REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 97 OF 2012

HARRISON KARIUKI MURU.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD.....2ND DEFENDANT

JUDGMENT

The plaintiff sued the defendants, jointly and severally, for damages for libel and for an order directing them to remove the plaintiff's name from the list of loan defaulters or those people who are otherwise regarded by lending institutions as not being financially creditworthy.

In the plaint dated 18 April, 2012 and filed on 3 May, 2012, the plaintiff pleaded that at all times material to this suit, he held a bank account with the 1st defendant, being account No. [xxx] in which, so it was agreed between the plaintiff and the 1st respondent, that the latter would, deposit some funds in the form of a loan to the plaintiff, for the purchase of stock, by the 1st respondent and for the benefit of the plaintiff, in an initial public offer on the stock market.

The 1st defendant breached the contract and so the plaintiff initiated a suit for a liquidated sum and obtained judgment against it in the Chief Magistrates Court Civil Case No. 538 of 2009. From the available evidence, the decretal sum which the 1st respondent was ordered to pay including interest as of the date of decree was Kshs. 142,900.30.

Despite having been held to be indebted to the plaintiff, the 1st defendant is alleged to have fed the 2nd defendant with malicious information to the effect that the plaintiff was a defaulter which information the 2nd defendant circulated to other lending institutions alerting them of the plaintiff's negative credit status.

Although the plaintiff took the initiative to inform the 2nd defendant that the information with which it had been fed was subject to a dispute for determination in the magistrate's court, the 2nd defendant persisted in listing the plaintiff negatively as a result of which the plaintiff could not borrow money from financial institutions, in particular Equity Bank Limited, Consolidated Bank Limited and what he referred to as "other Saccos".

According to the plaintiff, the information given to the 2nd defendant by the 1st defendant was understood to mean that he, the plaintiff, was a dishonest person who borrows money but never repays and that he is a bad debtor not worth of any credit or trust. With this kind of reputation, lending institutions would be wary of him.

It is against this background that the plaintiff sought for prayers to which reference has already been made.

The defendants opposed the plaintiff's suit and filed their respective statements of defence to that effect.

The 1st defendant admitted that indeed the plaintiff obtained a judgment against it in Nyeri Chief Magistrates Court Civil Case No. 538 of 2009 but that at the time of filing its defence, the 1st defendant had filed an appeal against the judgment and the appeal itself was pending for determination. It however denied that it issued a note to the 2nd defendant that bore the meaning attributed to it by the plaintiff. In other words, it is denied that the note was libelous as alleged by the plaintiff or at all.

On its part the 2nd defendant admitted that it is a credit reference bureau whose operations are licensed under section 31(4) of the Banking Act, cap. 488 and that according to sections 31(3)(b) and (c) of the Banking Act and regulation no. 3(1) of the Banking (Credit Reference Bureau) Regulations, 2008, it is a statutory or a disclosed agent of the Central Bank of Kenya and such other institutions, including the 1st defendant licensed under the Banking Act.

Accordingly, so it was averred, if the 2nd defendant received any information in relation to the plaintiff, it did so in the cause of its functions and that its handling of that information was the subject of a qualified privilege under **regulations 14(1) and 28(1) and 28(6)** of the **Banking (credit Reference Bureau) Regulations, 2008.**

In the alternative, it was contented on behalf of the 2nd defendant that it is not in the business of publishing information regarding the creditworthiness of individuals and that it merely facilitates the sharing of information concerning non-performing loans between institutions licensed under the **Banking Act** as required under **regulation 14(1)** of the **Regulations** and as mandated under **section 31(4)** of that **Act**. Accordingly, it facilitated the sharing of information in accordance with **regulation 15** of the Regulations.

The 2nd defendant also acknowledged having received communication from the plaintiff indicating that there was a dispute between him and the 1st respondent over his creditworthiness; upon receipt of this communication, it caused the plaintiff to prepare a statement setting out his claim. This statement was inserted into the plaintiff's credit information report.

It was also an averment of the 2nd defendant that the pleadings, the judgment and the decree which the plaintiff obtained in **Nyeri Chief Magistrates Court Civil Case No. 538 of 2009** had no bearing at all of his listing. In any event, the 2nd defendant was never served with any order arising from that suit requiring it to delete the plaintiff's name from the negative listing.

The 2nd defendant further pleaded that according to regulation 18(2) of the Regulations, institutions are prohibited from using customers information maintained by credit reference bureaus solely to deny credit to their customers. It followed that if the plaintiff was denied any credit by any institution as alleged, that denial could not solely have been as a result of the information of the 1st defendant's negative listing.

Again, **under regulation 28(3), (4)** and **(5)** of the **Banking (Credit Reference Bureau) Regulations,** so the 2nd defendant pleaded, it is the duty of the lending institutions licensed under the Banking Act to provide accurate information to create Credit Reference Bureaus; to submit customer information to credit reference bureaus and update the information on a monthly basis or within such an time as is necessary; and, to give an amendment notice instruction to credit reference bureaus to delete any inaccurate information and replace it with the accurate information whenever it becomes aware that the information previously submitted was inaccurate. Accordingly, if at all any information provided to the 2nd defendant by the 1st defendant in relation to the plaintiff was inaccurate and therefore, if at all the plaintiff has suffered any loss or damage, the 1st defendant is solely liable to the plaintiff and the 2nd defendant is entitled to indemnity from the 1st defendant.

The 2nd defendant raised other issues in its defence with respect to validity or lack thereof of the plaintiff's suit. First, it pleaded that that the suit is fatally defective because it does not comply with the mandatory provisions of **Order 8 rule 7(1)** of the **Civil Procedure Rules, 2010;** secondly, it pleaded that the suit is statute barred under **section 31(5)** of the **Banking Act** and finally, that the particulars of the words complained of and published by the defendants were not specifically pleaded.

Besides the legal contentions in the plaint, the 2nd defendant also filed a notice of preliminary objection dated 10th December, 2017 in which it pursued further the question of limitation and claimed that the plaintiff's suit is statute-barred under **section 4** of the **Limitation of Actions Act Cap. 22** and **section 20** of the **Defamation Act, cap. 36.**

As much as the evidence of the parties was taken, it is worth considering these issues in limine since they have the potential of disposing of this suit at the preliminary stage.

It is common ground that the plaintiff's suit is for a claim in damages for defamation and in particular, libel. Paragraph 7 in his plaint summarises his cause of action; it says:

> ***The plaintiff avers that the 1st defendant herein maliciously caused a note to issue to the 2nd defendant indicating that the plaintiff herein was a bad debtor which information the 2nd defendant published for general consumption by all lending institutions, full facts whereof are well within the defendants(sic) knowledge; this having been done during the pendency of the above cited NYERI C.M.C.C No. 538 of 2009.***

It is not apparent from this paragraph when the offending note was made and neither have I been able to find it amongst the documents the plaintiff relied upon; however, one of the documents the plaintiff exhibited in support of his case is a copy of a letter dated 24 January, 2011 addressed to the 2nd defendant asking it to remove his name from the negative credit listing. What this implies is that, at least as early as 24 January, 2011 the plaintiff was aware of the note which in his view was libelous and which now forms the substratum of his suit.

The 2nd defendant itself made reference to what it described as 'the consumer credit report' of 26 August, 2010 in which the plaintiff was apparently listed; in its view, the cause of action accrued on this date. In the absence of any evidence to the contrary, it would be reasonable to assume, as the 2nd defendant suggests, that this was the operative date.

In light of these facts, what the court now needs to consider is whether the plaintiff's suit, being of the nature that it is, was filed timeously. In this regard, one needs look no further than the Limitation of Actions Act; section 4(2) of that Act prescribes the time within which an action in tort, generally, must be filed with specific reference to the proviso thereto which caters for the limitation period for institution of suits arising out of defamation; it states as follows:

> ***(2) 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.***

Even if the date of 24th January, 2011 on which the defendant responded to the offensive listing by the 2nd defendant, was to be deemed the date when the cause of action accrued, twelve months elapsed on 23rd January, 2012 by which date the plaintiff ought to have filed his suit. The suit, as noted, was filed on 3rd May, 2012 more than three months out of time.

The plaintiff did not directly respond to this issue save to intimate in submissions filed on his behalf by his counsel that the cause of action arose only after the resolution of the dispute in Nyeri Chief Magistrates Court Civil Case No. 538 of 2009. In other words, it only became apparent that the plaintiff had been defamed after the magistrates' court determined the dispute between him and the 1st defendant.

This argument cannot hold because the suit in the magistrate's court was filed in September 2009 while the earliest the alleged defamatory words were published was on 26 August, 2010, almost a year later. The plaintiff's claim and the counter-claim by the 1st defendant were about whether either of them owed the other ascertained sums of money and not whether the plaintiff had been defamed; if the latter were to be the case the present suit would have been unnecessary.

I therefore agree with the learned counsel for the 2nd defendant that the present suit was filed in breach of **section 4(2)** of the **Limitation of Actions Act** to the extent that it was filed out of time.

The second limb of the 2nd defendant's objection to the plaintiff's suit relates to **Order 2 Rule 7** of the **Civil Procedure Rules** erroneously indicated in the defence as **Order 8 Rule 7(1);** this latter rule deals with the form of amended pleadings of which the plaintiff's plaint is not one. Order 2 Rule 7 reads as follows:

> ***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.***

The particulars of the facts and matters referred to in this rule would ordinarily constitute the words concerning the plaintiff which in his view, are calculated to lower him in the estimation of the 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 him in his office, profession, calling, trade or business. (**See Halsbury's Laws of England, 3rd Edition Vol. 24 page 6** on definition of defamation).

Apart from making reference to a note issued by the 1st defendant to the 2nd defendant in paragraph 7 of his plaint, the plaintiff did not provide any other particulars of the facts or matters which would be understood to have been used in a defamatory sense. Yet to prove defamation, it was incumbent upon him to prove, among other things, that the impugned note or statement was defamatory and that it referred to him; he could not possibly prove these two elements if they were not pleaded as prescribed by the rules in the first place. It follows that in a suit such as the plaintiff's, failure to plead the words used is fatal to a claimant's claim.

This position was reiterated in **Collins versus Jones (1955) ALL ER 145** where it was observed that:

> ***A plaintiff in a libel action not only must set out with reasonable certainty in his pleading the words complained of, but also must be prepared to give such particulars as to ensure that he has a proper case to put before the court and is not merely fishing for one…***
>
> ***In libel and slander the very words complained of are the facts on which the action is grounded. It is not the fact of the defendant having used defamatory expressions alleged which is the fact on which the case depends…***
>
> ***If he cannot give the particulars he cannot be allowed to go on with the charge.***

The authors of **Gatley on Libel and slander, 11th Edition, Sweet and Maxwell 2008** (cited by Mabeya, J. in **Christopher Orina Kenyariri versus Barclays Bank of Kenya Limited & Credit Reference Bureau Africa Limited (2012) eKLR** which counsel for the 1st defendant relied upon) emphasised the same point; at page 967 of their book, they have stated as follows:

> ***In a libel claim the words used are material facts and they must therefore be set out verbatim in the particulars of the claim, preferably in the form of a quotation. It is not enough to describe their substance, purport or effect.***

This principle was again reiterated in **Bunt versus Tilley (2007) 1WLR 1243** (again cited by Mabeya, J. in **Kenyariri** decision (supra)) in which Eady, J. stated as follows:

> ***Nevertheless, he (the claimant) has to recognise that there is no mechanism in this kind of litigation for a proceeding on the basis of "sample" publications. If a claimant wishes to sue over defamatory allegations, and to recover compensation and other remedies in respect of them, they must be set out clearly in the particulars of the claim.***

And in **Bullen & Leake, Jacobs Precedents of Pleadings, Sweet & Maxwell 17th Edition Vol. 1. 2012** at **page 636, paragraph 37-31**, it is stated thus:

> ***Libel – the words must be set out verbatim in the particulars of claim. It is not enough to set out their substance or effect.***

In the final analysis, I agree with the learned counsel for the 2nd defendant that the plaintiff's suit is blemished on at least two grounds; first, it was filed out of time contrary to the provisions of the section 4(2) of the Limitation of Actions Act and secondly, it is deficient of

particulars of the alleged defamation as prescribed in Order 2 Rule 7 of the Civil Procedure Rules. I am therefore inclined to uphold the 2nd defendant's preliminary objection and strike out the plaintiff's suit. It is so struck out with costs to the defendants.

I feel bound to commend the learned counsel for the respective parties for their able submissions; of particular mention is Mr Kisinga, the learned counsel for the 2nd defendant whose relatively lengthy submissions and legal authorities he cited in support of the position adopted by the 2nd defendant adopted in this matter were enlightening to a great degree.

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Finally, I must also register my apologies to the parties for the delay in the delivery of this judgment. It was initially set to be delivered on 28 September, 2018; however, none of the parties appeared on that date and therefore it was deferred to 14 December, 2018. Unfortunately, I happened to be away on some other official engagement on this particular date. Ordinarily, a new date ought to have been set and parties informed accordingly; this however, did not happen as the file was mixed up with the rest of the files whose judgments had been delivered much earlier. I regret this mix-up and the ensuing delay.

Dated, signed and delivered in open court this 29th day of March, 2019

Ngaah Jairus

JUDGE