



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCCA NO. 83 OF 2017

CO-OPERATIVE BANK OF KENYA LIMITED.....APPELLANT

VERSUS

PETER OCHIENGRESPONDENT

[Being an Appeal from the Judgment and Decree of the Honourable R.M. Ndombi,

Resident Magistrate delivered on June 31st October 2017 KISUMU CMCC No. 610 of 2016]

JUDGMENT

1. By a Judgment dated 31st October 2017, the learned trial magistrate held the Appellant liable for defamation, and thereafter awarded General Damages in the sum of Kshs.200,000/=.
2. The Respondent, **PETER OCHIENG**, was also awarded Interest on the general damages, together with the costs of the suit.
3. The Appellant, **CO-OPERATIVE BANK OF KENYA LIMITED**, felt dissatisfied with the whole judgment and lodged an appeal to challenge it.
4. It was the view of the Appellant that the trial court had relied on the wrong principles of law, and had entered judgment contrary to the evidence on record.
5. The trial court was accused of failing to have regard to the evidence which the parties had tendered during the trial.
6. It was the understanding of the Appellant that the trial court had awarded compensation to the Respondent for wrongful listing of the Respondent in the Credit Reference Bureau.
7. Meanwhile, because the Plaintiff did not contain a prayer for compensation based on the alleged wrongful listing, the trial court is said to have been biased, by amending the Plaintiff.
8. The Respondent is also alleged to have failed to prove that the Appellant was actuated by malice.
9. The trial court was also faulted for awarding to the Respondent a sum which was manifestly high.
10. When canvassing the appeal, the Appellant submitted that the Respondent did not prove defamation as per **Sections 107, 108 and 109 of the Evidence Act**.
11. In the opinion of the Appellant, the Respondent had a responsibility to prove that the Appellant was propelled by malice.
12. The Appellant submitted that Malice connotes wrong intentions, and it cited **"Black Law Dictionary"** for that definition.
13. The Appellant said that in this case the Respondent did not prove any wrong intention.
14. Quoting from **WILLIAMSON DIAMONDS LTD & ANOTHER Vs BROWN [1970] E.A. 1**, the Appellant submitted that a defendant would be protected if the comment deemed defamatory was made on the basis of belief that the comment was true.
15. In this case the name of the Respondent had been sent to the Credit Reference Bureau when the Appellant knew that the Respondent's

account was non-performing.

16. The Appellant further submitted that the matters complained about did not lower the reputation of the Respondent, as the words did not disparage the Respondent's reputation in the eyes of reasonable men.
17. Furthermore, the Appellant pointed out that the provisions of the Banking (CRB) Regulations stipulate that the Credit Reference Bureau shall release information to a subscriber only. Therefore, the Appellant contends that the information was not accessible to the public.
18. Once information was released to a subscriber, the said subscriber is required to destroy the information after he gets it.
19. The information was said to have been provided to the Credit Reference Bureau under Qualified Privilege.
20. The Appellant submitted that the documents provided by the Respondent did not demonstrate that the Respondent had been unable to get loans.
21. In any event, even if it were assumed that the Respondent had been unable to get loans, the Appellant pointed out that the Respondent did not provide evidence to show the reason why he failed to get loans from Equity Bank.
22. The Appellant also faulted the Respondent for failing to utilize the procedure provided under the Banking (CRB) Regulations, to cure the wrong, if any.
23. When responding to the appeal, Mr. M.C. Ouma, the learned Advocate for the Respondent submitted that the Appellant had failed to challenge the evidence which the Respondent tendered during the trial.
24. At this point it is vital to point out that the Appellant closed its case without calling any witnesses. In effect, the only evidence which was available to the trial court was the evidence adduced by the Respondent.
25. In the circumstances, the Respondent contended that the Appellant did not controvert the evidence which the Respondent had provided.
26. For instance, the Appellant is faulted for failing to produce evidence to show the loan account which the Respondent was allegedly not servicing.
27. In the absence of the evidence of the loan account, the Respondent submitted that the Appellant had no reason to forward the Respondent's name to the Credit Reference Bureau.
28. But the Appellant countered that submission by pointing out that the Respondent did produce the statement of account which showed that at the material time, in 2014, the Respondent was not servicing his loan account.
29. I have carefully perused the one-page statement of account which the Respondent produced in evidence. It shows the Debit Balance as at 6th October 2016. It does not show any status of the account as at 2014.
30. Therefore, the said piece of evidence cannot advance the Appellant's position at all. There is nothing before the court, which can justify the Appellant's action, of forwarding the Respondent's name to the Credit Reference Bureau.
31. When the Appellant failed to demonstrate that it had any reason to justify the referral of the Respondent's name to the Credit Reference Bureau, it can only be concluded that the bank had no justification for forwarding the Respondent's name to the Credit Reference Bureau.
32. According to the Respondent, the Defence on record does not include a plea of Qualified Privilege. But the Appellant insists that although it did not specifically cite Qualified Privilege in the Defence, the said line of defence was taken up in Paragraph 9 of the Defence.
33. The said paragraph reads as follows:

“The Defendant states that at the time the Plaintiff was referred to the METROPOL CREDIT REFERENCE BUREAU in the year 2014, the Plaintiff had a non performing account whose outstanding balance accrued and the Plaintiff without reason failed to settle. Full particulars the Plaintiff is fully aware.”
34. In my understanding, that paragraph contains a statement which can be construed as qualified privilege. I say so because the Appellant was basically saying that it had a legitimate reason for notifying the Metropol Credit Reference Bureau that the Respondent had failed to settle his non-performing account, and that the Respondent had no justification for his said failure.
35. Pursuant to the Banking (CRB) Regulations, a bank had an obligation to forward to the Credit Reference Bureau, the names of customers who were defaulting in their obligations to service their respective loan obligations. Therefore, if the Respondent had not been servicing his loan, the bank would have been obliged to notify the Credit Reference Bureau about that fact; and the said Credit Reference Bureau had a corresponding duty to receive such information.
36. Although the Defence did not specifically mention qualified privilege, it nonetheless included a plea which constitutes the said defence.

37. But, as I have already held, the Appellant has failed to show that the Respondent had a non-performing account at the material time.
38. I also find that the Respondent did not demonstrate that Equity Bank or any other bank had refused to give him loans because his name was at the Credit Reference Bureau. We only have his word for it, without any supporting document.
39. The Appellant believes that it controverted the evidence adduced by the Respondent, through the process of cross-examination.
40. I think that that submission is not properly founded.
41. Cross-examination is the process through which one party seeks to show that the evidence of a witness was not believable or was of doubtful integrity.
42. If the court is persuaded not to believe the evidence of a witness, such evidence would be disregarded.
43. But if the weight to be attached to some evidence was reduced, that alone cannot lead to the conclusion that the case of the other party should be believed.
44. Of course, when a Plaintiff brings insufficient evidence, he may fail to prove his case, regardless of whether or not there was cross-examination.
45. But if a Plaintiff brings evidence which was, prima facie, sufficient to prove his case, the court would find in his favour unless the defendant leads other evidence to counter the Plaintiff's case.
46. The evidence which counters the evidence of the rival party, and puts forward a case that was deemed more probable than that of the first party, is said to have controverted the evidence of the first party.
47. In this case the Appellant failed to adduce any evidence to counter the evidence tendered by the Respondent.
48. And because the Respondent had produced evidence which was sufficient to prove his case, the learned trial magistrate was right to have found the Appellant liable.
49. I acknowledge that pursuant to Regulation 20 of the Banking (CRB) Regulations a customer who believes that the information contained on the CRB database was inaccurate, erroneous or outdated, may notify the bureau that the information is disputed.
50. Where investigations reveal that there was an error, the Bureau will promptly remedy the error.
51. In effect, Regulation 20 provides a relief to any customer who is aggrieved by wrong or erroneous information which had been posted on the CRB database.
52. Therefore, it would have been open to the Appellant to raise a Preliminary Objection to the court proceedings, on the ground that the Respondent had moved straight to court, before utilizing the procedure provided by law.
53. However, I note that even when the Respondent gave Notice to the bank, the Appellant did not point at the Regulations.
54. The Appellant denied receipt of the Demand Notice, and it indicated that it would, at the first hearing of the case, seek the striking out or the dismissal of the suit. But the Defendant made no such an application when the case first came up for hearing. Instead, the Appellant sought for an adjournment because its witness was on Maternity leave.
55. On that very day the Appellant also sought the indulgence of the court to have the matter mentioned in a month. When seeking the said indulgence, the Appellant told the court that the Respondent had been wrongly listed under the Credit Reference Bureau.
56. The trial court rejected the plea for an indulgence, and the trial commenced.
57. However, after the Plaintiff closed his case, the Appellant sought and was granted an adjournment.
58. When the trial resumed, on 1st August 2017, the Appellant closed its case without calling any witness.
59. In a nutshell, although the Defence appeared to suggest that the Appellant would raise objections to the suit, the Appellant did not pursue that line before the trial court.
60. It did not seek either the striking out or the dismissal of the suit, summarily.
61. By making a conscious decision to participate in the trial, the Appellant is deemed to have abandoned its intention to challenge the suit or the jurisdiction of the court.
62. It is therefore not open to the Appellant to raise the issue at the appellate stage, when the trial court was not called upon to adjudicate on

it.

63. As regards the quantum of the award, the Appellant did not put up a serious case.

64. In any event I find that the learned trial magistrate did not give consideration to any irrelevant or extraneous matters. The trial court also did not fail to give consideration to any relevant factors. In the result, this court has no basis, in law or in fact, for disturbing the award.

65. Accordingly, the appeal has no merit, and it is dismissed. The Appellant will pay to the Respondent the costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU this 18TH day of OCTOBER 2018.

FRED A. OCHIENG

JUDGE