



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NUMBER 72 OF 2015

ALICE NJERI MAINA PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LTD DEFENDANT

JUDGMENT

1. The background facts to this case are fairly straight forward. On the 11th February 2011, the plaintiff **Alice Njeri Maina of P.O. Box 748 Nakuru and Identity Card No.** [Particulars withheld] opened a Cub Account (minors' account) at Kenya Commercial Bank Limited Flamingo branch Nakuru and an **Account Number** [Particulars withheld] given to the account in her son's name MMM. She had no other account with Kenya Commercial Bank at the material times.

The Bank took all her details as stated above including her cell phone number.

2. Another customer by similar names **Alice Njeri Maina of P.O. Box 3633-2100 Nairobi, Identity Card No.** [Particulars withheld] had taken a loan under account **No. PDMG** [Particulars withheld] from Moi Avenue Branch, Kenya Commercial Bank, Nairobi. As at 26th May 2011, loan account had arrears of Kshs.167,103/751 necessitating the bank to write to the borrower to notify her of the arrears and a request to pay. The arrears were not paid so the bank referred the borrower **Alice Njeri Maina** to the **Credit Reference Bureau(CRB)** who published the list of the defaulters with others through its Debt Collectors Metropol East Africa Limited by its letter dated 8th February 2012.

3. Instead of the actual Loan defaulter **Alice Njeri Maina of Nairobi, Identity Card No.** [Particulars withheld] and **Box No. 3622-0100 Nairobi**, the bank gave out the name of the Plaintiff, a different customer, by the same names, but different locations and identity details and who had no loan at all with the bank, for listing with the Credit Reference Bureau (CRB) which was done. The bank did not inform the **plaintiff Alice Njeri Maina of Nakuru** of the events.

4. Upon realising that her name had been listed by CRB as a loan defaulter apparently when her loan application to her sacco, she visited KCB Bank at Nakuru to inquire about the alleged loan and advice, and followed with a complaint letter to the bank on the 1st July 2015. The bank promised to investigate but did not respond to the complaint immediately, or at all, at least not in writing.

5. On the 22nd July 2015, the plaintiff's advocate served a demand letter to the Bank and demanded removal of the plaintiffs names from CRB listing. In the plaintiffs testimony and statement, it appears like her name was not removed therefrom upto September 2015. However, the plaintiff decided to move to court, and by her **plaint dated 8th October 2015** and filed on even date, the plaintiff sued the Bank citing malice at the bank by sending her name for listing as a loan defaulter with CRB and stated particulars of malice. She sought for compensation in terms of General damages and costs of the suit.

6. In its **defence dated 11th November 2015** the defendant denied the plaintiff's claim and allegations, that the reporting of the plaintiff to the CRB was not malicious, that being a banking institution, it was obligated under the law and Central Bank Regulations to adhere to prudential guidelines, and further that the plaintiffs publication was on occasion of qualified privilege under the Banking Act and regulations thereof. It sought that the suit be dismissed with costs.

7. I have considered the parties evidence, documents and submissions.

The issues that present themselves for determination in my opinion, and being re edition of counsel framed issues are:

(1) Whether the listing/publication of the plaintiff's names to the Credit Reference Bureau by the defendant was actuated by malice or negligence.

(2) Whether listing a bank customer with CRB for loan default is defamatory.

(3) Whether the plaintiff is entitled to the reliefs stated in the plaint.

These issues are intertwined and will be considered together.

8. When the plaintiff reported to having been wrongly listed with CRB as a loan defaulter in July 2015, the defendant moved quickly and upon investigations, made findings that there was a name mix up and rectified the situation by having the plaintiff's name delisted by CRB. There was an express admission in the name mix up and therefore negligence by the bank officials, who at all times are required to act prudently and diligently before enlisting a customer with CRB. It is common sense and good practice to notify a customer of its intention to enlist the customer with CRB. This was not done in respect of the plaintiff and had it been done the mix up in names would have been sorted before the CRB listing.

9. The defendant conceded to the negligent error but no apology was ever extended to the plaintiff. **DW1** did not testify to such apology by letter or otherwise. This is so evident from its defence that it moved to deny all the plaintiff's claims, and proceeded to cite defence of qualified privilege in its statutory obligations. See **Namalwa Christine Masinde -vs- National Bank of Kenya (2016) e KLR** where in similar circumstances, the court found the Bank to have been negligent, and compensated the plaintiff in damages. There can be no doubt that the Bank by its official acted recklessly and negligently.

10. Was the bank's negligent action actuated by malice?

It was explained by the **DW1** that the incident was caused by similarity of the plaintiffs names to those of the actual loan defaulter, **Alice Njeri Maina of Nairobi**. This in itself shows how casually and recklessly the bank officials handle customers accounts. Even after the bank delisted the plaintiff from CRB, no formal notice was given to her, and no apology was addressed to her either.

11. **DW1** did not demonstrate by letter or otherwise that the plaintiff was notified of the delisting necessitating her to file this suit, apparently after the delisting sometimes on 16th July 2015 as alleged by the defendant, a fact that the plaintiff had no notice of.

DW1 was heard to testify that the plaintiff's advocate's demand letter dated 22nd July 2015 was given to him and that he did not respond. If indeed the delisting was done **"sometimes on 16th July 2015, why then did DW1 not respond and inform the plaintiff that she had been delisted?"** Is it evident that there was no deliberate action by the defendant to mend the admitted negligence and sequel harm to the plaintiff.

12. I do not however find a malicious intention by the defendant in listing the plaintiff's name with CRB - circumstances having been explained. **Court of Appeal in the case Williamson Diamonds Ltd & Another -vs- Brown (1770)**

"-- the onus is on the plaintiff to establish that the appellants had cited honesty for the purpose of protecting themselves, therefore, the finding of malice could not be sustained."

13. The Defendant no doubt followed the regulations as laid out under **Regulation 20** of the Banking (Credit Reference Bureau) regulations, 2008 by reporting the plaintiff, though wrongly for listing to the CRB. I am satisfied that pursuant to the said Regulations, the Defendant carried out investigations and delisted the plaintiff's name, but never informed her of the delisting in good time which would have forestalled filing of this suit.

See **Daniel Gachanja Githanga -vs- Credit Reference Bureau Africa Ltd & 2 Others (2013) e KLR** and **Amy Kagendo Mate -vs- Prime Bank Ltd -vs- Credit Reference Bureau & Another (2013) e KLR**.

In the above cases, the court found that the suits were premature as the plaintiffs had not invoked and or exhausted the procedure under Regulation 20 referred to above. They are therefore distinguishable.

14. The upshot and upon careful consideration, I find no malice by the defendant in listing the plaintiff's name with the CRB, but that the defendant's actions were reckless and negligent. This is so because, and in addition to my sediments above, the defendant owes a duty of care to its customers including the plaintiff and once that duty is breached, then negligence arises, unless it is sufficiently explained.

15. In this instance case, the negligence cannot be said to be remote as to delink the harm that may have ensued. The bank's duty under its contract with a customer must be exercised with reasonable care and skill in regard to its operations within the contract with its customer. Negligence may lead to a case in tort or breach of contract and it is upon the plaintiff to prove that the bank owed a duty of care and the said duty was breached and that the customer has suffered loss as a result – **Brite Print (K) Ltd & George Maina Kingori -vs- Barclays Bank(K) Ltd (2014) e KLR**.

16. That brings me to the issue whether the plaintiff suffered loss and damage as a result of the Defendant's negligence.

The plaintiff did not call any evidence or demonstrate that she applied for a loan from Unitas Savings and Co-operative Society and that the said application was rejected as a result of her listing with CRB. No application letter and no response were tendered rejecting the application on ground of being listed with the CRB.

It is trite that a party who alleges must prove- **Section 107-108 Evidence Act**. No evidence of financial loss was demonstrated by the plaintiff despite her name having been listed with CRB.

See **Jamlick Gighuhi Mwangi -vs- Kenya Commercial Bank Ltd and Another (2016) e KLR**.

17. Was the listing of the plaintiff at the CRB defamatory?

“Defamation is a tort and is defined as a publication of a statement which tends to lower a person in the estimation of right thinking members of the society generally or which tend to make him be shunned or avoided. The defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers---The words must be maliciously published and malice can be inferred from a deliberate or reckless or even negligently ignoring of facts.”

The above paragraph is cited in **Phineahs Nyagah -vs- Gitobu Imanyara (2013) e KLR by Odunga J.** and captures the ingredients of defamation.

18. In diverging confidential information of a customer, a bank may not be in itself defamatory, courtesy of the **Credit Reference Bureau Regulations 2013, under the Banking Act. Section 26** states that:

(i) A Bureau shall protect the confidentiality of a customer information received in terms of these regulations and shall only report or release such customer information.

1. to the customer concerned

2. to the Central Bank

3. to a requesting subscriber

4. to a third party as authorised by the customer concerned, or

5. As required by law.

19. **Regulation 19(1)** further states that:

“a suit cannot lie against the Central Bank, Bureau, an institution of chairpersons --- or any other person authorised under these Regulations --- for loss or damage caused or which is likely to be caused by anything, which is done or intended to be done in good faith in pursuance of these regulations or guidelines issued hereunder.”

20. The above provisions, in my considered view are applicable if the “**thing**” complained of was done in good faith. Where the institution is found to have been reckless and negligent and in breach of the institutions duty of care to the customer, then, a suit for negligence and sequential damage will lie.

The onus lies on the plaintiff to prove that the bank or institution did not act honestly and was actuated by malice.

21. I have already made a finding that the Defendant acted recklessly and negligently. Though the plaintiff did not suffer financial loss and damage, she must have suffered embarrassment and emotional anguish. In the case **Namalwa Christine Masinde (Supra)**, the court awarded the plaintiff damages in the sum of Kshs.200,000/= upon prove that the plaintiff had been denied a loan by a bank as a result of being listed with CRB. The case of **Hon. Nicholas R.O. Omoja -vs- KCB (2009) e KLR** cited by the plaintiff is not relevant in the circumstances.

22. I do not think that the published listing of the plaintiff to authorised institutions as stated in the Regulations cited above was defamatory to her character. No unauthorised persons got that information. The publication is authorised under Statute, the Banking Act. It can therefore not be defamatory unless the plaintiff publisized the same to unauthorised persons including “**right thinking members of the society**” and no proof was tendered.- See **Phineahs case Supra**, as well as **Standard Chartered Bank of Kenya Ltd -vs- Intercom Services Ltd & 4 Others** where it was held that the duty of confidentiality is not absolute as it may be broken when it for instance, by a court order, a party is directed to disclose certain information to various bodies or organization.

23. Having rendered myself as above, I find that the plaintiff is entitled to minimal damages as a result of emotional suffering, that she may have encountered as a result of the wrong listing with CRB.

I proceed to award her a sum of Kshs.200,000/= as general damages plus costs and interest at court rates from the date of this judgment.

Dated, signed and delivered this 21st Day of June 2018

J.N. MULWA

JUDGE