



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 276 OF 2011

CHRISTOPHER ORINA KENYARIRI.....PLAINTIFF

VERSUS

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

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

JUDGMENT

PRELIMINARY

1. *Christopher Orina Kenyariri*, the plaintiff, has sued *Barclays Bank of Kenya Limited*, the 1st defendant, and *Credit Reference Bureau Africa limited*, the 2nd defendant.
2. This action was defended by both defendants but those defences of both defendants were struck out by the Ruling of **11th February 2014**. Those defences were struck out due to the defendants' failure to supply to the plaintiff a letters dated **21st February** and **18th March 2011** and a screen shot of encrypted electronic information sent by the 1st defendant to the 2nd defendant.
3. As a consequence of that striking out of both defences the case proceeded with only the plaintiff's evidence.
4. The 2nd defendant issued a notice to the 1st defendant pursuant to Order 1 Rule 24(i) of the Civil Procedure Rules seeking indemnity, in this matter, from the 1st defendant.

PARTIES IN THE CASE

5. The plaintiff is an advocate of the high court of Kenya and is engaged as such as a managing partner in practice under the name and style of *Kenyariri & Associates Advocates*.
6. The 1st defendant is a Limited liability company licensed under the Banking Act Cap 488, to carry on business in the Republic of Kenya.
7. The 2nd defendant is a Limited liability company licensed by the Central Bank of Kenya to carry on business as a credit reference Bureau under Section 31(3) (b) (c) and (4) of the Banking Act Cap 488.

PLAINTIFF'S CASE

8. The plaintiff was at all material time a bank customer of the 1st defendant at its Queensway Branch. From the evidence before court he operated two bank accounts. One was account No.075140XXXX and the second was account No.800XXXX.
9. It is evidenced by the testimony of the plaintiff and from the documentary evidence that the 1st defendant on or about **21st February 2011** reported the plaintiff as a loan defaulter to the 2nd defendant, the credit reference agency.
10. The plaintiff has filed this present action alleging breach of duty, in statutory and common law, against both defendant.
11. The plaintiff in his evidence stated that he operated account no. 075140XXXX at the 1st defendant Bank and that he obtained a credit

facility through that account.

12. That on **28th September 2001** the 1st defendant unfairly, unjustly and mischievously threatened to report the plaintiff to the Credit Reference Bureau for money owed to the 1st defendant.

13. As a consequence to that threat the plaintiff filed before the Milimani Chief Magistrate's Court civil suit No.7333 of 2010. An injunction was issued by that court restraining the 1st defendant from reporting the plaintiff to the Credit Reference Bureau.

14. That while restraining order was subsisting the 1st defendant on **18th March 2011** reported the plaintiff to the Credit Reference Bureau.

15. That it was after the plaintiff filed this present suit that the 1st defendant instructed the 2nd to delete plaintiff's name from its list of defaulters.

16. The plaintiff stated that the 1st defendant's report to the 2nd defendant caused him to incur economic damage because he was denied credit and a top up to a loan by two banks. That the defendants' listings of the plaintiff interfered with plaintiff's plan to purchase an apartment which would earned him a rental income of Ksh.130,000 per month.

17. That the listing of his name led to him not to obtain credit of Ksh.20,000,000 the purchase price for an apartment as well as the rental income.

18. The plaintiff while being cross examined by counsel for the 1st defendant stated that he operated an account no.800XXXX, with the 1st defendant but denied that he had an overdraft facility with 1st defendant.

19. Plaintiff confirmed that the 1st defendant wrote him a letter informing him that his account was overdrawn. He stated that he responded to that letter by making payment of Ksh.949,122.05 and that that payment was sufficient to clear the entire overdrawn amount. That he informed the 1st defendant that it had recovered an amount of Ksh.50,000 from his other account.

20. That thereafter the 1st defendant demanded payment of Kshs.45,531.20 and that was the reason the plaintiff filed a suit before the Chief Magistrate's court.

21. The plaintiff referred to his letter dated **16th May 2011** addressed to the 2nd defendant whereby he informed the 2nd defendant that he was not indebted to the 1st defendant.

22. The plaintiff stated that he was unaware that 1st defendant had forwarded his name to the 2nd defendant and only realized when the CFC Bank wrote him an email on **3rd June 2011** where it informed him it had declined to give him credit because of his listing as a defaulter. The CFC Bank forwarded to the plaintiff a screen short of his listing as defaulter.

23. That it was later the 1st defendant acknowledged that the plaintiff had been listed as a defaulter in error.

24. That as a consequence of him being listed as a defaulter he was declined credit by CFC Bank and was therefore unable to purchase an apartment. In response to further questioning the plaintiff stated that he had not entered into a written contract with the vendor.

25. Plaintiff stated that after he was listed as a defaulter he was embarrassed amongst his peers and the banks. In this regard he stated that the credit information was available in a public portal of the 2nd defendant.

26. On being cross examined by the counsel for the 2nd defendant the plaintiff stated that he was not in default when the 1st defendant reported him as a defaulter because he forwarded payment to the 1st defendant by his letter dated 19th July 2010.

2ND DEFENDANT'S CASE AGAINST 1ST DEFENDANT

27. The evidence of 2nd defendant's claim for indemnity against 1st defendant was led by the witness **Beatrice Mwangi**.

28. She stated that the 2nd defendant is a Credit Reference Bureau Licensed under the Banking (Credit Reference Bureau) Regulations 2008. That it is an organization authorized by the Central Bank of Kenya to collect and share both positive and negative credit information from subscribing institutions which are Banks and Micro-finance institutions.

29. That the 2nd defendant maintains a database through which institutions licensed under the Banking Act share prescribed credit information relating to their customers.

30. That the information submitted by the Banks is usually in a standard form and the 2nd defendant does not retain the books of account in relation to the many entries made. That such a requirement would be practically impossible.

31. In respect to this suit the witness stated that on **6th May 2011** the 1st defendant sent to the 2nd defendant an amended notice pursuant to

Regulation 28(5) of Regulations 2008. That notice required the 2nd defendant to delist information previously supplied in relation to the plaintiff. Further to that Notice the 2nd defendant proceeded to delist the plaintiff on **7th May 2011** and issued Notice of change to CFC Bank and Kenya Commercial Bank Limited.

32. That Regulation 28(3) (4) and (5) of the Regulation 2008 places a duty on the institutions licensed under the Banking Act when providing information to reference bureaus. That duty she referred to is as follows:

i) To provide accurate information to credit reference bureaus, 1st Defendant included;

ii) To update all submitted customer information on a monthly basis or within such earlier time as an update is necessary;

iii) To give an amendment notice when seeking to delete any inaccurate information and to replace the deleted information with correct information whenever such institutions become aware that the information previously submitted is inaccurate.

33. That in view of the above obligation if the information concerning the plaintiff, provided by the 1st defendant, was inaccurate, the resulting loss to the plaintiff would be the sole responsibility of the 1st defendant.

ANALYSIS AND DETERMINATION

34. The plaintiff's case is fairly straight forward but it is complicated by the very convoluted plaint filed on behalf of the plaintiff.

35. Simplistically what the plaintiff's plaint brings out is a claim for breach of duty in respect to both defendants; a claim for defamation; and a claim for financial loss, again, against both defendants.

36. The evidence the plaintiff relies upon to prove those claims is set out above but I will attempt to bring out the salient points hereunder.

37. The 1st defendant by letter dated **16th June 2010** made a demand to the plaintiff for the plaintiff to settle Kshs.999,522.05 overdrawn in the plaintiff's account no.800XXXX.

38. The plaintiff by his letter dated **19th July 2010** forwarded to the 1st defendant a cheque for Ksh.949,122.05 to pay that overdrawn amount. In that letter the plaintiff informed the 1st defendant that he had deducted an amount of Ksh.50,400 which the 1st defendant had debited from his other account.

39. In that regard the plaintiff provided a Bank statement of his account No. 1404328 where there is a withdrawal of Kshs.49,710.10 on **28th June 2010**. The description relating to that withdrawal is **"Transfer Order Loan Recovery"**.

40. The plaintiff also provided a bank statement of that same account which shows that as at **31st August 2010** the plaintiff had zero credit balance.

41. The 1st defendant wrote to the plaintiff two letters on **28th September 2010**.

42. One of those letters is in regard to the account No.075140XXXX. The title of that letter is **"WARNING BALANCE OF YOUR ACCOUNT IS STILL OUT OF ORDER."** The 1st defendant by that letter demanded from the plaintiff settlement of Kshs.45,531.20 and stated that if that payment was not received within 14 days from the date of the letter the 1st defendant would assign the debt due to debt management company and would disclose information to the credit reference agency.

43. The second letter of the same date, was in regard to account No.094800XXXX. The letter was entitled **"NOTICE OF INTENTION TO LIST YOUR DEFAULT INFORMATION WITH THE CREDIT REFERENCE BUREAU"**.

44. Without assigning any amount due in that account the 1st defendant wrote in that letter that the plaintiff had failed to regularize his loan that was seriously in arrears. The letter gave the plaintiff 7 days notice to regularize the account failing which the 1st defendant would give personal information of the plaintiff to the Credit Reference Bureau. The 1st defendant by that letter further stated:

"Case be advised that your information with the CRB is used by employers institutions including banks in assessing applications for credit by you, members of your household, joint account holders and member of their households and for debt tracing and fraud prevention purposes. In addition, having your information listed with the CRB may affect your ability to maintain existing facilities with other credit issuers and lending institutions including banks. Therefore, should you refuse to heed to this notification you will be held yourself responsible for the consequences arising there from.

We are reserving the right to take further action against you including legal action at your own costs and risk. We trust that this action shall not be necessary and look forward to receiving your co-operation in this matter. [If you have settled your account since the issue date of this letter, we thank you for your continued business]"

45. The plaintiff, as stated above, filed an action before the Chief Magistrate's Court seeking to restrain the 1st defendant from giving his information to the credit bureau. The interlocutory application before that Court, seeking these restraining orders, was filed by the plaintiff

on 26th November 2010.

46. The replying affidavit of **Allan Onyango** sworn on behalf of the 1st response to that interlocutory application admitted that the 1st defendant's threat to report the plaintiff to the credit bureau was in error. This is what is deponed:

i. **THAT** I know of my own knowledge that the defendant has not listed the plaintiff's name with any Credit Reference Bureau as alleged and admits that the demand letter sent on the 28th day of September 2010 was done so erroneously.

ii. **THAT** nevertheless the Defendant had stated in its said letter that if the plaintiff had cleared his debt prior to the said letter, then he was to ignore the same. At most the Plaintiff should have called upon the Defendant's offices and/or written to the Defendant for an explanation to the issuance of the demand prior to filing suit.

iii. **THAT** I know of my own knowledge that the listing of debtors with the Credit Reference Bureau is a standard procedure followed by all banks and financial institutions therefore it is not motivated by malice and/or any ill intent. In any event, the plaintiff has not substantiated and/or supplied any intent. In any event, the plaintiff has not substantiated and/or supplied any or proper particulars of the alleged malice and/or in intent in circumstances the same are therefore denied.

iv. **THAT** in the circumstances this application is premature, frivolous & vexatious and the Plaintiff/Applicant is not deserving of the Orders sought as he has not demonstrated the harm and/or irreparable loss he will suffer as it is also evident that since the demand was issued the Defendant discovered that the same was sent in error and that is why to date it has not acted as stated therein.

v. **THAT** I therefore swear this Affidavit in response to the Plaintiff's application dated 26th November 2010 which I ask this honourable Court to dismiss with costs.

47. The plaintiff in his testimony stated that he was committed to purchase an apartment No. B2 on **L.R. No.1/500 Hurlingham** known as **Starwood Apartment**. To that end he sought credit from CFC Stanbic Bank, Naivasha branch for Kshs.20 Million. He stated that he needed that credit facility to enable purchase that apartment.

48. The bank manager of CFC wrote to him an email on 3rd June 2011 whereby he stated thus:

"This mail serves to advise you that we were unable to progress your facility further due to your credit History on the Credit Reference Bureau. Please find attached the CRB report as per your request."

49. That attached Credit Bureau report to that email, reveals that the listing of the plaintiff in the Credit Bureau register was on 21st February 2011. It was in respect to plaintiff's bank account 094800XXXX. The amount reflected on that report as due was Kshs.44,814.05.

50. The 1st defendant on 4th May 2011 sent a notice to the 2nd defendant which was in the following terms:

Without Prejudice

NOTICE OF AMENDMENT ISSUED PURSUANT TO REGULATIN 28(5) of the banking regulations (credit reference bureau): 2008

OUR LETTER DATED 2/21/2011 SUBMITTING THE ATTACHED CUSTOMER'S INFORMATION TO CREDIT REFERENCE BUREAU AFRICA LTD FOR LISTING, REFERS.

IT HAS SINCE COME TO OUR ATTENTION THAT THE INFORMATION SUBMITTED TO YOU FOR LISTING WAS INACCURATE AS AT THE TIME IT WAS PROVIDED.

CHRISTOPHER ORINA KENYARIRI ID NO. [PARTICULARS WITHHELD] WAS LISTED IN ERROR.

YOU ARE HEREBY ADVISED TO DELETE THE INACCURATE INFORMATION AND REPLACE IT WITH THE FOLLOWING INFORMATION:

CUSTOMERS HAVE NOT BAD DEBT WITH BARCLAYS BANK OF KENYA LTD. DELETE COMPLETELY

51. The 2nd defendant by letter dated 12th May 2011 wrote to Kenya Commercial Bank Limited and CFC Stanbic Bank Limited in the following terms:

"NOTICE OF CHANGE

WITHOUT PREJUDICE

RE: CHRISTOPHER ORINA KENYARIRI (LISTING REF: 0948003XXXX)

We are in receipt on an amendment notice regarding the above customer, whose information was submitted to us for listing, and based on which information; you had obtained a credit report.

Please note that there has been a significant change in the customer's credit information file and you may obtain an updated credit report.

This notice is issued pursuant to the provisions of regulation 20(12) of the Banking (CRB) Regulations 2008 and you are hereby advised to take note of the changes."

52. In the affidavit of **Allan Onyango** sworn on **19th January 2011** the 1st defendant acknowledged that there was not basis of it reporting the plaintiff to the credit bureau. However by the credit Reference report sent to the plaintiff by CFC Bank it became clear that on **21st February 2011** the 1st defendant forwarded information of the alleged plaintiff's default to the 2nd defendant.

53. It is clear from the above scenario that the 1st defendant, since it later acknowledged its error, was negligent in forwarding the plaintiff's name to the 2nd defendant.

54. The 1st defendant owed a duty of care not to carelessly forward the plaintiff's name to the 2nd defendant when the plaintiff was not indebted to the 1st defendant.

55. I wish to dissuade the defendants in their submissions that the 1st defendant was entitled to forward the plaintiff's name to the Credit Bureau because, as the defendants submitted, the plaintiff had an outstanding debt with the plaintiff. There was simply no evidence before Court that the plaintiff was indebted as alleged. The 1st defendant is in any case bound by the documents before Court which show its acknowledgement of its error in forwarding the plaintiff's name.

56. I also reject the defendant's submission that the plaintiff's present suit was premature in view of the mechanism of the reported party writing to inform the credit bureau when the information with the bureau had an error. This mechanism is in regulation 20 of the Regulation 2008.

57. In my view, that mechanism is not a bar to a party seeking legal redress when such party is aggrieved.

58. Although the plaintiff, in my view, has proved that the 1st defendant was negligent he has not proved malice, impunity or contempt. There was however recklessness on the part of the 1st defendant, otherwise how can one explain why after barely a month of the 1st defendant giving assurance it would not report the plaintiff to the credit bureau it did exactly that, one month later.

59. The plaintiff has in my view proved that his character was defamed. This is because CFC Bank and Kenya Commercial Bank which are his bankers accessed the credit bureau information. As a consequence of that access the plaintiff was denied credit by CFC Bank.

60. In this regard I rely on the decision of **Miguna Miguna V Standard Group Limited & 4 others (2017) eKLR** where the Court of Appeal stated thus:

"The law of defamation, or, more accurately, the law of libel and slander, is concerned with the protection of reputation: 'as a general rule, English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbor. It supplies a temporal sanction...' Defamation protects a person's reputation that is the estimation in which he is held by other; it does not protect a person's opinion of himself nor his character. The law recognizes in every man a right to have the estimation in which he stands in the opinion of others unaffected by false statements to his discredit 'and it affords redress against those who speak such defamatory falsehoods....'".

That Court proceeded to cite the case **SMW v ZWM (2015) eKLR** viz:

"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided".

61. The plaintiff however failed to prove, on a balance of probability, the loss of capital gain that is the loss purchase of the apartment. Although the plaintiff stated that he had not obtained a sale agreement because he wished to first secure the credit from CFC Bank, I believe that in a transaction of purchase of immovable property there would be some correspondence, such as letter of offer, which could be written subject to contract.

62. The plaintiff did not provide any evidential proof of his purchase of the apartment. That claim including the claim for loss of bargain and loss of income therefore fail.

63. The plaintiff was however denied credit by CFC because of the 1st defendant's negligence.

64. The 2nd defendant adequately acquitted itself from blame when it adduced evidence that the information of its listing of the plaintiff was supplied by the 1st defendant and any error must solely be borne by the 1st defendant.

65. The 1st defendant did not rebutt that evidence.

66. The plaintiff shall obtain costs of the suit since he has substantially succeeded in his claim. Since the 2nd defendant has been found to have no fault its costs will be borne by the 1st defendant.

67. In the end the finding of this Court is that there shall be judgment for **Christopher Orina Kenyariri** against **Barclays Bank of Kenya Ltd** as follows:

a) General damages in negligence Kshs.3 million with interest at Court rate from the date of judgment until payment in full.

b) Damages in defamation Kshs.1 million with interest at Court rate from the date of judgment until payment in full. Costs of the suit.

68. **Barclays Bank of Kenya Ltd** shall pay the costs of **Credit Reference Bureau Africa Ltd**.

DATED, SIGNED and DELIVERED at NAIROBI this 29th day of November, 2018.

MARY KASANGO

JUDGE

Judgment read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE