REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 277 OF 2019

PATRICK KARIGE MUNGE ....PLAINTIFF

VERSUS

NCBA BANK KENYA .....DEFENDANT

RULING

1. By way of a plaint dated 20th December 2019 and filed in court on the same day, the plaintiff, *Patrick Karige Munge* instituted suit against the defendant, *NCBA Bank Kenya*, claiming general, special and exemplary damages for defamation, costs of the suit and interest.

2. Upon service of summons, the defendant filed a statement of defence on 19th February 2020 contemporaneously with a notice of preliminary objection dated 17th February 2020. In the notice of preliminary objection (the objection), the defendant challenged the validity of the plaintiff's suit on grounds that it was incompetent and fatally defective and ought to be struck out with costs for the following main reasons:

i. That the suit is a nullity as the plaintiff has sued an entity that does not exist.

ii.That the suit is time barred by dint of Section 4 (2) of the Limitation of Actions Act.

iii. That the suit is premature and the court lacks jurisdiction to hear it as the plaintiff failed to exhaust the legal mechanisms provided in Regulation 35 of the Credit Reference Bureau Regulations 2013 (the Regulations) to dispute the accuracy of his credit information held by a Credit Reference Bureau (CRB) prior to instituting the suit.

iv. That the plaintiff's suit does not raise a cause of action as the defendant did not publish the alleged false information about the plaintiff.

v. That the plaintiff's suit is a nullity under Section 31(5) of the Banking Act as the defendant cannot be said to be in breach of its legal duties to the plaintiff by reason of disclosure of his credit information in good faith and in the course of its banking business to a credit reference bureau.

vi. That the suit is a nullity under Section 31(5) of the Banking Act and Regulation 19 of the Credit Reference Bureau Regulations 2013 as no suit may lie against the defendant for loss or damage caused or likely to be caused by a disclosure of information or any action done in good faith in the performance of its duties under the Regulations.

3. By consent of the parties, the objection was prosecuted by way of written submissions which both parties duly filed together with a list and bundle of authorities.

4. I have carefully considered the pleadings filed in the suit, the preliminary objection, the parties' rival written submissions and the authorities cited.

5. As defined in the celebrated case of ***Mukisa Biscuit Company V West End Distributors Limited, [1969] EA 696*:**

> **"A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration."**

6. Sir Charles Newbold proceeded to state as follows at page 701:

> **"A Preliminary Objection is in the nature of what used to be a demurrer. It 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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion."**

7. The above definition has been adopted by our Supreme Court in the case of **Independent Electoral & Boundaries Commission V Jane Cheperenger & 2 Others, [2015] eKLR** in which the court held *inter alia*, as follows:

> **"It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law."** [Emphasis added]

8. Applying the above definition to the grounds raised by the defendant in support of its preliminary objection, I find that the objections raised in grounds *i, iv, v and vi* are based on contested facts which would require investigation and proof by way of evidence.

9. Starting with the first ground, the defendant contends that the entity named as the defendant, namely NCBA Bank Kenya does not exist in law or fact and that the name of the defendant is NCBA Bank Kenya PLC.

10. In his plaint at paragraph 2, the plaintiff described the defendant as a limited liability company incorporated as NCBA Bank Kenya which carries on business as a bank pursuant to the provisions of the Banking Act. The plaintiff reiterated this averment in his reply to the defendant's statement of defence which denied existence of the defendant as named in the plaint. The plaintiff went further to plead that the defendant is the Kenyan subsidiary of NCBA Group PLC which at all material times traded with the plaintiff as NIC Bank Limited which in December 2018 changed its name to NCBA Bank Kenya following its merger with CBA Bank.

11. From the foregoing pleadings, it is clear that the position taken by the defendant is disputed by the plaintiff who has maintained that the defendant as sued is an existing legal entity. It therefore follows that this is a factual issue which would require further investigation by way of evidence and cannot thus form the basis of a preliminary objection.

12. In any event, even assuming that the defendant's current name is NCBA Bank Kenya PLC, from the pleadings and documents filed in the suit, I am persuaded to find that the omission of the word "PLC" does not mean that the defendant does not actually exist. The omission in my view amounts to a misdescription of the defendant which appears to be a bonafide mistake which is curable by way of an amendment under *Order 1 Rule 10* of the *Civil Procedure Rules*.

13. I associate myself with the holding of *Hon. Olola J* in ***Mambrui Properties Limited V Michele Servo, [2018] eKLR*** that such an omission was curable by an amendment and the Hon. Judge proceeded to order amendment of the pleadings to properly describe the defendant. Similarly, the Court of Appeal in the very recent case of **Patrick Okeeff V Jonathan Savage, [2020] eKLR**, when dismissing an appeal filed on grounds *inter alia* that the appellant was wrongly sued held as follows:

> **"We now turn to the second ground of appeal. It is not disputed that parcels of land numbers 1138 and 1139 are owned by Digitel Communications System Ltd and not the respondent as pleaded. The learned judge was of the view that the defect could be corrected by way of an amendment to the plaint, instead of striking out the entire suit. He therefore ordered that an amendment to the plaint be effected. In so holding, the learned judge exercised his discretion. Did that amount to injudicious exercise of discretion" We do not think so. Ndichu Associates & Company Advocates drew the plaint on behalf of the respondent. It would have been unjust to punish the respondent for a basic error of law made by the respondent's advocates that could be corrected without occasioning prejudice to the appellant. ….. The provisions of Article 159 (2) (d) of the Constitution of Kenya, 2010 require that justice be administered without undue regard to procedural technicalities."**

14. Taking the foregoing into account, it is my finding that the omission to include the word "PLC" to the description of the defendant does not render the plaintiff's suit incurably defective as to warrant the drastic action of striking out the suit.

15. Turning to grounds *iv, v and vi*, my opinion is that all these grounds raise matters of fact which are all contested in the pleadings which can only be established by way of evidence in a trial. I say so because whether or not the alleged false information in reference to the plaintiff was published by the defendant and whether or not the disclosure by the defendant of the plaintiff's credit information was made in good faith in the ordinary course of business are factual issues which can only be resolved by evidence. Grounds *iv* to *vi* are therefore not pure points of law and do not meet the threshold of what in law constitutes a preliminary objection.

16. I now turn to consider the defendant's objection to the court's jurisdiction to hear the plaintiff's suit on grounds that the suit is statutorily time barred and premature as prior to its filing, the plaintiff did not exhaust the legal mechanisms provided in *Regulation 35* of the *Credit Reference Bureau Regulations of 2013*.

17. I will begin with the claim that the suit is defective as it is time barred. *Section 4 (2)* of the *Limitation of Actions Act* stipulates that:

> **"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:**
>
> **Provided that an action for libel or slander may not be brought after the end of twelve months from such date."**

18. The proviso to the above section which is replicated in *Section 20* of the *Defamation Act* means that an action founded on defamation like the one in the current suit must be instituted within one year from the date the cause of action arose.

19. In ***Royal Media Services Ltd V Valentine Mugure Maina & Another, [2019] eKLR,*** the Court of Appeal explained when the cause of action in libel accrues. It stated as follows:

> **"As far as libel is concerned, the cause of action accrues when the defamatory material is published and in the present case the alleged defamatory material was published more than a year before she filed her suit. In short, her suit was filed out of time and the learned magistrate ought to have held so and struck it out."**

20. The defendant has argued that the plaintiff's cause of action is based on the defendant's letter dated 30th November 2017 and the alleged CRB report published by CRB Africa Limited *T/A* Transunion which shows that the last NPA listing date from the banking sector was 17th October 2012; that as the suit was filed on 20th December 2019 which was over 12 months later, the suit was statutorily time barred and ought to be struck out.

21. The plaintiff countered this claim by denying that its cause of action was solely premised on the letter dated 30th November 2017. It is the plaintiff's case that the defendant repeated and republished the alleged defamatory statements contained in the aforesaid letter as evidenced by its email dated 25th February 2019 in which it acknowledged republishing adverse credit reports in reference to the plaintiff.

22. I have carefully scrutinized the plaint. I note that in paragraphs 8 and 10 thereof, the plaintiff has pleaded that subsequent to the letter dated 30th November 2017, the defendant continued to regularly relist him at the CRB and maliciously refused, ignored or declined to correct its records causing continuous republishing of the alleged defamatory information by the CRB.

23. From the plaintiff's list of documents, I have seen the email dated 25th February 2019 authored on behalf of the defendant which alluded to republication of contents of the alleged defamatory letter dated 30th November 2017. As correctly stated by *Hon. Jaden J* in ***Performance Products & Another V Hassan Wario Arero & Others, [2018] eKLR***, republications and repetitions of an alleged defamatory statement creates a further or new cause of action which is independent from the original cause of action premised on the initial publication.

24. Going by the pleadings in paragraphs 8 and 10 of the plaint, the evidence contained in the plaintiff's bundle of documents and the date on which the suit was filed, I am persuaded to find that the plaint was filed within 12 months of the alleged republication and was not therefore statutorily time barred.

25. Lastly, the defendant has invited me to strike out the plaintiff's suit on grounds that it was premature as it was filed before the plaintiff exhausted the legal mechanisms of disputing inaccurate information held by a CRB under *Regulation 35 (5)* of the *Regulations*. The plaintiff though admitting to having not sought correction of the alleged erroneous credit information from the CRB in question contended that this was not necessary as he had already sought correction of the information from the defendant.

26. My reading of the above regulation reveals that it provides a procedure through which a customer who believes that information held by a CRB is inaccurate, erroneous or outdated can lodge a dispute with the CRB with a view to having the erroneous information corrected. The provision is permissive as the word used is "may" not "must" or "shall" which means that it does not make it mandatory for an aggrieved customer to seek the remedy of correction under the regulation before instituting a suit in court.

27. As I held in ***Nicasio Njiru Njagi V Kenya Commercial Bank Limited & Another, [2020] eKLR***, the mechanism provided under *Regulation 20* of the *Regulations of 2008* which is a replica of *Regulation 35 (5)* of the *Regulations of 2013*, creates an option for an aggrieved customer to lodge a dispute with a CRB to seek correction or deletion of erroneous credit information but does not oust the jurisdiction of the court. It does not bar an aggrieved party from seeking legal redress in court. See also ***Christopher Orina Kenyariri V Barclays Bank of Kenya Limited & Another, [2018] eKLR; Geoffrey Muthinja & Another V Samuel Muguna Henry & 1756 Others, [2015] eKLR*** and **Proto Energy Limited V Hashi Energy Limited, [2019] eKLR.**

28. For all the foregoing reasons, I have come to the conclusion that the defendant's preliminary objection lacks merit and it is hereby dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th** day of October, 2020.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Jeji holding brief for Mr. Odongo for the plaintiff

Ms Ambuya holding brief for Mr. Wafula for the defendant

Ms Ubah: Court Assistant