



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 373 OF 2018

JAMII BORA BANK LIMITED.....APPELLANT

VERSUS

JOASH ONDIEKI GISORE.....RESPONDENT

(Being an appeal from the judgment and decree of the Hon. P.N Gesora (Mr) Chief Magistrate delivered on 12th July, 2018 in Nairobi Milimani CMCC No. 5679 of 2017)

JUDGMENT

The respondent herein brought a suit against the appellant before the lower court claiming damages for what he pleaded to be irregular, unlawful and malicious actions by the appellant, following the submission of his name to the Credit Reference Bureau and publication thereof. It was his case that he was entitled to damages because of the embarrassment, loss and dented reputation visited upon him as a result of the appellant's action. The appellant denied the respondent's claim in its defence and stated that the respondent having taken a loan facility and defaulted in servicing the same, the reference to the bureau was justified. Further, the respondent having failed to service the loan, the appellant was under a statutory obligation by virtue of the Banking Act and Credit Reference Bureau Regulations to take the action that it did. No admission was made to the jurisdiction of the court.

At some stage there was filed a Notice of Preliminary Objection on the basis that the suit was time barred in so far as it relates to a claim for defamation by virtue of the provisions of Section 20 of the defamation Act as read with Section 4 of the Limitation of Actions Act, and that the court also lacks jurisdiction by virtue of Section 31 (5) of the Banking Act Cap 488 Laws of Kenya and Regulation 35 (5) – (8) of the Credit Bureau Regulations. Additionally the objection stated that the reliefs sought cannot be granted within the ambit of the law, that is general damages for breach of contract.

The lower court heard the evidence from both parties but found the appellant liable to the respondent and proceeded to award a total sum of Kshs. 5,000,000/= made up of Kshs. 3,000,000/= general damages for defamation, Kshs. 1,000,000/= general damages for breach of contract and Kshs. 1,000,000/= aggravated damages. The respondent was also awarded costs and interest.

Aggrieved by the said judgment the appellant lodged this appeal by way of memorandum of appeal dated 9th August, 2018. In that Memorandum the appellant has raised some of the pleadings contained in the statement of defence and also justification as to the actions taken. The lower court has been faulted specifically and generally in the way it handled the entire dispute.

As the first appellate court, it is my duty to evaluate the evidence adduced before the trial court with a view to arriving at independent conclusions. This I have done. In deciding in favour of the respondent the trial court stated in part as follows,

“I also hold that being the lender once there is default by the borrower before forwarding that information and in high authority it had a duty to raise the same with both the plaintiff and his employer.....”

There is evidence to the effect that the plaintiff herein sought redress from the defendant's official to no avail. The defendant failed to reply to the plaintiff's demand letter on the same. It is my humble view that the actions by the defendant's exposed the plaintiff to immense pain and mental anguish and also embarrassed him as he could not access any credit from any financial institution as he had attempted to approach Equity Bank in this regard.”

The appellant made or forwarded the respondent's name to the Bureau on 31st October, 2014. The respondent did not know about this until October, 2016 and this informs the filing of the suit in August, 2017. I have considered the Notice of Preliminary Objection which had been filed by the appellant and noted that it was never prosecuted and since it goes to jurisdiction, the appellant having submitted itself to the jurisdiction of the court by calling evidence, leads to a conclusion that it abandoned that objection. In any case, even if that objection were to be prosecuted the success remained slim in that it is the knowledge to the aggrieved party that triggers the running of time against him. That being the case, having come to the knowledge of the reference in October, 2016 and filed his suit by August, 2017 he was within the time to

do so. The preliminary objection would not have terminated the proceedings herein. – See *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696*

It cannot be said that the suit was premature because regulation 35 of the Credit Reference Bureau Regulation does not address a remedy for injured reputation, but provides administrative procedures to have the name removed from the reference. It cannot therefore be said that the respondent should have invoked that regulation instead of instituting the case in court.

The case of *Nzoia Company Limited vs. Fungututi (1988) e KLR* is distinguishable. I have also considered what the courts stated in the cases of *Speaker of the National Assembly vs. James Njenga Karume (1992) e KLR*, *Geoffrey Muthinja & Another vs. Samuel Muguna Henry & Others (2015) e KLR* and *Kennedy Odhiambo Nyagudi vs. Central Bank of Kenya & Others (2013) e KLR*.

It bears repeating regulation 35 may not meet the expectations of a litigant seeking damages as claimed in the pleadings herein. In any case the availability of alternative dispute resolution does not oust the jurisdiction of the court. If the legislature intended that a litigant must first exhaust that alternative before moving to the court, nothing stopped the provisions from expressly declaring so.

I have considered Section 31 (5) of the Banking Act. On a balance of probability the respondent established that the appellant acted recklessly in making the reference before any information to or dialogue with the respondent. In any case, the default relied upon was so minimal that, even a call to the respondent would have avoided that embarrassment. Any claim of good faith was eroded. Duty of care was breached. See *HCCC No. 547 of 2008 Hon. Nicholas R.O. Ombija vs. Kenya Commercial Bank Limited, HCCA 243 of 2011 Co-operative Bank of Kenya Limited vs. Kenneth Ondieki Obae*

I have reviewed the evidence as I have said and concluded that the respondent established his case on a balance of probability to hold the appellant liable.

On damages awarded, the trial court did not apply wrong principles neither can the awards be said to be excessive in the circumstances of this case. There was every justification to make the said awards and I have no reason whatsoever to interfere with the same. The end result is that this appeal is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 15th Day of March, 2019.

A. MBOGHOLI MSAGHA

JUDGE