



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 38 OF 2017

REUBEN KIOKO MUTYAENE.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

AND

TRANSUNION T/A

CREDIT REFERENCE BUREAU AFRICA LIMITED.....INTERESTED PARTY

JUDGMENT

Brief Background and Pleadings.

1. At all material times between the year 1991 and 2011, the plaintiff was an employee of the Defendant Bank. During the time, he was advanced loans and overdrafts to facilitate running of his businesses. Upon termination of the Defendant's employment, the Defendant amalgamated the said loan facilities and converted them to an amount of Kshs.2,723,951.20/= to conform with public terms and conditions for lending as at 9/5/2012. The plaintiff was not satisfied with the said sum, but through negotiations, a sum of Shs. 2,510,284.55/= was mutually agreed upon to be paid by the plaintiff to the Defendant bank by the 30/11/2012.

2. However, as the negotiations were on going, the Defendant Bank caused the plaintiff's name to be listed with the Credit Reference Bureau (CRB) Transunion Credit Bureau Africa Ltd negative database on the 18/8/2012, the Interested party in these proceedings, under the heading -

“Non performing Accounts – Account reference MG 1210700357 for a principal amount of Kshs. 2,678,961.02/= This was the 2nd attempt as the bank had caused a listing with Metropol Credit Reference Bureau on the 16/4/2012.

Further, on the 21/8/2014 another listing was made with the interested party's negative Database for Kshs.2,024,428.10/=

3. The plaintiff's claim against the Defendant Bank is that the listings were referred by the defendant without issuing him with **“adverse action notices”** as provided by the CRB Regulations Act. As a result, it is the plaintiff's claim that his loan applications to various other banks and notably, TransNational Bank on 14/2/2013 for Shs. 700,000/= and Housing Finance Corporation Ltd on the 27/6/2017 for Shs. 6,500,000/= were declined due to the adverse listings.

As a result, his construction of a commercial property under the name **Kyamu Construction Co. Ltd** was adversely affected by lack of funds.

4. It is for the above that the plaintiff filed this suit against both the defendant and the Interested Party seeking:

(i) A declaration that the Defendant's actions amounted to negligence, ignorance, breach of statutory duty of care and breach of contract.

(ii) A declaration that the Defendant's action was in violation of the Plaintiff's constitutional right and Fundamental freedoms as enumerated in 23 (1) above.

(iii) A declaration that the Defendant's action was in violation of Fair Administrative Action act.

(iv) An order directing the Defendant and the Interested Party to permanently expunge the non-performing item from their records and that of any other credit reference bureau.

(v) An order directing the Interested Party and any other credit reference bureau holding the erroneous information to issue "notice of change" to any Institution(s) which may have sought the; Plaintiff's status report in the last 12 months as per CRB Regulation 35(12).

(vi) An order directing the Defendant to pay damages in lieu of written apology for the numerous inconveniences caused to the Plaintiff since the erroneous negative listing was effected in 2012.

(vii) Special damages Kshs.35, 000.00 as pleaded in paragraph 28 of the plaint.

(viii) General & Aggravated damages.

(ix) Any other relief the Court may deem fit.

(x) Cost of this suit.

5. The defendant denied the plaintiff's claim by a **statement of Defence dated 14/9/2017 and filed on even date, seeking dismissal of the suit.**

The Interested Party on its part filed a **Notice of Claim against the Defendant on the 14/9/2018 seeking an indemnity for any damages or costs arising from the credit information.**

6. Prior to filing of this suit, the plaintiff's claim was time barred by virtue of **Section 4 (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya**, being a claim based on the tort of negligence, which ought to have been filed three years from the date on which the cause of action accrued; and for an action based on Libel or slander within 12 months from such date.

Upon application to the court (Ndungu J) granted leave to the plaintiff to file the suit out of time on the 17/8/2017, Vide **Nakuru HCCC NO. 35 of 2017 (O.S) - Reuben Kioko Mutyaene Vs. Kenya Commercial Bank Ltd & Trans Union.**

7. ISSUES FOR DETERMINATION.

i. Whether leave to file suit out of time granted by the court on the 17/8/2017 ex parte was merited, and if not, whether the court ought to set it aside and dismiss the suit.

ii. Whether the Defendant's actions in causing the negative listing of the defendant with the Interested Party CRB amounted to negligence and breach of Statutory duty of care and breach of contract.

iii. Whether the Interested Party is entitled to indemnity and/or contribution to any claim arising in this suit from the Defendant.

iv. Whether the plaintiff is entitled to general, exemplary and special damages.

v. Costs of the suit.

8. The plaintiff filed a bundle of documents on the 30/7/2018, 25/5/2018 and 9/1/2019. They are marked as Pexhibit 1– 32. He testified as **PW1**, and called one witness **PW2, John Ndunda**, a certified public Accountant, who prepared cash flow statements and an independent Audit report that he produced as Pexhibit 30. Both the Defendant and the Interested Party filed their separate document.

9. At the close of the case, the plaintiff who acted in person, and the defendants advocates filed written submissions. The Defendant was represented by Mr. Opondo, instructed by Ms. Mukite Musangi & Co. Advocates whereas the Interested Party was represented by Mr. Kisinga, instructed by Ms. Mohammed Madhani & Co. Advocates.

ANALYSIS AND FINDINGS.

10. Leave to file suit out of time

Consideration of the plaintiff's pleading (the plaint) show a multiplicity of different causes of actions, ranging from negligence and breach of Statutory duty of care, breach of contract, violation of constitutional rights and fundamental freedoms. The above are stated to have arisen in the year 2012, after the plaintiff left employment of the Defendant in 2011. The background is stated under paragraph 1 of this judgment.

10 (a) Relevant here are the dates of amalgamation of the loans and overdrafts advanced to the plaintiff by the defendant, and the listings of the plaintiff by the Defendant with CRB, through the Interested party, when negotiations were on going between the parties to settle on the amount payable. This was achieved and mutually agreed at **Shs.2,510,384/20 and payable by the Plaintiff to the Defendant by the 30/11/12**. The first listing was on the 18/8/2012, and the second on the 21/8/2014, not for the mutually agreed sums, but other sums when the negotiations were on going, save the latter.

11. The plaintiff's claim against the Defendant, in my view, arose when the CRB listed the plaintiff as a defaulter, in his non-performing account MG1210700357 on the 18/8/2012.

Section 4(2) of the Limitations of Actions is specific that an action based on the Tort of Negligence ought to be filed within three years from the date the action arises.

This suit was filed, about two years out of time, by leave of court. This court has not been provided with the proceedings in **Nakuru HCCC NO. 35/2017** wherein the grounds, and the court's ruling may be found. It is only the court order that has been provided.

12. It is not in dispute that negotiations were on going when the defendant listed the plaintiff with the CRB. The court (Ndungu J) in extending the period to file the suit must have been satisfied that the grounds upon which the application was made were merited.

Shah JA in the case Nairobi Civil Appeal No. 195/1995 – Mary Wambui Kabugu Vs. Kenya Bus Service Ltd held that, the only time when a party may challenge an order of extension of time to file suit out of time is *“at the trial, either on facts brought out at the trial, or by way of arguments at the trial, if circumstances and facts allow-----that is, if there are no disputes as to facts”*.

Odunga J in Dr. Lucas Ndungu Munyua Vs. Royal Media Services Ltd & another (2014), stating that the order of extension is not final, and that it is the trial court that must finally rule whether the plaintiff has satisfied the conditions for extension of time.

13. I have considered the Interested Parties submissions. I have stated above that there were ongoing negotiations. The breakthrough was reached, and a definite amount agreed and time to complete payments as the 30/11/2012. The defendant rushed to have the plaintiff listed as a defaulter when negotiations were on going. This action, without a doubt, was made in bad faith. The default in my view ought to have been viewed against the final date as to when the debt ought to have been settled. **Section 27 of Cap 22** provides for extension of time in actions for negligence.

Section 27(2) thereof provides

“The requirements of this sub section are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which

(a) either was after three year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period, and

(b) in either case, was a date not earlier than one year before the date on which the action was brought”.

Sub section (a) is specific that an applicant must satisfy that the facts of decisive character were outside his knowledge until after the three years period prescribed under the Act”.

14. I have considered the letters exchanged between the plaintiff and the defendant from the time the plaintiff left employment of the defendant, and in particular, in respect of the loan facilities.

These are the plaintiffs documents filed on the 24/8/2017 – Appendix – 1, No.16 and 20.

The plaintiff was informed of his debt by a letter dated 9/5/2012 (Appendix 1). He responded by a letter dated 4/7/2012. The defendant informed him of The full and Final Settlement Sum by letter dated 17/9/2012, in the sum of Sh.2,510,384.55 (Appendix 2 and 3). This was after the Bank had already listed him as a defaulter with CRB on the 18/8/2012. By his letter to the Bank dated 24/9/2012, the plaintiff agreed to pay the said sum of Shs.2,510, 384/55 in full settlement of the debt. He appealed to be granted time to pay by the 30/11/2012. This request was granted by a letter dated 1/10/2012 (Apprx.5), wherein the plaintiff signed as a show of acceptance on the 8/10/2012.

15. By a letter dated 12/5/2014 the Bank confirmed that the debt had been paid in full, and undertook to advise the CRB to updated its records.

In his evidence in chief, the plaintiff testified to have paid the agreed debt on the 30/5/2013. This time was outside the time mutually agreed by the parties, the 30/11/2012. But nevertheless the debt was settled. He testified that the Bank never notified him of its intention to list him with CRB when negotiations were on going. He further testified that despite the Bank having received its entitlement, CRB did not lift the listing until the May 2019, six years after payment.

16. In these circumstances, did the Defendant notify the plaintiff of its intention to list his name with CRB, or thereafter notified him that it had caused his name, through the Interested Party that he had been listed with CRB in default of payment?

The Credit Reference Bureau Regulations, 2013 are established under the Banking Act, and are operationalized under Section 31 and 34 of the Microfinance Act, who are mandated to submit both positive and negative information the performance of the credit facilities extended to its customers.

Under Regulation 14 (1) of the Banking Act (Credit Reference Bureau Regulations, 2008) as read with Section 31 (4) of the Banking Act, CRB is mandated to facilitate the sharing of information concerning non-performing customers between institutions licensed under the

Banking Act.

17. A Bank under the Act has an obligation to forward to the CRB names of customers who default in their obligations to service their loans, and the CRB has a corresponding duty to receive such information – **Co-operative Bank of Kenya Ltd Vs. Peter Ochieng (2018) e KLR.**

It is common ground that the plaintiff had an outstanding loan with the bank, his employment with it having been terminated, and the debt amount was determined long after the first listing to the CRB, and without notice to the plaintiff.

No evidence was adduced that the Bank notified the plaintiff of its intention to list his name with CRB during and or before the negotiations were completed. Up to that stage, even though the negotiations bore fruit and the debt amount agreed upon, there was no plausible reason as to why the Bank took the action it did, before the payment due date. As stated above, this action by the Bank was taken in bad faith, and not warranted at all.

18. The plaintiff continued to repay the loan as agreed without knowledge that he had been listed with CRB. This is evidently clear (Lack of knowledge) that had he known, he would not have applied for credit facilities, after paying off the debt with the Defendant from other financial institutions, which were denied due to the listing as a defaulter. It is only upon enquiry to the financial institutions, notably CFC Stanbic Bank and Trans National Bank that he was informed of the CRB listing, long after he had repaid the debt owed to the defendant. This action by the defendant was contrary to **CRB Regulation 25(1), 25 (8) and 50(2) (b)** as also it failed to make corrections on the amounts listed with CRB as owing, update and or issue instructions to delist upon full payment, after the five year period provided under the Regulations.

19. It is trite that a party is entitled to be given all information upon which an adverse action may be taken against him before, to facilitate remedy, if possible.

Article 35 (1) (b) of the Constitution states:

Every citizen has the right of access to

(b) Information held by another person and required for the exercise or provision of adverse information to his creditworthiness was arbitrarily denied by the defendant.

It is no doubt caused him financial embarrassment when it became known to him that he could not be accorded any financial facilities due to the listing, reference to denied facilities by Trans National Bank Ltd, 2013, CFC Stanbic Bank, 2015.

20. The plaintiff has proved by his evidence, including documentary, that he was unaware of the CRB listing during the negotiations with the Defendant and thereafter even after full repayment of the loan facility – **Gathoni Vs. Kenya Co-operative Creameries Ltd (1982) KLR.**

For the foregoing, I am satisfied that the plaintiff met the threshold and requirements for extension of time to file suit out of time under **Section 4 (2) of Cap 22, and 27(2) Laws of Kenya**, pursuant to the facts and arguments during the hearing of the suit, **See Court of Appeal holding in – Mary Wambui Kabugu decision (Supra).**

21. Claim for defamation (Libel)

By publication of the alleged non-performing loans of the plaintiff by the Defendant with CRB, the plaintiff, by his plaint, claims to have been defamed in his character, from which he seeks general and aggravated damages.

A defamatory statement as defined in Halsbury Laws of England 3rd Edition Volume – 24 page 15:

“-----a statement which is published of 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 his office, profession, calling trade or business.”

Order 2 Rule 7(1) of the CPR provides that

(1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense.

22. I have considered the plaint. The words or phrases alleged to be defamatory have not been stated.

Such words are material facts and they must be set out verbatim in the particulars of claim.

The court is obligated to decide on the nature and effect of the words complained of. The defendant too must be able to know the exact claim that it faces. There must be clear certainty in the claimants pleading with particulars clearly pleaded – **Christopher Orina Kenyariri Vs. Barclays Bank of Kenya Ltd & Credit Reference Bureau Africa Ltd (2012) e KLR.**

When it is a corporation like in this case, it must be shown which particular employee or agent or both published the complained of words.

23. The above prerequisites are seriously missing in the plaintiff's pleadings/statement of claim.

In **Alice Njeri Maina Vs. Kenya Commercial Bank Ltd (2018) e KLR**, this court, faced with issues similar to the present ones made findings that the defendant bank in publishing to the CRB the plaintiffs non-performing loan was not actuated by malice, though negligent, and that by diverging confidential information of a customer, a Bank may not be in itself defamatory pursuant to the **CRB Regulations 2013, under which the Bureau is mandated to protect the confidentiality of a customer information so received, and only to release such to (a) the customer concerned, (b) to the Central Bank and (c) to a requesting subscriber (d) to a third party as authorized by the customer, or € as required under the law.**

24. The statutory period for filing a suit for defamation is stated as twelve months – under **Order 2 rule 7(1) CPR**. The plaintiff seeks damages in respect of the malicious falsehoods in lieu of an apology. I have carefully considered the plaintiff's evidence, including the material facts in support of the claim for defamation. The allegations thereof are unsubstantiated and do not meet the threshold of proof in a claim for defamation. Unlike in the claim of the tort of negligence, nothing was laid before the court in support. The decision in the case of **Mary Wambui Kabugu (Supra), Shah JA** rendered that

“-----the requirements of Section 27 of the Act are explicit and the judge cannot go beyond the scope of those requirements. He cannot for instance grant leave out of sympathy, or because the applicant did not know the law-----”

25. Considering the entirety of evidence and taking into account the defendants and Interested Party's defence, I come to a finding that leave to bring the action for defamation against the defendant and the interested party were merited.

Consequently, I proceed to dismiss the Plaintiff's claim for defamation against the Defendant and the Interested party.

The plaintiff's claim for negligence and any accruing damages arising therefrom shall proceed for determination.

26. Negligence by the Defendant.

The plaintiff's claim is based on Bank-customer relationship that is contractual in nature. That relationship imposes a duty of care on the Bank, to exercise reasonable care and skill in its dealings with the customer. In the case **National Bank of Kenya Ltd Vs. Isaac A. Ogetta (1999) e KLR**, the court rendered that

“There must be contractual terms of lending backed up contract with its customer. The standard of that reasonable care and skill is an objective standard applicable to bankers. Whether or not it has been attained in any particular case has to be decided in the light of all the relevant facts, which can vary almost infinitely”.

27. That duty of care may also arise both in, contract and Tort. It is therefore upon the customer to elect to pursue one or both, taking into account issues of Limitation periods and rules as to remoteness of damages as stated in the case **Andrew Kiriti GATHII Vs. Equity Bank Ltd, NRB HCCC NO. 37 of 2016 (UR)**, and cited in the case **Eric Omuodo Ounga Vs. KCB Ltd (2017) e KLR**.

28. There is no contestation that the Bank listed the plaintiff as a defaulter with CRB, over the initial amount it deemed due and owing (**Kshs.2,678,961.20/=** while negotiations to arrive at a mutually agreed sum. It is also not in dispute that the Bank took the above action without giving the plaintiff Notice of its intentions to list negative information against the plaintiff, and that even after doing so, initially with Metropol Credit Reference Bureau on the 16/4/2012, and on the 18/8/2012, with the Interested Party herein, it deemed it not necessary to inform the plaintiff, and kept him in ignorance – See **Jamlick Gichuhi Mwangi Vs. KCB (2016) e KLR**.

29. The Bank by its evidence did not dispute that it did not give the plaintiff notice of its intention to submit or list the plaintiff as a defaulter.

Section 25(1) of the Credit Reference Bureau Regulations, 2013 provides that

“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 30 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”

Section 25(2) provides that if the credit information provider has reasonable cause to believe that the information is incorrect, it shall not furnish the information to the credit bureau.

Section 25(3) further provides that if the customer has notified the provider that the specific information is inaccurate, it shall not furnish such information to the Credit Bureau; but under Subsection (4), it may do so, if the provider has addressed the customer's concern over the inaccuracy by re-affirming the accuracy or rectifying the inaccuracy 25(8) is specific that;

A credit information provider who has furnished credit information to a Bureau shall, within thirty days from the date the information was furnished to a bureau, notify the customer that his credit information has been forwarded to the Bureau.

30. As demonstrated above, the Bank was under an obligation to comply with the duties to the customer as provided under the Credit Reference Bureau Regulations cited above. It failed to exercise reasonable care over the entire relationship with the plaintiff.

Information to a party in a contractual relationship is core to the well being of the contract. I agree with the defendant's (Bank) submission that the plaintiff admitted being in arrears. I also agree with the plaintiff that the amount due and owing was not ascertained, leading to both parties entering into negotiations to ascertain, and or mutually agree on the correct amount. That was done.

As I have stated above, it was not prudent, that while negotiations were on going, and without Notice or at all, the Bank proceeded to list the plaintiff as a defaulter with CRB, upon an inaccurate amount.

31. This is demonstrated by the final and mutually agreed sum. The CRB regulations, and specifically **Section 25** is clear that, if the amount of arrears is not ascertained, and the customer brings this inaccuracy to the attention of the Bank, then, until such time that the said sum is ascertained as accurate, and the customer is so informed, and notice under **Section 25(1)** thereof is given in the manner provided, the duty care by the bank is not rendered as envisaged under the rules, as well as under the law of contract.

32. On the 18/8/2012 while negotiations were ongoing the Bank listed the plaintiff in the Interested Party's negative database as a non-performing Account, in the sum of Shs.2,678,961.02/= The above in my view, as earlier on observed, was done in bad faith, and without regard to the Credit Bureau Regulations stated above, as the amount was not accurate and/or ascertainable at that time.

By and large, I come to the finding that the listing of the plaintiff with the Interested Party was not done in fulfillment of the Bank's legal obligations, as the Bank had a moral and legal duty to await the outcome of the negotiations which by its conduct and correspondence (produced as exhibits) entered into freely, without coercion with the plaintiff. It was thus premature, as the plaintiff had not defaulted in paying at the time.

33. It is further observed that even after the inaccurate listing was done, the Bank failed to comply with provisions of **Section 25(8)**, after reaching a mutual loan amount, by not causing a rectification and or correction on the listing, and by informing the plaintiff that his credit information had been forwarded to the Bureau. The deliberate failure continued upto, and after the indebtedness was cleared.

34. For the foregoing, I find and hold that the Defendant's actions amounted to negligence and breach of statutory duty of care and breach of contract with the plaintiff, from which the plaintiff suffered loss and damage.

35. **Interested Party's Case (IP).**

By a Notice of claim against the Defendant dated 13/9/2018 and filed on the 14/9/2018, the Interested Party sought indemnity for any damages or costs that may arise from the Credit information.

DW1 Rosemary Mbugua testified for the Interested Party. It was her evidence that the Interested Party relied entirely on information furnished by the Defendant, and that under the CRB Regulations, the bank is liable for the accuracy or otherwise of the information given.

35. I have considered the filed submissions by this Party.

Regulation 28 (3) (4) and (5) places a duty on the institutions licensed under the Banking Act, the Defendant included, when providing information to Reference Bureaus to

i. To provide accurate information to credit bureaus

ii. To update all submitted customer information on a monthly basis or within such earlier time as an update is necessary.

iii. To give an amendment notice when seeking to delete any inaccurate information and to replace the deleted information with correct information whenever such institutions become aware that the information previously submitted is inaccurate.

36. Thus, and without a doubt, the above obligations rested with the defendant to furnish the Interested Party with the correct and accurate information, and to seek for updates as and when it became necessary. This too, the Defendant failed to do.

To that end, I find and hold that the Interested Party cannot be blamed for the negligent acts and omissions the Defendant. I find and hold that the Interested Party having not contributed to the plaintiff's woes, cannot shoulder any blame. The claim against the Interested Party is therefore dismissed.

37. The Interested Party was a necessary party, in this suits as its duty was to shed light to the court, from whose evidence the court was able to call together, and determine all the issues in the suit. By its evidence, it has absorbed itself from blame. I shall however not grant costs to the Interested party due to the nature and circumstances of the claim. **Section 27 (1) of the Civil Procedure Act, Cap 21** Laws of Kenya grants the court discretion to award or not costs upon consideration of the peculiar circumstances.

38. As much as Referral of positive and or negative information of a party to the CRB is a legal requirement under the Banking Act and the CRB Regulations, wrongful, reckless and negligence of a defendant in so doing, may affect a party negatively in regard to their creditworthy, with dire consequences. The plaintiff pleaded denial of credit facilities by at least two Banks citing negative CRB listing, for which he intended to construct a commercial building at **LR Masii/Mithini/774**, by his construction firm, Kyamu Construction and Engineering Ltd.

39. On the 18/6/2018 KWFT Bank Ltd declined to approve a loan facility due to Low CRB ratings, Account with default history (PEXhibit 2 and PEXhibit 23).

Transnational Bank Ltd declined credit facilities on the 14/2/2013, reason, adverse listing on CRB Africa. CFC Stanbic Bank also returned a negative response to credit the same reason. That was the same position by HFCK in June 2017.

As a result, the intended construction project by the plaintiff stalled going by his evidence.

40. **PW2, John Ndunda**, a certified Public Accountant prepared a cash flow statements, and produced a Report dated 22/5/2018 on the proposed construction to the tune of Shs.11,711,410/= (Appendix 1), based on the CFC, and Trans National loans requested for. The facilities were all denied, and by the said Report the plaintiff intended, to ascertain the loss of earnings capacity as a result of the negative listing with CRB Africa Ltd.

41. It was the evidence of the Interested Party's witness that they received instructions from the Defendant to de list the plaintiff after last payment of the loan on 16/12/2013, in June 2017, five years, after payment pursuant to CRB Regulations, thus the listing was due, for delisting in December 2018. The plaintiff's evidence is that the delisting was done in May 2019, five month's after the due date.

42. As a result of the above, the plaintiff pleaded in his plaint to have suffered loss and sought compensation from both the Defendant and Interested Party. This sum is stated to have been expended in hiring a paralegal assistant to help the plaintiff in research, drafting and filing the pleadings. No proof was adduced of this expenditure; documentary or otherwise – **HCCA No. 42/1983 Herbert Hahn Vs. Amrik Singh** where the court held that special damages must not only be claimed specifically but proved strictly for they are not direct or natural probable consequences by the act complained of and may not be inferred from the Act.

See also **Civil Appeal No. 14 of 2014 Joseph Kimani & another Vs. James Kangara Kahanya (2017) e KLR and Nkunene Diary Farmers Co-op Society Ltd & another Vs. Ngachia Ndeyiya (2010) e KLR.**

43. **I am therefore persuaded that the plaintiff has failed to strictly prove the special damage. The claim is therefore dismissed.**

44. **General and Exemplary Damages for Loss of Dimished earning capacity.**

This claim, though not specifically pleaded as such flows from the direct, natural and probable consequences by the acts complained of, Loss of earnings and loss of earning capacity is a special damage claim, and ought to be pleaded and strictly proved. The damages therefrom may also be classified as a General damage that also must be proved upon a balance of probability – **Kimatu Mburi e/a Kimatu Mburi & Bros Vs. Augustine Munyao Kioko (2006) e KLR.**

45. The Plaintiff cleared the loan with the Defendant on the 29/11/2013. **Under Section 33(1) of the CRB Regulations**, the listing could only be lifted five years thereafter, meaning about December,2014.

To that extend, the plaintiff, with that knowledge knew that any other applications for credit facilitation would be rejected. There is no contestation that the listing was lifted while this case was ongoing. I therefore discount the Auditors cash flow projections as a basis for loss of earning capacity.

I fully concur with the holding in **Five Continents Ltd Vs. Mpata Investments Ltd (2003) e KLR**, where the court rejected accounts analysis, stating.

“The plaintiff relied on the accounts analysis to show the defendants indebtedness. That account analysis was apparently prepared by the plaintiff for use in this suit-----“

The plaintiff did not, by any evidence, prove any actual loss.

46. Damages for breach of Contract and breach of duty of care are designed to compensate for the damage, loss or injury suffered by a claimant through the breach. However, a claimant who has not in fact suffered any loss by reason of the breach is nevertheless entitled to **nominal damages – Equity Bank Ltd & another Vs. Robert Chesang (2016) e KLR.**

It is instructive that despite the Defendant causing the plaintiff's name to be listed with CRB prematurely, it never acknowledged its mistake or apologized to the plaintiff but continued to engage with him as if nothing had happened.

47. The Defendant's conduct in dealing with the plaintiff was not above board and did not meet the threshold required of the duty of care in a Bank-customer relationship. It was shrouded in secrecy and bad faith.

In the case **Jamlick Gichuhi Mwangi (Supra)** in quite similar circumstances when the Bank was found to have been in contravention of the CRB Regulations 2013 in listing the plaintiff with CRB, the court awarded a sum of Shs.100,000/= to the plaintiff as general damages for defamation and Shs.100,000/= nominal on aggravated damages.

48. Aggravated damages, as stated by the **Court of Appeal in Ken Odondi Vs. James Okoth Ombura t/a (2013) e KLR** rendered that;

“Exemplarily damages on the other hand-----are meant to punish” the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice, insistence on a flurry defence of justification or failure to apologies”.

49. In a matter of applications for credit that fails on account of incorrect data or wrongful listing by a Bank, the harm is likely to be a temporary inconvenience.

Regulation 18(2) of CRB Regulations provides that

(2) information kept in accordance with subsection (1) may not be used, solely to affect the customers chances of obtaining credit, but to inform the decision making process.

In the circumstances of this case, though no apology was tendered to the plaintiff by the defendant, the harm and inconvenience as I have stated was temporary as the plaintiff failed to settle the debt within the agreed timelines, though time was extended.

50. Further, as stated in the **case Keith Smeaton Vs. Equifax PLC (2013) EWCA Civil 108, and pursuant to Section 8.1 of the Regulations**, any repeat application for credit will be treated as a new application, and assessed accordingly. An applicant for credit will not be declined or accepted solely on the ground of having made a previously declined or accepted application to that credit grantor.

As the listing with CRB has been lifted, the plaintiff is at liberty to seek credit facilities to whomsoever financial institution as he may desire. To that extent the temporary incapacitation is now remedied.

51. That however does not translate to holding that the plaintiff did not suffer temporary inconvenience and some economic embarrassment as a result of the premature and reckless listing.

Having considered relevant case law on the award's of damages for loss of, and diminished earning capacity and the inconvenience sustained, I come to the conclusion that a sum of Kshs.400,000/= would be fair and sufficient, to remedy the loss and damage.

52. The upshot is that I find and hold that the plaintiff has proved his case to the required standard, to the extent stated above, upon a balance of probability against the Defendant, Kenya Commercial Bank Ltd. The claim against the Interested Party is dismissed.

Consequently, judgment is entered for the plaintiff against the defendant as follows:-

- 1) A declaration is issued that the Defendant's actions towards the plaintiff amounted to negligence and breach of care and contract, to the extend stated in the body of the judgment.**
- 2) Prayer No. (ii), (iii), (v) in the plaintiffs plaint have been overtaken by events.**
- 3) The claim for special damages is dismissed.**
- 4) The plaintiff is awarded Kshs.400,000/= in general and aggravated damages.**
- 5) The award under (4) above shall accrue interest at court rates from date of this judgement.**
- 6) Circumstances of the suit dictate that an order of no costs to or by any of the parties be made. Each party shall therefore bear own costs of the suit.**

DELIVERED, SIGNED AND DATED ELECTRONICALLY AT NAIROBI THIS 27TH MAY, 2020.

.....

J.N. MULWA

HIGH COURT JUDGE.