



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 314 OF 2016**

**GERVASE MAINA NDONGA.....PLAINTIFF**

**VERSUS**

**AAR CREDIT SERVICES LIMITED .....**

**METROPOL CREDIT REFERENCE BUREAU.....DEFENDANTS**

**RULING**

The plaintiff sued the two defendants herein for damages and costs of the suit based on some publication and or malicious information said to have been published by the two defendants in relation to his credit worthiness. The two defendants in their respective defences denied the plaintiff's claim and in fact the 1st defendant raised a counter claim against the plaintiff.

The 2<sup>nd</sup> defendant had indicated in its defence that at the hearing or appropriate moment, a preliminary objection will be raised based on Credit Reference Bureau Regulations, 2013. Indeed, on 8<sup>th</sup> February 2017 a Notice of Preliminary Objection was filed by the advocates for the 1<sup>st</sup> defendant wrongfully signed as advocates for the plaintiff.

The Notice of Preliminary Objection was to the effect that, there being an alternative statutory mechanism under Regulation 35 (5) of the Credit Reference Bureau Regulations, 2013, and the plaintiff having failed to utilize the same, the entire suit is *ex – facie* incompetent, frivolous, premature and should be determined *in limine*.

All parties have filed submissions addressing the preliminary objection and cited several authorities.

The starting point is the provision of Regulation 35 (5) which provides as follows,

**“Where the customer believes that information contained in the database is inaccurate, erroneous or outdated, the customer may notify the bureau in writing of the information disputed.”**

There are several authorities that have held where a clear procedure of dispute resolution is provided in a statute, that process has to be exhausted before resort is sought through the courts. – See **Speaker of the National Assembly vs Karume (2008) 1 KLR 425** and **Samson Chembe Vuko vs. Nelson Kilumo and 2 others (2016) e KLR.**

It is also to be remembered that the Constitution, and in particular Article 159 (2) (C) provides for alternative forms of dispute resolution. In the case of **Jamlick Gichuhi Mwangi vs. Kenya Commercial Bank Limited & Another (2016) e KLR** the court cited yet another related case - **Nairobi HCCC No. 511 of 2011 Daniel Gachanja Githaiga vs. Credit Reference Bureau Africa Limited and 2 others** where the court said as follows,

**“Finally, in my view, the application is premature as the procedure for correction and /or decision of a customer's information shared with the 1<sup>st</sup> defendant is clearly and intricately provided for under regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008, which procedure inter alia requires a customer to notify the 1<sup>st</sup> defendant in writing that he disputes the reference after which the 1<sup>st</sup> defendant carries out investigations and decides whether to delete or retain the reference. The plaintiff has not invoked and /or exhausted the aforesaid procedure, and therefore this application is premature.”**

In yet another case **Nairobi High Court Petition No. 383 Of 2015 Ann Wanjiru Muriithi Vs. Jamii Bora Bank** the court stated as follows,

**“Even when applying this Act, Section 9 is clear that one cannot come to court until internal dispute resolution mechanisms have been exhausted. The petitioner could have taken advantage of the regulations to resolve the dispute which she did not do. She has not shown that the mechanism was not adequate in order to come to court by way of Constitution Petition.”**

The thrust of the foregoing citations is that, a party should exhaust internal dispute mechanisms provided before resorting to intervention by the court. Each case however must depend on its own facts and circumstances.

Where a party pleads a dispute may be determined in *limine*, it must be demonstrated that such a step if taken may avoid prolonged hearing, and I believe it is intended to save time and costs in dispute resolution.

The subject of preliminary objection has been addressed over a period of time. One of the most outstanding cases is that of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors (1969) EA 696** where Sir Charles Newbold, P. stated as follows,

**“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 if any fact has to be ascertained if what is sought is the exercise of juridical discretion. The improper raising of points by way of preliminary objection does nothing and unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”**

Earlier in the same decision Law, J.A. stated as follows,

**“So far as I am aware, 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 of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

The two defendants have joined hands in submitting that the plaintiff’s suit should be struck out for being incompetent, frivolous and premature. The cause of action is defamation. I have related the pleadings and prayers in the plaint to the provisions of Regulation 35 (5) cited by the defendants. In the event the plaintiff were to notify the Bureau of the information disputed, and that information turns out to be false, the remedies are to be found in Regulation 35 (8) where the Bureau is called upon to delete or correct the offending information. The prayers sought by the plaintiff in his plaint include damages, costs and interest. There is nowhere under

this Regulation that the Bureau is compelled to award damages, costs and interest as pleaded in the plaintiff’s suit. The invocation of this Regulation therefore cannot determine the dispute between the parties here. Going by the observations in the **Mukisa case**, the step taken by the two defendants is improper practice that should stop.

The Regulation is not mandatory; the plaintiff was aggrieved by the information said to have been disseminated by the two defendants and therefore had the right to elect which forum to follow. Above all, the two defendants at paragraphs 26 and 17 respectively in their defences have admitted the jurisdiction of this court.

The preliminary objection is therefore misplaced and misconceived. The same is hereby dismissed with costs to the plaintiff.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> Day of June, 2018.***

**A. MBOGHOLI MSAGHA**

**JUDGE**