



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.181 OF 2014

RAPHAEL KARUU GITAU.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD..... DEFENDANT

JUDGEMENT

1. Raphael Karuu Gitau (**the Plaintiff**) brings an action for libel against his former Bank, Barclays Bank of Kenya Limited (**the Defendant Bank**).
2. In a lengthy and detailed Plaint dated 30th April, 2014 and filed on 6th May, 2014, the Plaintiff sets out his action. This Court gives an abridged version thereof.
3. It is averred that for about 7-8 years the Plaintiff was a customer of the Defendant Bank as a Prestige Member. Something about the conduct of the Bank towards him disappointed the Plaintiff and on 28th March, 2006, the Plaintiff withdrew his membership from the business club and returned the membership card No.140045167. Notwithstanding this the Bank continued to levy charges on the Plaintiff's Account.
3. On 18th September, 2006 the Plaintiff wrote to the Defendant Bank and reiterated the contents of the letter of 28th March 2006 and in addition expressed his willingness to close his other accounts being Prestige Account No.[particulars withheld] and current Account No.[particulars withheld]. He then returned the Cheque Book and ATM cards for the two Accounts. On demand, the Defendant refunded to the Plaintiff Business Club Membership fee for 6 months of Ksh.6,600/=.
4. On 19th January 2007, the Defendant Bank started to demand monies from the Plaintiff and threatened to take recovery action. Following through that threat, Collection Africa Limited (a Debt Collector), on instruction of the Bank, demanded a sum on Ksh.46,675,75 from the Plaintiff and threatened to report the Plaintiff to a Credit Reference Agency if he did not oblige to the demand. The Plaintiff maintains that no money was owing and so the publication was false, malicious and intended to embarrass him.
5. That the Defendant did infact have the Plaintiff listed by a Credit Reference Bureau as a bad debtor. It is the Plaintiff's averment that the letters by /or instigated by the Defendant Bank are libelous of the Plaintiff's character and reputation and are actionable per se. The particulars of imputations and innuendo are set out in paragraph 16 of the Plaint.
6. In paragraph 17 of the same pleadings the Plaintiff avers (and reproduces a communication) that his loan application for Kshs.5,000,000/= to Equity was declined because of the negative listing with the

Credit Reference Bureau. This happened again on 17th January 2014 when NIC Bank declined to grant the Plaintiff Financial Accommodation of Kshs.2,600,000/=.

7. The Plaintiff's contention is that the Defendant's actions were motivated by ill will and malice, and without regard to the consequences thereof or incidental thereto. The Plaintiff's claim is for the following reliefs:-

- a) General Damages for libel**
- b) Loss of business worth Kshs.7,600,000/=.**
- c) Punitive and Exemplary damages.**
- d) Aggravated damages.**
- e) Costs of this suit.**
- f) Interest at Court rates on items (a), (b),(c) above at Court rates.**
- g) Orders directing the Defendant to tender an appropriate apology to the Plaintiff.**
- h) Any other or further relief that this Honourable Court may deem fit and just to grant.**

9. In a statement of Defence filed on 19th June, 2014, the Defendant first sets up a Defence that the Plaintiff's claim is time barred, under the Provisions of Section 4(2) of The Limitation of Action Act Cap 22 Laws of Kenya.

10. The Defendant then avers that it is Standard Banking Practice and Procedure that where a Customer's Account has been unsatisfactorily operated, the identified profit and loss Account is debited with the amount owing from the customer and the customer's loan balance account is credited with a corresponding entry. Such an Account may then be closed at the Branch office and matter referred to the Recoveries Unit for purposes of recovery.

11. The Defendant further avers that it is Standard Practice and as guided by the Bank (Credit Reference Bureau) Regulations 2008 to notify all its defaulting customers that they would be adversely reported to a Credit Reference Bureau (CRB). It is also the position of the Plaintiffs that any Reference to a CRB is governed by confidentiality rules and any Credit Reports from the Bureau is obtained by prospective lenders or Credit providers only when they have permissible reasons as defined by law.

12. Each side called one witness who generally repeated and highlighted what was contained in their respective pleadings. It would be needless to rehash that part of the testimony. However some additional information emerged.

13. In his testimony to Court, the Plaintiff stated that the Bank acted on his instructions and closed his prestige Account in November 2006. He also told Court that he had another Account being A/C No. [particulars withheld] which enabled him to be a Club member. In answer to questions in cross-examination, the Plaintiff informed Court that he had two Standing order with Old Mutual for two (2) Life Insurance Covers. Although he could remember that one order was for about Ksh.10,000/-, he could not remember the exact amount for the other order but was certain that it was less than Kshs.10,000/=. But it was also his testimony that when he gave instructions to close the Account he had stopped the Old Mutual Orders.

14. The Plaintiff further explained that he filed the forms for the Standing Orders at Old Mutual. That he instructed Old Mutual to get payment from the Defendant Bank. That he knew the effect of a Standing order and that if there was no money in the Account the Standing order would not be paid. However the faulted Order would attract a penalty. The Plaintiff told Court that the balance of Kshs.45,275/= was on

Account of charges from the Standing orders. In re-examination he contended that he did not expect the Bank to transact with Old Mutual.

15. On the part of the Bank, one Alan Ochieng Odhiambo testified. On the question of the Standing orders by Old Mutual, the witness stated that the Bank got instructions for the order from the Insurance after the Customer signed the instructions. That there was an agreement with the Insurance to execute standing orders brought to the Bank. The witness contended that the Account could not be closed with the standing orders still subsisting and that it was the Customer who should have cancelled the Standing orders.

16. The witness further told Court that the Account was closed in December 2014 after the Debt was written off. In cross-examination, the witness conceded that the Bank did not communicate the reason for not closing the Account to the customer. He also stated that;

“If Old Mutual delayed in stopping standing order, its Old Mutual to blame”.

17. Only the Plaintiff proposed the issues to be determined. From that proposal, the pleadings and the evidence before Court the following are the issues that crystallize for determination.

(i) Is the Plaintiff’s claim time-barred?

(ii) If not, was the Defendant entitled to make a negative report of the Plaintiff to the Credit Reference Bureau?

(iii) If the answer to (ii) is in the negative, did that conduct by the Plaintiff amount to libel, actionable per se.

(iv) If the answer to (ii) is in the positive, what loss did the Plaintiff suffer?

(v) What is the appropriate order on costs?

18. The first issue invites a short answer. It is not in contention that the Plaintiff’s cause of action is founded on libel. It would also seem that the Plaintiff’s chief grievance, perhaps the only grievance, was the negative communication by the Defendant to CRB which depicted the Plaintiff as a defaulter and the negative impact it had on his relationship with other Banks. The evidence on record is that it was only on 28th January 2014 that the Plaintiff received communication from Trans Union (an agent of the Bank) that the Bank had removed the adverse report with the CRB.

19. If it were to be accepted that the CRB Report was libelous, then it would seem that the defamation persisted upto the time of removal. The only evidence of removal came from the Bank and was in a communication of 28th January, 2014 and so the Plaintiff is entitled to insist that the wrong on him persisted upon 28th January 2014. Having brought this action on 6th May 2014, then it cannot have been caught up with the statute of Limitations, as the Provisions of Section 4(2) of the Limitation of Action Act provide:-

“2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:

Provided that an action for libel or slander may not be brought after the end of twelve months from such date”.

20. The woes for the Plaintiff began when on 18th March, 2011, the Bank made a negative report to Credit Reference Bureau Africa Ltd, a Credit Reference Bureau. In a notification to the Plaintiff of 24th March 2011 the Bank stated that it was mandated to share that information under the provisions of the Banking (Credit Reference Bureau) legislation, 2008.

21. Then, and at the hearing, the Bank justified the giving of the negative information on the basis that at the material time the Plaintiff had a non-performing debt with the Bank. In the letter of 24th March 2011 that debt was said to be Kshs.51,159.95 in account No. [particulars withheld] (previously A/C No. [particulars withheld]).

22. It is now common ground that the Debit Balance arose from the charges that the Standing Orders in the Plaintiffs Account attracted. What is not agreed is whether the Standing Orders ought to have been still existing at all. The position of the Plaintiff is that upon closing his A/C No. [particulars withheld], the Standing Orders ceased to operate. The Defendant's witness on the other had was emphatic that,

“The Account could not be closed with Standing Order”.

23. The starting point in resolving this all important question is the letter of the Plaintiff communicating the closure of the Account. This is the letter of 18th September 2006 which is reproduced below:-

Raphael K. Gitau

P.O. Box 5445-0200

NAIROBI

18TH September, 2006

The Manager (Business)

Barclays Bank (k) Ltd

WESTLANDS BRANCH

NAIROBI

Dear Sir,

RE: BUSINESS CLUB MEMBERSHIP NO.140045167

Further to my letter dated 18th March 2006 addressed to Ms. Carolyn Onyango your business Development Manager and copied to yourself, I wish to say that I have not received any reply, and that you're continuing charging to my account the membership fee for the Business Club.

In my letter of 28th March 2006 it was to serve you as a withdrawal of the membership and thus stop you from deducting the membership fee immediately.

In a new development I'm willing also to close my accounts with you. My prestige Account No.[particulars withheld] and my Current A/C No. [particulars withheld]. I do attach herewith cheque book containing cheque No.100546 also enclosed are (ATM) cards for the both Accounts.

Please issue me with a cheque for the refund of Business Club Membership for six months Kshs.6,600/=.

Thank you.

Yours faithfully

Signed

RAPHAEL KARUU GITAU

CC. CHEQUE BOOK ATM CARD A/C No. [particulars withheld], [particulars withheld]

24. Whilst the Court observes that the language used by the Plaintiff was not unequivocal as he stated that he was “willing” to close his Account, it does seem that the Bank understood it as a communication to close the Account. It is however the Bank’s position that the Account could not be closed because two standing Orders in favour of Old Mutual were still alive. That then leads to the next question. Was the communication from the Plaintiff to the Bank to close the Account sufficient to countermand the Standing Orders or was this to be done separately?

What is a Standing Order and how is it to be cancelled? Neither the Plaintiff nor the Defendant sought to explain the nature of a Standing Order. On the part of the Court it found the following explanation in Ellingers Modern Banking Law 5th Edition at page 562:-

“On receipt of the payer’s payment order, the payer’s bank will debit his account, unless the payer has provided his bank with some other means of reimbursement, and credit the payee’s account where it is held at the same bank, or, where the payee’s account is held at another bank, forward a payment order to the payee’s bank, which will then credit the payee’s account.”

26. It is clear that the person who gives instructions for the creation of a Standing Order is the Customer. The Standing Order can be cancelled by the Customer countermanding the instructions or if the operation thereof is unsatisfactory (say where the Standing Order repeatedly becomes due without sufficient funds in the customer’s Account or arrangements to settle), the Bank may stop it. The explanation given by the Bank’s witness as to how a Standing Order ceases is therefore not entirely correct. Mr. Odhiambo had stated,

“The Customer should have cancelled same with Old Mutual who then would inform Bank. No instructions to stop received from Old Mutual”.

27. If a Standing Order is cancellable by the customer countermanding the Instructions to the Bank, then was the Plaintiff’s letter closing the Account sufficient or did he need to give separate instructions? The answer to the question appears to have been given by the Bank’s own Advocates in their submissions of 24th August 2016.

28. In those submissions the Advocates stated,

‘In this particular case, after the Plaintiff’s details were forwarded to the Credit Reference Bureau, the Plaintiff through his lawyer wrote to the bank explaining that he had closed his account. The Defendant conducted investigations and established that indeed that was the position. This was followed by the Defendant retracting its statement immediately. The Defendant actually went further to refund the Plaintiff any monies he may have been charged by the Defendant as a result thereof. The Defendant therefore submits that the Plaintiff cannot bring a successful suit under libel as the Defendant made amends for the harm done at a time when it was not clear that the Plaintiff was not a defaulter’. *(my emphasis)*

29. The Bank has accepted that upon receiving the ‘closure’ letter, it ought to have closed the Account and should have not levied further charges to the Plaintiff. This is an admission that the letter would have sufficiently served as a countermand to the Standing Orders.

30. Having come to that answer, then it was wrong for the Bank to give negative information to the CRB.

31. The consequences of that information is now all to clear. Because of the adverse report, Equity turned down the Plaintiff’s application for a loan of Kshs. 5,000,000/= and so did NIC Bank decline a facility for

Kshs. 2.6 million.

32. The following passage from the Judgment of Odunga J. in **Phineahs Nyagah Vs. Gitobu Imanyara** [2013] eKLR is useful in the next part of this Decision. In it the good Judge said:-

“Defamation is a tort and is defined as the 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 statements is one which has tendency to injure the reputation of the person to whom it refers by lowering him in estimation of the right thinking members of society generally and in particular to cause him to be regarded with feeling of hatred, contempt, ridicule, fear, dislike and disesteem and typical examples are an attack upon the moral character of the Plaintiff attributing to him any form of disgraceful conduct such crime, dishonesty, cruelty and so on. Publication is the communication of the words to at least one other person other than the person defamed. Publication to the Plaintiff alone is not enough because defamation is an injury to one’s reputation and reputation is what other people think of a man and not his own opinion of himself. An action for defamation is essentially an action to compensate a person for the harm done to his reputation. Defamation is not about publication of falsehoods against a person; it is necessary to show that the published falsehood disparaged the reputation of the plaintiff or tended to lower him in the estimation of right thinking members of society generally. An injurious falsehood may not necessarily be an attack on the Plaintiff’s reputation. The words must be maliciously published and malice can be inferred form a deliberate or reckless or even negligently ignoring of facts”.(My emphasis)

33. The responsibility of a Bank under the Banking (Credit Reference Bureau Regulations 2009 (now replaced with Banking Credit Reference Regulations, 2014) is to forward accurate information to a Credit Reference Bureau. In the matter at hand, the negative information forwarded by the Bank of and concerning the Plaintiff was certainly inaccurate and the effect of that information was that two Banks namely Equity and NIC Bank declined to advance some Credit facilities to the Plaintiff. Although representatives of these two Banks were not called to give evidence, it can be firmly assumed that one reason why they turned down the Plaintiff’s request is because they believed he was not Credit worthy as duly informed by the Credit Reference Bureau. The negative information had caused third parties to disesteem the Credit worthiness of the Plaintiff.

34. Yet if the words were not maliciously published then the Tort of defamation would not be complete.

35. On 19th January 2007, the Bank wrote a formal Demand to the Plaintiff for repayment of Kshs.40,267.20/=. This was followed by another Demand dated 22nd February 2007 from Collection Africa Limited, a Debt Collecting Firm, on behalf of the Defendant Bank.

36. The evidence of the Plaintiff is that on receiving these Demands and statements he visited the Bank and informed its Managers that he had closed his account and that the Bank should stop sending Statements and Demands. There is then the letter of 28th September 2010 from the Plaintiff in which he states:-

28th September, 2010

The Complaint Manager

Barclays Bank (k) Ltd

Westlands Branch

P.O. Box 14403

NAIROBI

RE: A/C NO. [particulars withheld]

I refer to the above account and wish to remind you that this account was closed on 19th September 2006.

A copy of the letter regarding this matter is hereby enclosed for reference if you have lost your copy.

Please stop sending me statements.

Thank you

Regards

Signed

Raphael K. Gitau

37. To the complaint raised by the Plaintiff, the Bank wrote back on 11th October 2010 assuring him that the complaint was being investigated and the matter would be resolved soon. That issue was not resolved, and notwithstanding the Assurance made by the Bank, it proceeded to forward an adverse Report to the Credit Reference Bureau Africa Ltd on 18th March 2011. The Bank is expected to know, and would have known, of the damning effects the Report would have had on the Plaintiff's Credit reputation. Yet it went ahead to make it notwithstanding that the Plaintiff had on several occasions alerted it that he did not owe it money and it (the Bank) had promised to investigate the matter. As it later turned out that the Demands were erroneous, this Court must find that the Bank was reckless when it forwarded the adverse Report to the CRB and the Report was therefore malicious.

38. But I must add this. Malice will not be inferred merely because of an institution sending 'an erroneous' Report to a CRB. It is the contemplation of the Banking Credit Reference Bureau Regulation, 2008 (and also Bank Credit Reference Bureau Regulation 2013 which replaced the 2008 Regulations) that erroneous/incorrect adverse Reports will from time to time be sent to a CRB. Perhaps an acknowledgement that to err is human! However, Regulation 20 (and now 35) gives an avenue for correction of an error. Regulations 20(5), (6), (7), (8), (9), (10), (11), (12) provides:-

(5) Where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed.

(6) Within five working days of being informed that information in a customers' credit report is disputed, the Bureau shall-

(a) attach a note to the credit information report, warning that the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and

(b) give the institution that supplied the information a notice of dispute requesting confirmation from the institution as to the accuracy of the information.

(7) Within fifteen working days, the Bureau shall conduct a reasonable investigation, based on all relevant information provided by the customer, and contacting the furnisher of the information as necessary.

(8) Where an Institution receives a notice of dispute from the Bureau it shall, within ten working days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.

(9) Where the investigation reveals an error, the Bureau shall promptly remedy the error.

(10) If the Bureau does not complete its investigation within fifteen days, it shall delete the disputed or correct information as requested by the customer.

(11) If the Bureau later completes its investigation, it may reinsert or revise disputed information based on the results of such investigation.

(12) Upon receipt of a notice of resolution or an amendment notice from an institution the Bureau shall, within five working days of such receipt, send a notice of change to any subscriber that has in the previous twelve months obtained a credit information report from the Bureau containing the incorrect information.

39. In respect to the Responsibility of an Institution Regulation 28 of the 2008 Regulations was critically important(similar provisions are retained in the 2013 Regulations). Regulation 28 of the previous Regulations provide:-

(1). Institutions shall be required to –

(a) notify each customer of the name and address of the Bureaus to which the customer's information has been submitted under these Regulations, within thirty days of the first listing of the customers' information with the Bureaus;

(b) issue an adverse action notice to a customer against whom a decision has been taken or determination made, in whole or in part, that is adverse to the interests of the customer based on information obtained from a Bureau;

(c) the adverse action notice shall be provided at the time the adverse decision or determination is communicated to the customer and shall notify the customer-

(i) that customer information played a role in the decision;

(ii) the name, address and telephone number of the Bureau that provided the customer information;

(iii) the customer's right to a free copy of the information provided by the Bureau, and

(iv) the customer's right to dispute such information with the bureau and, if erroneous or outdated, have it corrected.

(2) Institutions shall be deemed to have notified the customer if they sent the notifications issued subsequent to sub-regulation (1) to the customer's last known address by registered mail or by certificate of posting.

(3) Institutions shall be responsible for providing accurate information to Bureaus.

14(3) is (4) Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations.

(5) Where an institution has provided customer information to the bureau and subsequently

becomes aware that the information was inaccurate at the time of it was provided, the institution will within five working days from the day the Institution becomes aware of the inaccuracy, give the Bureau an amendment notice instructing it to delete the inaccurate information and replace with the correct Bureaus.

(6) Institutions shall ensure that the customer information furnished pursuant to regulation provided to all licensed Bureaus.

The view of this Court is that an Institution which innocently, and without malice, forwards an erroneous negative Report to a CRB should not be condemned and found culpable in Tort if it duly informs the customer of the adverse Report as required by Regulation 28 (now Regulation 50) and if upon, notification of the error, corrects it.

40. Here however, the Bank had been notified, on several occasions, that the Demand to the Plaintiff was erroneous and yet proceeded to make an erroneous Report to the CRB without investigating the Plaintiff's complaint. This was compounded because the Bank proceeded even after giving an assurance to the Plaintiff that it was looking into his complaint.

41. The next task is to consider the Damages awardable. The Plaintiff seeks the following:-

- (i) General Damages for libel
- (ii) Loss of business worth Kshs.7,600,000/=
- (iii) Punitive and exemplary Damages
- (v) Aggravated Damage

42. Straight away, this Court finds no ground for awarding Punitive, Exemplary and aggravated Damages. The Defendant attempted to make amends before the filing of the suit. It did so by withdrawing its negative report to the CRB after establishing that it was based on erroneous report. To that extent it mitigated its earlier misconduct.

43. A claim for Kshs.7,600,000/? This relates to the missed facilities from Equity and NIC Bank that are directly attributable to the negative report to the CRB. The Court is unable to make an award for this sum for obvious reasons. The Plaintiff did not tell Court how he intended to apply the money and the projected returns. Not all loans turn into a profit and fortune! The stories of misery brought about by loans are all too common. The claim is speculative and certainly unproved!

44. Libel is a tort that is actionable per see. On the appropriate damages this Court has considered the authorities cited by the Plaintiff and which included **Mwangi Kiunjuri Vs. Wangethi Mwangi & 2 others** [2008] eKLR. In my view an award of Kshs.1,000,000/=(Kenya shillings one million) is sufficient. The Plaintiff was a businessman who was found credible enough to deserve the status of Prestige Membership. Yet on the other hand, the only evidence availed to Court was that he sought a facility of about Kshs.5,000,000/- to 'boost' his business. An award of Kshs.1,000,000/= would therefore seem sufficient. In any event his financially esteem may have been restored now that the negative report has been lifted.

45. The Plaintiff will also have costs of the suit.

Dated, Signed and Delivered in Court at Nairobi this 30th day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

N/a for Plaintiff

Mugacha for Nduta for Defendant

Alex - Court Clerk