



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 380 OF 2013

PEKATEWA INVESTMENTS COMPANY LIMITED.....PLAINTIFF

VERSUS

NIC BANK LIMITED..... DEFENDANT

JUDGMENT

1. The plaintiff's claim against the defendant is for general, aggravated and punitive damages for defamation and negligence and a refund of a liquidated amount of KShs.119,000. The claim is premised on the amended plaint dated 31st October 2016 in which the plaintiff sought the following reliefs:

- a) An order directing the defendant to offer a public apology for the embarrassment and agony suffered by the plaintiff.*
- b) General damages, aggravated damages and punitive damages against the defendant.*
- c) KShs.119,000 together with interest at commercial rates from 19th December, 2013 until payment thereon in full.*
- d) Costs of the suit.*

2. In the suit, the plaintiff averred that it was involved in the business of supplies, transport and construction among others and that on or around 11th June 2013, the defendant wrote a letter addressed to its directors copied to *CRB Africa Limited* and *Metropol Credit Reference Bureau* falsely and maliciously alleging that the plaintiff's loan account was in arrears for a period of over 90 days and that it would be listed with the aforesaid Credit Reference Bureaus (CRBs) as a defaulter.

3. The plaintiff pleaded that the contents of the letter was defamatory as in its ordinary meaning and by innuendo, the letter meant and was understood to mean *inter alia* that it had defaulted in servicing its loan with the defendant; that it was uncreditworthy and was incapable of managing its financial affairs.

4. The plaintiff asserted that the content of the letter was false since at the time of its publication, it had not defaulted in servicing its loan with the defendant and its account did not have any loan arrears; that the letter was aimed at damaging its business and character; that the letter was actuated by malice as the defendant being well aware of the consequences of listing an entity or person with a CRB proceeded to enlist it as a defaulter before confirming either from the plaintiff or from its records the true position regarding its credit account number [...] and that to that extent, the defendant was liable in negligence.

5. The plaintiff further pleaded that as a result of the defamatory publication and the defendant's negligence, its reputation as an outstanding and honest business entity had been ruined and it had consequently suffered loss and damage for which it was entitled to both general and punitive damages.

6. In addition, the plaintiff claimed that during the pendency of the suit, the defendant illegally debited a sum of KShs.119,000 from its account which was paid to the Law Firm of *Kimondo Gachoka & Company Advocates* being instruction fees for defending the suit; that it was entitled to a refund of the money together with interest from the date of the unlawful debit until payment in full.

7. Upon being served with summons, the defendant filed a statement of defence dated 23rd October 2013 which was amended on 24th November 2016. In its defence, the defendant pleaded that the plaintiff had a hire purchase facility with it and that on or about September 2012, it changed its core banking system necessitating migration of all its customer accounts to the new system; that in the course of this transition, system generated errors occurred which affected the plaintiff's hire purchase account by failing to record and to update payments made into the account with the result that the plaintiff's account was erroneously categorized as non performing.

8. The defendant claimed that based on the information generated by its core banking system, in the months of January and February 2013, it

wrote to the plaintiff informing it that its account was in arrears and that unless they were settled, it was going to be listed as a defaulter with the CRBs; that it proceeded to actualize the threat since the plaintiff did not respond to any of the two letters; that it was not aware of the error in its system until 23rd July 2013 when it received a demand letter from the plaintiff's advocates dated 19th July 2013.

9. Though admitting having authored the undated letter premising the plaintiff's cause of action, the defendant denied that the letter was defamatory as alleged or at all. It pleaded that it wrote the letter in good faith in compliance with its statutory duties under the *Banking Act* and the *Banking (Credit Reference Bureaus) Regulations 2008* (the Regulations); that upon realizing the error, it rectified the same by immediately advising *Credit Reference Bureau Africa Limited* to delist the plaintiff which it did and the plaintiff was thereafter given a written apology.

10. The defendant therefore denied the particulars of defamation, malice and negligence as set out in the plaint and also denied that the plaintiff was entitled to an award of damages as claimed.

11. Regarding the plaintiff's claim for a refund of KShs.119,000, the defendant pleaded that the plaintiffs' loan account was lawfully debited with the amount in accordance with the general terms and conditions governing the operations of the plaintiff's bank account which allowed the defendant to debit the account for purposes of settling legal fees or other costs incurred in any proceedings arising out of the plaintiff's account.

12. During the hearing, each of the parties called one witness in support of its case. The plaintiff's Managing Director *Mr. Peterson Kamau Kiarie* testified on behalf of the plaintiff. He adopted his amended witness statement dated 11th September 2018 as his evidence in chief in which he basically reiterated his pleadings. He also produced in evidence the plaintiff's bundle of documents dated 6th September 2013 as *Pexhibit 1 (a) to (e)* and further documents dated 23rd March 2014 as *Pexhibit 2 (a) and (b)*.

13. In his evidence, PW1 maintained that the letter addressed to the plaintiff's Directors which was reproduced in the plaint was defamatory since it adversely affected his relationship with Kenya Commercial Bank (KCB) which demanded security for an unsecured loan it had previously advanced to him.

14. The witness admitted having received the defendant's letters dated 9th January 2013 and 8th February 2013 in which the defendant threatened to cause listing of the plaintiff with the CRB if outstanding arrears in its loan account were not cleared within a specified period of time. He recalled that on receiving these letters and an alert from KCB, he visited the defendant and asked it to correct its records to reflect the correct position that the plaintiff had already cleared its loan and did not therefore have any loan arrears.

15. PW1 also admitted having received an apology from the defendant for the erroneous listing but claimed that the same was an afterthought. He reiterated the plaintiff's prayer for a public apology insisting that its listing had been circulated to its other banks.

16. PW1 further testified that the debit of KShs.119,000 from the plaintiff's account to cater for legal fees for defending the suit was unlawful since the suit did not have anything to do with the plaintiff's loan account.

17. During cross examination, PW1 admitted that the letter dated 11th June 2013 was only addressed to the plaintiff's Directors and it was not copied to any third party. Besides admitting that banks had a legal duty to report loan defaulters to CRBs, PW1 conceded that there was nothing defamatory in the letters addressed to the plaintiff by the defendant. He clarified that what was defamatory was the plaintiff's listing with CRB when it did not have any outstanding loan with the defendant.

18. *Mr. Ibrahim Mbogo Ngatia* testified as DW1 in support of the defendant's case. He adopted his witness statement dated 10th October 2014 as his evidence in chief and produced as *Dexhibit 1-14* the defendant's list and bundle of documents dated 25th February 2016 and 2nd July 2018.

19. DW1 maintained the defendant's position that the erroneous listing of the plaintiff as a loan defaulter was caused by systemic errors generated in the course of transitioning from the old to a new core banking system and was not deliberate or malicious. He also narrated how the error was swiftly corrected and the plaintiff issued with a written apology once the defendant discovered the error.

20. In cross examination, DW1 admitted that in the course of the hearing, the defendant debited the plaintiff's account with KShs.119,000 as costs in the instant suit despite the fact that the defendant had not been awarded costs in the suit and the plaintiff had cleared the loan issued under the Chattels Mortgage way back in the year 2012. He maintained that the debit was lawful as it was based on *clause 5 (g)* of the general terms and conditions of the Chattels Mortgage Instrument executed by the parties.

21. At the close of the hearing, the parties exchanged and filed written submissions which were highlighted before me on 6th July 2020 by learned counsel *Ms Baithalu* for the plaintiff and learned counsel *Ms Mungai* for the defendant. In their written and oral submissions, learned counsel expounded on and buttressed the positions taken by their respective clients as summarized hereinabove.

22. The court record shows that the parties separately filed a list of issues they identified for the court's determination in this case. The plaintiff's list of issues is dated 3rd February 2014 while that of the defendant is dated 14th November 2014.

23. On my part, after a careful evaluation of the pleadings, the evidence adduced by the parties, the rival written and oral submissions made on behalf of the parties alongside all the authorities cited, I find that three main issues emerge for my determination in this case which are:

- i. Whether the plaintiff has proved its claim for defamation and negligence against the defendant to the standard required by the law.

ii. Whether the plaintiff is entitled to a refund of KShs.119,000 on terms sought in the amended plaint.

iii. Whether the plaintiff is entitled to the reliefs sought.

24. Regarding whether the plaintiff has made out a case for defamation against the defendant, I wish to start by pointing out that the law of defamation is designed to protect a person's reputation from injury or damage arising from false and malicious statements made to third parties.

25. A defamatory statement is defined in *Gatley on Libel and Slander* 11th edition at page 38 as one which is to the "claimant's discredit; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule...."

The Court of Appeal in *SMW V ZWM, [2015] eKLR* and in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR* defined a defamatory statement as follows:

"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."

26. It is now settled law that for a plaintiff to succeed in an action for defamation, he or she must prove that the words complained of were published by the defendant in reference to him or her; that the words were defamatory in that they lowered the claimant's reputation in the estimation of right thinking members of the society or caused him to be shunned or avoided. The claimant must in addition prove that the words were malicious. See: *Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR* ; *Phineas Nyagah V Gitobu Imanyara, [2013] eKLR* among others.

27. In this case, the plaintiff's action for defamation is premised on the letter dated 11th June 2013 which it claims was copied to two CRBs advising them that its loan account was in arrears for a period of over 90 days which information was false; that the defendant's negligence in not ascertaining the true status of its loan account before the publication was malicious and injured its reputation as a business entity.

28. Though the defendant admitted having authored the letter and having caused the listing of the plaintiff with the two CRBs mentioned in the letter, a close scrutiny of the said letter shows that it was not copied to the two CRBs or to any other entity. My reading of the letter reveals that it was meant to notify the plaintiff of the name and address of the CRBs to whom the defendant had already submitted its credit information in compliance with *Regulation 25 of the Banking (Credit Reference Bureau) Regulations, 2013*.

29. Be that as it may, the defendant admitted through the evidence of DW1 that it published the information contained in the impugned letter to the two CRBs mentioned therein. It is not disputed that the information so submitted was erroneous and false since at the time of its publication, the plaintiff had long cleared the loan it had taken from the defendant.

30. What is disputed and what this court is called upon to determine is whether the publication was actuated by malice and whether it disparaged the plaintiff's reputation and standing as a sound business entity.

31. The plaintiff has asserted that the publication was actuated by malice since the defendant did not contact it to establish the status of its loan account and did not verify from its own records the accuracy of the information before submitting it to the CRBs.

32. Malice in the context of defamation does not need to be express. It can be inferred from the circumstances surrounding the offending publication, the publication itself or the conduct of the parties either before or during the proceedings. It was defined in *Phineas Nyagah V Gitobu Imanyara, [2013] eKLR* in the following terms:

"Malice here does not necessarily mean spite or ill-will but recklessness itself may be evidence of malice. Evidence of malice may be found in the publication itself if the language used is utterly beyond or disproportionate to the facts. That may lead to an inference of malice but the law does not weigh in a hair balance and it does not follow merely because the words are excessive, there is therefore malice. Malice may also be inferred from the relations between the parties before or after publication or in the conduct of the defendant in the course of the proceedings. Malice can be founded in the publication itself if the language used is utterly beyond the facts. The failure to inquire into the facts is a fact from which inference of malice may properly be drawn."

33. Though there is a sense in which the defendant can be said to have been reckless for having not bothered to verify the veracity of the information retrieved from its system before sharing it with the CRBs, its conduct of having shared the information with the plaintiff twice before publishing it and the actions it took after being notified of the erroneous listing negates any inference of malice on its part. Though PW1 claimed that he visited the defendant's bank to clarify that the plaintiff had cleared its loan, there is no clear evidence to show when this was done, whether it was before or after the erroneous listing.

34. The defendant's claim that the erroneous listing was not deliberate and was not actuated by malice but was caused by an error automatically generated by its systems upgrade is plausible considering that there is evidence in the defendant's bundle of documents to prove that in September 2012, the defendant changed its core banking system from the *Equinox* to the *Temenos (T24)* system which involved migration of its customers accounts to the new system.

35. Further, the fact that the defendant on realizing the error took active steps to ensure that the error was corrected expeditiously and proceeded to issue the plaintiff with a written apology explaining the circumstances under which the error arose is in my view sufficient

evidence to prove that in publishing the information, the defendant acted in good faith and was not motivated by malice.

36. Though the plaintiff in its pleadings claimed that the publication of the letter caused damage to its business reputation, it failed to adduce any evidence to substantiate or to prove this claim. PW1 in his evidence only claimed that the publication caused his other bankers, KCB to change its perception of him because they required him to provide a security for an unsecured loan the bank had previously advanced to him. He did not however produce any documentary evidence to that effect and he did not claim that the plaintiff suffered any loss or damage as a result of the publication.

37. It must be remembered that the plaintiff is described as a limited liability company which means that it is a separate and distinct legal entity which is independent of its directors like the plaintiff. Any damage to the reputation allegedly suffered by its Managing Director (DW1) cannot be equated to damage suffered by the plaintiff and vice versa.

38. Drawing from the foregoing, it is my conclusion that the plaintiff has totally failed to discharge its burden of proving on a balance of probabilities that the defendant caused its listing with the CRBs maliciously and that the listing injured or damaged its reputation in the eyes of right thinking members of the society.

39. Consequently, it is my finding that the plaintiff has not proved its claim of defamation against the defendant to the standard required by the law.

40. Turning now to the question whether the plaintiff has proved its claim of negligence against the defendant, the starting point is a consideration of what constitutes the tort of negligence.

In *Kenya Wildlife Service V Rift Valley Agricultural Contractors Ltd, [2018] eKLR*, the Supreme Court laid down the essential elements a plaintiff must prove before succeeding in a claim for negligence. The court enumerated those elements as duty of care, breach of that duty, causation and damage. It expressed itself as follows:

“A defendant must owe a duty of care to the person bringing the claim, in the sense that they fall within a class of interests which the law considers should be protected. There is breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law.”

41. In this case, it is not disputed that a banker-customer relationship existed between the plaintiff and the defendant at the material time. The defendant had advanced to the plaintiff a loan facility on the basis of the aforesaid relationship and it therefore goes without saying that it owed the plaintiff a duty to exercise reasonable care, diligence and skill in managing and updating payments made to the plaintiff's account when servicing the loan advanced to it.

42. The defendant was also statutorily required by *Regulation 25 (3)* of the *Regulations of 2013* to provide only accurate credit information of its defaulting customers to CRBs. By admitting that it submitted inaccurate credit information in reference to the plaintiff, the defendant in effect admitted that it did not cross check the information retrieved from its system regarding the status of the plaintiff's loan account to confirm that it was accurate before sharing it with the CRBs.

43. In my opinion, the defendant ought to have undertaken due diligence to satisfy itself that the plaintiff's account was in fact in arrears before causing its listing with the CRBs. Instead of doing so, the defendant directly transmitted information retrieved from the system without caring whether it was correct or not and in doing so, it not only breached its statutory duty imposed by *Regulation 25 (3)* aforesaid but also breached the duty of care it owed to the plaintiff as its customer.

44. The defendant in its submissions relied on the case of *Jamlick Gichohi Mwangi V Kenya Commercial Bank Ltd & Another, [2016] eKLR* to support its argument that the Regulations of 2008 only created statutory duties which did not create a co-existing duty of care under the common law tort of negligence. While I agree with the defendant's submission in so far as it relates to CRBs, I am of the view that the same argument is not applicable to banks because unlike CRBs which entirely rely on information shared by banks and have no way of ascertaining its accuracy, banks are charged with the responsibility of ensuring that the customer information shared with CRBs is accurate. When a bank fails to undertake due diligence to confirm the actual status of its customer's credit information and thereby provides erroneous information to CRBs, it breaches its duty of care both to the CRB in question and to its customers.

45. The fact that the defendant notified the plaintiff of the erroneous listing and thereafter corrected it does not make it any less culpable because these are actions that were done after the fact.

46. Having found as I have above, the next question which begs my determination is whether the plaintiff has proved that as a result of the defendant's breach of its duty of care, it suffered loss or damage. Although the plaintiff claimed in its pleadings that it indeed suffered damage as a result of the defendant's actions, it failed to adduce any evidence to demonstrate the alleged loss or damage. My finding is that mere allegations which are not backed by any evidence cannot suffice. As stated earlier, proof of loss or damage is an essential element of the tort of negligence and failure to prove the same means that the plaintiff has failed to establish its claim for negligence against the defendant to the standard required by the law. The plaintiff's claim in negligence therefore collapses.

47. Regarding whether the defendant was justified in debiting the plaintiff's account with KShs.119,000, the defendant claimed that the debit was lawful as it was based on *clause 5 (g)* of the Chattels Mortgage Instrument (the Instrument) which allowed the said debit.

48. I have looked at *clause 5 (g)* of the Instrument which was produced in evidence by the defendant and I think that it is prudent to reproduce it in full in order to decipher its true import. It states as follows:

“The mortgagor agrees that during the currency of this mortgage he shall:-

...

(g) repay to the company on demand all legal costs incurred by the company (including advocate and client costs) in connection with the enforcement of the terms of this mortgage (or any of them), whether proceedings shall be commenced or otherwise, together with all other expenses incurred by the company in maintaining and defending its rights hereunder. Until such repayment, the said costs and expenses shall be a charge upon the goods from the date of demand by the company...”

49. My reading of *clause 5 (g)* leads me to agree with the plaintiff’s submission that it related to payment of legal costs incurred by the bank in connection with the enforcement of the terms of the Chattels Mortgage. A perusal of the pleadings in this case leave no doubt that the case was not instituted for the purpose of enforcing any term in the Chattels Mortgage. The case concerns a claim for damages for defamation and negligence. Consequently, *clause 5 (g)* of the instrument was not applicable to this case. In the premises, it is my finding that the debit of KShs.119,000 from the plaintiff’s account without its authority or consent was not only arbitrary and unjustified but was also completely illegal.

50. The above finding leads me to the third issue which requires me to determine whether the plaintiff is entitled to the reliefs sought in the amended plaint.

Having found that the plaintiff has failed to establish its claims for defamation and negligence, it is my determination that the plaintiff is not entitled to an award of general and punitive damages as sought. I find no merit in the claims for defamation and negligence and the same are hereby dismissed.

51. I am however enjoined by law to assess the damages I would have awarded the plaintiff had it succeeded in proving the two claims. Starting with the claim for defamation, considering that the plaintiff did not prove any special damage to its reputation and considering the factors that guide courts in awarding damages as espoused in the cases of ***Johnson Evan Gicheru V Andrew Morton & Another, [2005] eKLR*** and ***John V MGN Limited, [1996] 1 All 36*** which include the extent of circulation of the offending publication, given the evidence on record showing that the publication was limited to two CRBs, I would have awarded the plaintiff nominal damages in the sum of KShs.300,000.

52. Regarding aggravated or punitive damages, I would have declined to grant the plaintiff any damages under this head since the plaintiff did not prove the existence of any aggravating factors that would have warranted such awards. It is pertinent to note that the defendant offered the plaintiff a written apology soon after it was notified of the plaintiff’s erroneous listing.

53. I would also not have allowed the prayer for a public apology given that the plaintiff did not avail any evidence to prove the extent of circulation of its erroneous listing and considering the time lapse between the date of the listing and today, granting the prayer in my view would not have served any useful purpose.

54. As far as the claim for negligence is concerned, since the plaintiff did not prove that it suffered any damage or loss as a result of the defendant’s negligence, I am unable to assess damages under that claim.

55. As I have already made a finding that the defendant unlawfully debited KShs.119,000 from the plaintiff’s bank account, it is my conclusion that the plaintiff is entitled to a refund of the said amount. I note that the plaintiff had prayed for interest on the amount at commercial rates from 19th December 2013 but it failed to tender evidence regarding what the commercial rate was at the material time.

Consequently, the suit partially succeeds to the extent that judgment is entered for the plaintiff against the defendant in the sum of KShs.119,000 together with interest at court rates from 19th December 2013 until payment in full.

56. The plaintiff is awarded costs of the suit.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 24th day of September 2020.

C. W. GITHUA

JUDGE

In the presence of:

Ms Baithalu holding brief for Mr. Mwangi for the plaintiff

No appearance for the defendant

Ms Mwinzi: Court Assistant