 4.2.2014 she received information that she had been listed as a loan defaulter by the 3rd defendant, **Credit Reference Bureau Africa Limited** and upon enquiring, she learnt that the 1st defendant used her documents to obtain a loan for Kshs.570,000/= on the 29.9.2012.

4. Upon the above information, the Plaintiff proceeded to sue the defendants for the negligence of the 2nd defendant and 3rd defendant, stating particulars thereof, and for fraudulently procuring the loan by the 1st defendant without her authority. Particulars of fraud are stated thereon.

5. The Plaintiff thus seeks, from the Court;

a) An order of Mandatory injunction compelling the 3rd defendant, by its agents and servants, to expunge the Plaintiff's name from the 3rd defendant's database.

b) General damages for losses incurred.

c) Costs of the suit.

d) Interest on a, b, & c at Court rates.

d) Any other relief the court may deem fit to grant.

6. The defendants filed separate statements of defences to the plaintiff's claim.

The 1st defendant denied all the particulars of claim stated in the plaint by a defence filed on 16.6.2014.

The 2nd defendant stated to be a stranger to the plaintiff's claim, but acknowledged having received the plaintiff's documents, opened an account for her, and granted a loan of Kshs.570,000/= on the 29.9.2012 which was approved, but that the plaintiff defaulted in the repayment necessitating it to refer the plaintiff's name to the Credit Reference Bureau the 3rd Defendant.

It denied any fraudulent deeds and the alleged negligence on its part. The defence is dated 8.5.2014 and filed on the 9.5.2014.

7. **The 3rd defendant** while denying the plaintiff's claim, further lodged a claim dated 13.6.2014 against the 2nd defendant seeking full indemnity in respect of the plaintiff's claim for damages, costs and or any other pecuniary relief that may be awarded to the plaintiff, and costs of defendant the suit.

8. **The 4th defendant** by its defence filed on the 19.6.2014 denied knowledge of the allegations leading to the plaintiff being black listed by the Credit Reference Bureau.

The 4th defendant however confirmed that it had cleared the plaintiff of the loan it advanced to her, and further stated that the 1st defendant had been arrested for fraudulent use of the plaintiff's documents as the loans officer, and without authority, obtaining a loan for himself, and therefore places full culpability at his shoulders. Further the 4th Defendant denies that the plaintiff suffered any loss or damages, and puts her to strict proof.

9. PLAINTIFF'S EVIDENCE

The plaintiff relied on her recorded statement dated 15.8.2017 and filed on the 16.8.2017; together with documents filed. It was her evidence that she paid off her loan advanced to her by the 4th defendant in 2013, and that upon investigations by the 4th defendant, it was found that the 1st defendant fraudulently forged and used her documents to obtain a loan for which he defaulted, leading to her names being forwarded for listing by CRB, for five (5) years during which period she could not access any loan.

10. It was her evidence that the 1st defendant was eventually arrested and charged in a criminal case, found guilty and convicted for the offence of forgery. She however blamed the 4th defendant for negligence in handling her documents.

11. **The 1st defendant** did not testify despite having knowledge of the hearing date, and having filed statement of defence.

12. **The 2nd defendant's evidence** (National Africa Commercial Bank) was tendered by its relationship Manager, Evelyne Wambui Wamuyu. She relied on her statement filed on 21.1.2019 and documents filed on the 9.5.2014 – produced as exhibit No. 1-8.

She stated to the court the procedure of opening a bank account and application for a loan, and stated that the plaintiff did apply and was advanced a loan of Shs.686,000/= payable in 48 months, and that due to default in servicing the loan, the bank referred the plaintiff's name to the 3rd defendant, Credit Reference Bureau Africa Limited for listing as a defaulter. It was her evidence that due diligence was done, and urged for dismissal of the case.

13. On the Criminal case against the 1st defendant the witness testified that the 1st defendant must have used the plaintiff's documents to procure the loan, and was convicted for the offence of forgery. It was her evidence on cross examination that the 3rd defendant did not update the CRB when the information sent to it was found to be incorrect.

14. **The 3rd defendant's case** (Credit Reference Bureau Africa Limited was urged by one Rosemary Mbugua, a Legal officer at the bureau.

She also adopted her statement filed on 5.3.2019. It was her testimony that when the plaintiff requested for her credit report on 7.2.2014, she was promptly given, and never received any complaint from the plaintiff. It was her evidence that the CRB acted on information from the 2nd defendant bank to list the plaintiff as a loan defaulter, and therefore could not be blamed for any negligence or fraud.

15. **The 4th defendant's evidence** was tendered by **Peter Akonyi Amkoa**, who testified as DW1, for African Provident Bank. His evidence was that he was aware that the 1st defendant worked as a relationship officer at **Real People Micro - Finance** and that he procured a loan of Shs.300,000/= and that he is the one who processed the loan, with documents not kept at the bank.

He had no other information about the loan.

Upon closure of the evidence, parties filed written submissions.

16. ISSUES FOR DETERMINATION

1. Whether the plaintiff defaulted in repayment of any loan advanced to her by the 2nd defendant or at all.

2. Whether the plaintiff's names listing to the Credit Reference Bureau by the 3rd defendant was negligent and if so;

3. Whether the plaintiff's claim for loss and damages is sustainable.

17. ANALYSIS AND DETERMINATION

I have considered the pleadings, evidence and submissions by all the parties.

The 1st defendant who was accused for the offence of forgery of the plaintiff's documents to obtain a loan from the 2nd defendant in **Nakuru Criminal Case No.374/2014** and convicted, filed a statement of defence denying all the plaintiff's allegations, but failed to testify to support the assertions. It is trite that where a party fails to call evidence to substantiate its pleadings, the said pleadings remain as mere statements of fact.

Further, it is also trite that failure to adduce evidence to challenge the plaintiff's claim and evidence by the defendants renders the evidence uncontroverted, and therefore unchallenged.

18. **Section 107 and 108 of the Evidence Act** are clear that he who asserts or pleads must support by way of evidence – **Ruambuzi Company Limited Vs. Antony Mwaniki Nzioki (2016) eKLR.**

The same holding was held in **KCB Ltd Vs. Thomas K. Sambu t/a Solai Agencies & Another (2020) eKLR.**

To that extent then, the plaintiff's pleadings and evidence against the 1st defendant are uncontroverted and unchallenged. Coupled with the Criminal case Conviction on the same matter – forgery of the plaintiff's documents to procure a loan - it is without doubt that the 1st defendant has no defence to the plaintiff's claim.

19. As to the rest of the defendants, each of them had a legal duty, recognized under the Banking Act and the Credit Reference Bureau Regulations towards the Plaintiff.

The **Banking Act, Section 31 (4)** empowers Institutions licenced under it to share among themselves any Credit information of their customers. The bank in discharging its duties to its customers is mandated to **satisfactorily establish and verify the customer's true identity** and in doing so, it must be alert to the dangers that after opening of an account, it may be used for fraudulent purposes by its rogue staff, or by a scheme of fraudulent cartels within, and without their institutions.

20. The Central Bank of Kenya Guidelines on proceeds of Crime and money Laundering (prevention) **CBK/PG/08 guideline 4.1 (a)** states that;

“A bank is expected to ensure that the management obtain and maintain proper identification of customers wishing to open accounts or make transactions”

21. **Guideline 4.2 (a)** makes it mandatory for a bank to verify the identity of a customer when establishing initial business relations. In that respect, the 2nd defendant, failed in its duty to keep the plaintiff's documents in a safe custody, to avoid them being used by fraudsters, and further failed to verify, keep clear and proper identification of its customers as rendered in;

- Beyond Kenya Ltd & Another Vs. Gulf Africa Bank Kenya Limited (2019) eKLR.

22. In the case **Alice Njeri Maina Vs. Kenya Commercial Bank Ltd (2018) eKLR,** this court held that;

“the bank's duty under its contract with a customer must be exercised within reasonable care and skill in regard to its operations within the contract with its customers.

Negligence may lead to its case in a tort or breach of contract, and it is upon the plaintiff to prove that the bank owed a duty of care and the said duty was breached and the customer has suffered loss as a result”.

See also **Brith Print (K) Ltd & George Maina Kingori Vs. Barclays Bank (K) Ltd (2014) eKLR.**

23. **The 3rd Defendant,** is also regulated by the Credit Reference Bureau Regulations 2013. **Regulation 35 (1) (2) (3)** provides;

“(1) A customer has a right to know what information the institution has submitted to the Bureau regarding that customer.

(2) A customer shall be entitled to access credit reports relating to the customer that are kept in a database administered by a Bureau.

(4) A customer shall be entitled to a free copy of his credit report from a Bureau, or its agents in the following instances;

(a) at least once per year;

(b) within thirty day of receiving an adverse action notice issued under regulation 50 (iii) and

(c) Once per six months after making a request to a Bureau to have inaccurate information corrected in the database.

(4) Where a customer requests a Bureau for a credit report pursuant to sub-regulation (2), request in writing and such particulars as the Bureau may reasonably require to enable it identify the customer, provide to the customer a copy of all customer information relating to the customer held by the Bureau”.

24. **The 3rd defendant** when requested, did supply to the plaintiff the credit report. It therefore complied with its statutory obligations under the regulations, and it is upon such report, that the plaintiff certified that she had been listed with the CRB Despite the 2nd Defendant having referred a wrong listing to the CRB, it failed to update the record, and insisted that the plaintiff was a loan defaulter. It became aware but, failed to rectify the wrong, in terms of **Regulation 50 (5) CRB Regulations**.

25. Further, **Regulation 25 (1) CRB** mandates a Credit information provider to notify the customer in writing of its intention to submit negative information to any Credit Reference Bureau.

This, the 2nd defendant failed to abide with. **Regulation 25 (8) CRB** requires that upon a negative information being made of a customer, it ought, within 30 days to notify the customer of the listing.

These very important imperatives and duties by the 2nd Defendant Bank were ignored, and/or neglected.

It is my finding that had the 2nd defendant notified the plaintiff of these negative intentions and actions, she would have resolved the issue sooner than later, and would have absolved the bank from blame.

26. In **Eunice Nganga Vs. Higher Education Loan Board & 2 Others (2020) eKLR**, the Higher Education Loans Board classified the Petitioner as a loan defaulter, even though the Petitioner had never obtained a loan from the 1st Respondent, and forwarded the Petitioner’s name to the 2nd and 3rd Respondents for listing the Petitioner as a loan defaulter. The 2nd and 3rd Respondents adversely listed the Petitioner’s name in their records as a loan defaulter and proceeded to have Petitioner listed as a loan defaulter without first informing, or notifying or hearing the petitioner on the issue and in breach of constitutional, statutory and regulatory requirements. The Petitioner contends that the Respondents actions complained of adversely affected the Petitioner’s personal, commercial and professional reputation. The court held that;

“This court takes judicial notice to the fact that whoever is ever listed by any of the CRB following an adverse information or report cannot be taken as a person worthy granting loan or doing business with otherwise CRB listing would have no meaning in the business world. It would therefore be extremely difficult for such individual to produce evidence to demonstrate that she applied for a loan with any Bank or Financial institution or business or lost potential clients as no one would wish to give such an individual any chance to initiate such a process for fear of losing finances or being conned. The person loses all respect and dignity”.

27. In my opinion, the 2nd and 3rd defendants negligence and failures are wrong illegal and against the CRB Regulations that ought to guide them. Having admitted their statutory failures, they can only blame themselves. **Regulation 33 (5)** mandates any institution that furnishes customer information to a bureau; **on a monthly basis, or within such earlier time, to update it and ensure that the customer is constantly updated.**

28. It has been submitted that the 3rd defendant it merely an agent of the 2nd defendant and therefore ought to be discharged from blame.

It is on that basis that the **3rd defendant filed a notice of claim against the 2nd defendant for indemnity** on the 13.6.2014, citing the terms and conditions of business dated 10.8.2020 with the defendant which is still operational, and having stated to be a disclosed agent of the 2nd defendant, it ought not be liable for actions done on behalf of the disclosed principal.

29. In **Jamlick Gichuhi Mwangi Vs. KCB Ltd & Another**, this Court in a very similar circumstances rendered;

“In this instance, I am in agreement that the 2nd defendant is hereby an agent of the 1st defendant for the primary function of acting as a conduit of the customer information in the possession of the 1st defendant and transmitting the same to other banks which have subscribed.....”

By the foregoing, it is evident that the 1st Defendant cannot escape liability, having been charged, convicted for the offence of forgery of the plaintiffs documents to obtain a loan without her authority.

In the same breath, the 2nd defendant was under a statutory duty to ensure that the customers documents and identification mechanisms were beyond reproach as per Central Bank Guidelines **4.1 (a) and 4.2 (a)**.

30. The 3rd defendant’s culpability flows from the 2nd defendant’s negligence and recklessness. Had they adhered to their statutory duties and obligations, the 3rd defendant would not have found itself in the position it did, in this suit. That is evident by its notice of indemnity issued to the 2nd defendant. The 4th defendant’s position in the entire conflict is that it knew of the fraud committed by the 1st defendant. Whether it reported the same or not for investigation is not clear.

31. BY THE 1ST AND 2ND DEFENDANTS ACTIONS, DID THE

PLAINTIFF SUFFER DAMAGES?

There is no dispute that the Plaintiff's names were listed by the 3rd defendant upon instructions by the 2nd defendant. I have already rendered that the Bank (2nd defendant) acted negligently and recklessly, in breach of the statutory regulations and duty to the plaintiff, a customer; by its failure to keep the plaintiff's documents in safe custody and proper customer identification to wade off fraudsters who may be tempted to use the documents for fraudulent schemes.

32. When the wrong listing was discovered by the plaintiff, the CRB regulations state the procedure that the complainant ought to adhere to, prior to moving to court, for resolution. They are contained in **Regulations 35 (5) – (14)**; thus **Regulation 35 (5) to (14) of the CRB** provides:

“(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.

(6) Within five working days of being informed that the information in a customer's credit report is disputed the bureau shall;

(a) attach a note to the credit information report, which notice shall remain on the file until resolution of the dispute, and

(b) give the institution or credit information that supplied the information a notice of dispute requesting confirmation from the institution or credit information provider as the accuracy of the information.

32. The plaintiff clearly side stepped the said regulations and filed this suit against the defendants.

She gave the defendants no opportunity to investigate the complaint. There is no doubt that if investigations were undertaken a resolution could have been reached without to legal recourse.

33. **Majanja J in Kennedy Nyagudi Vs. Central Bank of Kenya & 2 Others (2013) eKLR**, observed that (in regard to CRB regulations)

“The provisions I have cited above clearly show that the Regulations provide for relief to any customer who is aggrieved by wrong and erroneous information.

The petitioner's generally fall within these provisions and he is entitled to invoke the statutory procedures provided”.

34. The same holding was stated in **Daniel Gachanja Githaiga V. Credit Reference Bureau Africa (2013) eKLR** where the plaintiff had bypassed the CRB Regulations leading to the dismissal of the case.

Though the plaintiff bypassed the Statutory Regulations this does not absorb the defendants from their own negligence and recklessness, and therefore culpability in different ways, against each.

35. In **Eunice Nganga V. Higher Education Loan Boards (Supra)**, the court rendered that *an adverse information or report cannot be taken as a person worthy granting a loan or doing business with otherwise CRB listing would have no meaning in the business world, and that it would be therefore extremely difficult for such individual to produce evidence to demonstrate that she applied for a loan or lost potential clients....”*

The court in this case held did not demonstrate that she requested for the information and it not given to her – **Regulation 33 (4) CRB**; nor that the CRB pursuant to **Regulations 35 (1) (2) CRB** was complied with by the Bank; and that the Credit Reference Bureau failed to comply with **Regulations 33 (4) CRB** by ensuring that the information registered in its database is regularly updated.

36. Though the plaintiff may not have complied with the **Regulations 35 (5) (14) CRB**, the fact remains that the listing was wrongful and the consequences are grave as no financial institution would grant any such person financial facility and that person loses all respect and dignity before all financial facilities. The court in the **Higher Education Board** case awarded damages to the petitioner.

37. I have considered the plaintiff's claim for damages and loss arising from the wrong listing.

Though no prove was tendered for any financial loss by wrong listing, the plaintiff must have suffered emotional embarrassment caused by the defendants at different levels. In **Equity Bank Vs. Gerald Wang'ombe (2015) eKLR**, the court rendered that a party claiming damages out of an occurrence must supply and prove particulars which would lead to an award of damages. Emotional embarrassment is not a matter they may be easily proved though no doubt that the plaintiff did suffer.

38. Upon consideration of several decisions, among them **Namwalwa Christine Masude - Vs – National Bank of Kenya (2016) eKLR**, the **Ann Njeri Maina -V- Kenya Commercial Bank Ltd (2018) eKLR**, I find and hold that a minimal award of Kshs.200,000/= would sufficiently compensate the plaintiff; as hereunder;

39. The sum of Kshs.200,000/= shall be paid to the Plaintiff by the 1st Defendant, Simon Karogha and the 2nd Defendant, National Africa Commercial Bank jointly and severally.

40. The said sum of Kshs.200,000/= shall bear interest at court rates from the date of this judgment.

41. There shall be no order as to costs as all the parties played some part prior to, and after filing of the suit.

Orders accordingly.

Signed electronically.

J. N. MULWA

JUDGE

Delivered at Nakuru this 29th day of April, 2021.

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H. CHEMITEI

JUDGE