



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

**CIVIL CASE NO. 361 OF 2013**

**ANTHONY KINYUA MWANIKI.....1<sup>ST</sup> PLAINTIFF**

**MIUJIZA INVESTMENTS LIMITED.....2<sup>ND</sup> PLAINTIFF**

**- V E R S U S -**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**CREDIT REFERENCE BUREAU**

**AFRICA LTD t/a TRANSUNION .....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. Anthony Kinyua Mwaniki and Miujiza Investments Ltd, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs herein filed an action vide the plaint dated 28<sup>th</sup> August 2013 against the Kenya Commercial Bank Ltd and Credit Reference Bureau Africa Ltd t/a Transunion, the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein. In the aforesaid plaint, the plaintiffs sought for general damages for defamation, punitive damages and general damages for negligence together with costs and interest. The plaintiffs accused the defendants for publishing an inaccurate information in breach of statutory duties they owed to the 1<sup>st</sup> plaintiff which resulted in loss of business and anticipated profits. The loss of business and anticipated profits is alleged to be as a result of the inaccurate and unlawful listing of the 1<sup>st</sup> plaintiff on the records of the 2<sup>nd</sup> defendant on the basis of information provided for by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant denied the plaintiffs' claim and beseeched this court to have the suit dismissed with costs. It denied ever forwarding any information concerning the 1<sup>st</sup> plaintiff's listing by the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant maintained that it was merely discharging its statutory duties as enshrined in the Banking Act (Credit Reference Bureau (CRB), 2008 in listing the 1<sup>st</sup> plaintiff's credit information and as such it should not be held liable for the actions of the 1<sup>st</sup> defendant.

2. It is the plaintiff's case that the 1<sup>st</sup> defendant negligently, maliciously and falsely reported to the Credit Reference Bureau (C.R.B), the 2<sup>nd</sup> defendant herein, that he was a bad debtor in the month of September 2011 and without informing him of the listing as required by law. The 1<sup>st</sup> plaintiff stated that he only came to know of the listing in the month of March 2013 while he was pursuing a loan facility from Cooperative Bank of Kenya Ltd. The 1<sup>st</sup> plaintiff further stated that the 2<sup>nd</sup> defendant published in its data base and disseminated the listing which was inaccurate even after he informed it of the inaccuracy. The 1<sup>st</sup> plaintiff further stated that the 2<sup>nd</sup> defendant never updated the information from the date of

listing to the date when he learnt to the erroneous listing while he continued to faithfully repay his loan with the Kenya Commercial Bank Ltd. The 1<sup>st</sup> plaintiff stated that the listing tarnished his name and diminished his creditworthiness as well as the credit worthiness of his associated business, the 2<sup>nd</sup> plaintiff to other financial institutions which use the information on listing to make prudent lending decisions. The 2<sup>nd</sup> plaintiff stated that it approached Cooperative Bank of Kenya Ltd and Barclays Bank Ltd for financial accommodation to enable it expand its business but the 2<sup>nd</sup> plaintiff's applications were denied for the reason of the 1<sup>st</sup> defendant's inaccurate listing of the 1<sup>st</sup> plaintiff, who was one of the directors of the 2<sup>nd</sup> plaintiff/ company. The 2<sup>nd</sup> plaintiff also aver that it applied for agency banking with Family Bank (Ltd) but the same was declined on account of the 1<sup>st</sup> plaintiff's inaccurate listing by the 2<sup>nd</sup> defendant.

3. It is also stated that the listing caused Cooperative Bank of Kenya Ltd and Barclays Bank Ltd to deny the 2<sup>nd</sup> plaintiff the loan facility which was already in progress for purposes of investing in the Simex Business and due to the listing the loan application by the 2<sup>nd</sup> plaintiff could not be approved. The 2<sup>nd</sup> plaintiff further averred that the action by the 2<sup>nd</sup> defendant resulted in the loss of business and anticipated profits by it and a tarnished reputation and a diminished creditworthiness on the part of the 1<sup>st</sup> plaintiff. In his evidence the 1<sup>st</sup> plaintiff (PW1) produced a bundle of documents as exhibits in evidence showing the estimated loss of the projected income from the Simex business had he been able to inject the funds from the loan facilities that were declined at ksh.4,766,389/60.

4. The 1<sup>st</sup> plaintiff testified on behalf of himself and the 2<sup>nd</sup> plaintiff.

The duo also summoned three independent witnesses to testify in support of their case. Ruth Njeri Wairimu (PW2) and Margaret Wangari Mbutu (PW3) told this court they had offered their title deeds to the 1<sup>st</sup> plaintiff to use to pledge as securities to get loans from Cooperative Bank of Kenya Ltd but they had to withdraw their offer upon learning about the 1<sup>st</sup> plaintiff's listing as a loan defaulter. Dr. Patrick Ng'ang'a (PW4) a director with Malibu Pharmacy narrated that the 1<sup>st</sup> plaintiff's former employer told this court that the pharmacy signed a check-off scheme with the 1<sup>st</sup> defendant and the vents that followed the disbursement of the loan including the penalization of the employees for not remitting their monthly instalments during the grace period of three months. PW4 also confirm that while many of his employees were affected by the accrued interest and penalties, none had been listed as defaulters by the 2<sup>nd</sup> defendant apart from the 1<sup>st</sup> plaintiff.

5. I have already stated that the defendants denied the plaintiffs claims. Kenya Commercial Bank Ltd the 1<sup>st</sup> defendant stated in its defence that although the 1<sup>st</sup> plaintiff was in arrears, it did not then or at any time thereafter submit his name to Credit Reference Bureau, the 2<sup>nd</sup> defendant for listing or at all even though it was entitled to do so. The 1<sup>st</sup> defendant's witness gave detailed evidence concerning the loans the 1<sup>st</sup> defendant advanced to the employees of Malibu Pharmacy. It is said that in the year 2008, the 1<sup>st</sup> defendant through its K.I.C.C branch introduced an unsecured personal loan on check off system to the 1<sup>st</sup> plaintiff's employer (Malibu Pharmacy) with the intention of benefitting its employees. One of the issues raised by the 1<sup>st</sup> defendant's staff who was invited to make a presentation was the grace period of the loan allowed before the payment of the first instalment which was communicated as being 3 months. The 1<sup>st</sup> plaintiff took advantage of the offer and borrowed ksh.550,000/= which amount was disbursed in July 2005. The 1<sup>st</sup> plaintiff was to repay by monthly instalments of kshs.14,302/=. The 1<sup>st</sup> plaintiff and his colleagues later learnt that they had been heavily penalised for non-payment over the grace period. They consequently approached the bank and they eventually agreed with the bank to have the accrued interest and the resultant penalties capitalized thus raising the 1<sup>st</sup> plaintiff's principal loan from ksh.550,000 to ksh.578,526/56 and the loan started to run afresh. The 1<sup>st</sup> plaintiff settled the loan fully by July 2013. The 1<sup>st</sup> defendant's witness confirmed that the 1<sup>st</sup> defendant made arrangements with the 1<sup>st</sup> plaintiff with his former colleagues to have the accrued interest and penalties capitalized. The 1<sup>st</sup> defendant stated that owing to the aforesaid arrangements, it would have been expected to communicate

with the 1<sup>st</sup> plaintiff to inform him that his employer had not remitted the instalments and seek to have him do so.

6. On its part, the 2<sup>nd</sup> defendant claimed that it merely discharged its statutory duties under the Banking Act (Credit Reference Bureau) Regulations, 2008 in listing the 1<sup>st</sup> plaintiff's credit information and as such should not be held liable for the actions of the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant further pleaded that it only published the information given to it for listing by various financial institutions, the 1<sup>st</sup> defendant included and therefore, there was no way it would have determined the accuracy or rectified the information without the 1<sup>st</sup> defendant forwarding the same to it. The 2<sup>nd</sup> defendant claimed it lawfully received the information from the 1<sup>st</sup> defendant and for this reason it filed a notice of indemnity against the 1<sup>st</sup> defendant.

7. At the close of evidence, this court invited learned counsels appearing in this matter to file and exchange written submissions. I have considered the evidence and the submissions presented by both sides. Parties to this dispute did not file the agreed issues, but they each chose to file their own individual issues. I have critically examined all the issues listed by each party and I think the following issues commend themselves for determination:

*i. Whether or not the 1<sup>st</sup> defendant listed the 1<sup>st</sup> plaintiff's information with the 2<sup>nd</sup> defendant's database?*

*ii. Whether there was default in the repayment of the loan borrowed from the 1<sup>st</sup> defendant by the 1<sup>st</sup> plaintiff?*

*iii. If the answer to (i) above is in the affirmative, whether the forwarding of the information was justifiable?*

*iv. Whether the publication was false and actuated by malice.*

*v. Whether or not the defendants owed the plaintiffs any statutory duties.*

*vi. Whether or not the defendants if any, acted negligently in the performance of their statutory duties leading to the loss of business and anticipated profits.*

*vii. Whether the 2<sup>nd</sup> defendant is entitled to indemnity from the 1<sup>st</sup> defendant.*

*viii. Whether the plaintiffs are entitled to the remedies sought in the suit?*

8. On the first issue as to whether or not the first defendant listed the 1<sup>st</sup> plaintiff's information with the 2<sup>nd</sup> defendant, the answer can easily be obtained by considering the evidence presented by the plaintiff's witnesses and those of the 2<sup>nd</sup> defendant. Though the 1<sup>st</sup> defendant denied forwarding the 1<sup>st</sup> plaintiff's name for listing to the 2<sup>nd</sup> respondent, it is apparent from the correspondences contained in the 1<sup>st</sup> defendant's bundle of documents via the email of 23<sup>rd</sup> July 2013 from Obwaka Derrick Okumu, that the account was submitted by Kenya Commercial Bank Ltd sometimes either in August and September, 2011. It is therefore clear that the 1<sup>st</sup> defendant did exactly what it has denied doing before this court.

9. On the second issue as to whether or not the 1<sup>st</sup> plaintiff was in default in the repayment of the 1<sup>st</sup> defendant's debt, an allegation which led to the 1<sup>st</sup> plaintiff being listed, there is no dispute that the 1<sup>st</sup> plaintiff borrowed ksh.550,000/= from the 1<sup>st</sup> defendant on an agreed check-off system between the 1<sup>st</sup> plaintiff's former employer, Malibu Pharmacy and the 1<sup>st</sup> defendant. There was a misunderstanding between the borrowers and the lender over the grace period before repayment. The lender insisted it was a one month grace period while the borrowers claimed they were informed by the lender's employee that

the grace period was 3 months. The parties extensively discussed the issue and eventually the 1<sup>st</sup> defendant agreed to capitalize the accrued interest and the penalties and thereafter waived the penalties. With respect, I agree with submissions of the 1<sup>st</sup> plaintiff that having capitalized the accrued interest and the penalties, the 1<sup>st</sup> defendant was estopped from taking any adverse decision against the 1<sup>st</sup> plaintiff. There was therefore no plausible basis for listing the 1<sup>st</sup> plaintiff. In fact, in its pleadings and evidence the 1<sup>st</sup> defendant stated that it never forwarded the 1<sup>st</sup> plaintiff's name for listing because the parties had already made arrangements to settle the arrears. The 1<sup>st</sup> defendant claimed that it merely submitted the 1<sup>st</sup> plaintiff's information on 8<sup>th</sup> September as an update but its system interpreted it as a new listing and automatically created an account for it. In sum, I am convinced that the 1<sup>st</sup> plaintiff did not default in repaying the debt due to the 1<sup>st</sup> defendant. It is apparent that the monthly instalments were remitted timely hence there was no plausible reason to warrant the 1<sup>st</sup> plaintiff being listed as not credit worthy. In answering the second issue, this court in essence equally answered the third issue. In a nutshell, there was no iota of justification for the 1<sup>st</sup> defendant to cause the 1<sup>st</sup> plaintiff's information to be listed in the negative sense by the 2<sup>nd</sup> defendant.

10. I have carefully considered issues (v) and (vi) and I think the two issues can be determined together. Let me start with issue (v) which is whether or not the 1<sup>st</sup> defendant owed the 1<sup>st</sup> plaintiff a statutory duty in the manner it handled the 1<sup>st</sup> plaintiff's information. Under Regulation 20(1) of the Banking (Credit Referencing Bureau) Regulations, 2008, a customer has a right to know what information an institution submitted to the Bureau regarding that customer. In fact Regulation 28(1)(a) is expressed in mandatory terms, that institutions shall be required to notify the customer of the name and address of the Bureaus to which the customer's information has been forwarded to within 30 days of the first listing of the customer's information with the bureaus. In this case, the 1<sup>st</sup> plaintiff was listed on 8<sup>th</sup> September 2011 and the 1<sup>st</sup> plaintiff came to know for the first time of his listing in the year 2013 from the Family Bank Ltd and the Cooperative Bank of Kenya Ltd while those banks were considering the 1<sup>st</sup> plaintiff's loan applications and agency banking application on behalf of the 2<sup>nd</sup> plaintiff. The effect of the 1<sup>st</sup> defendant's conduct is that the 1<sup>st</sup> plaintiff was denied the right and opportunity to have the information rectified in good time. There is no doubt that the 1<sup>st</sup> defendant breached the statutory duty owed to the 1<sup>st</sup> plaintiff thus making him lose his creditworthiness.

11. The other issue which needs to be determined is whether or not the publication was false and actuated by malice. There is ample evidence from the plaintiff and the 1<sup>st</sup> defendant that the information published by the 2<sup>nd</sup> defendant depicting the 1<sup>st</sup> plaintiff as a loan defaulter was false since the 1<sup>st</sup> plaintiff made his repayments regularly until the debt was settled in full. By its letter dated 8<sup>th</sup> September 2011 addressed to the 2<sup>nd</sup> defendant made a request to the 2<sup>nd</sup> defendant to update the information listed about the 1<sup>st</sup> plaintiff to reflect "performing" instead of "non-performing". Basically the 1<sup>st</sup> defendant admitted making a mistake. It is on record that the 1<sup>st</sup> defendant denied knowledge of the 1<sup>st</sup> plaintiff's listing as a loan defaulter. The denial was later on proved otherwise. When the 1<sup>st</sup> defendant was made aware of the inaccurate information, it took no serious effort to have the 1<sup>st</sup> plaintiff's name deleted from the database and or report to the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant merely wrote to the 2<sup>nd</sup> defendant requesting it to change the information from stating as "non-performing" to "performing".

12. There was no serious follow up by the 1<sup>st</sup> defendant to ensure that its request was immediately acted upon in view of the fact that it had knowledge that the information was accessible by other financial institutions. This is exactly what happened to the 1<sup>st</sup> plaintiff. I am convinced that in the circumstances of this case, malice can be inferred by this court on the part of the 1<sup>st</sup> defendant for two reasons. First, the 1<sup>st</sup> defendant failed to notify the 1<sup>st</sup> plaintiff that it had caused his information to be listed and published by the 2<sup>nd</sup> defendant. That conduct was in breach of Regulation 28(1) (a) of the Banking (Credit Referencing Bureau) Regulations, 2008. Secondly, the 1<sup>st</sup> defendant failed to take urgent steps to have the 1<sup>st</sup> plaintiff's name deleted from the list of those customers with non performing loans despite having

knowledge that the information listed and published was inaccurate. Though the element of malice can be inferred by this court, I am unable to hold that the plaintiffs were defamed in any way. What is clear in my mind is that the 1<sup>st</sup> defendant had no intention to defame. But the truth of the matter is that the 1<sup>st</sup> defendant acted in a reckless and negligent manner in the performance of its statutory duty thus making the 1<sup>st</sup> plaintiff lose his rating as a credit worthy person. He and the company associated with him missed out on financial accommodation. His company, the 2<sup>nd</sup> plaintiff failed also to clinch an appointment as a banking agent for Family Bank Ltd.

13. The other issue which was left to this court to determine is the liability of the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant's defence is that it simply performed its statutory duty to publish the information forwarded to it by the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant went ahead to issue a notice of claim as against the 1<sup>st</sup> defendant for indemnity. The 1<sup>st</sup> defendant did not resist this claim and rightly so because the inaccurate information the 1<sup>st</sup> defendant provided is the reason which this suit was filed. I agree with the submission of the 2<sup>nd</sup> defendant that it merely performed its statutory duty. The duty to ascertain the accuracy of the information lay with the 1<sup>st</sup> defendant.

14. The final issue is whether or not the plaintiffs are entitled to the reliefs sought. In order to appreciate the plaintiffs' claims it is important to state the prayers stated in the plaint as follows:

***a. Loss of anticipated profits from the Simex and agency businesses as will be quantified at the hearing of this suit.***

***b. General damages for the publication of inaccurate and legally unjustified adverse information;***

***c. General damages for defamation leading to loss of business and individual reputation.***

***d. Punitive damages for breach of statutory duties owed to the plaintiffs' by the defendants;***

***e. Punitive damages for negligence leading to loss of business.***

***f. Costs of and incidental to this suit, and***

***g. Any other or further relief as this honourable court may deem fit and just to grant.***

15. The plaintiffs have asked to be paid the loss of anticipated profits of kshs.4,766,389/60. It is said that is the amount expected to be gained from Simex and agency businesses. This is profit attached to the 2<sup>nd</sup> defendant, which is a limited liability company which had no bank-customer relationship with the 1<sup>st</sup> defendant. The 1<sup>st</sup> plaintiff and 2<sup>nd</sup> plaintiff are distinct entities. For this reason I decline to make an award on prayer (a) of the plaint.

16. On prayer (b), I am satisfied that the 1<sup>st</sup> plaintiff is entitled to damages for the publication of the inaccurate information. The plaintiffs did not suggest any figure. I grant the 1<sup>st</sup> plaintiff a global award of ksh.200,000/=.

17. In prayer (c) the plaintiffs have asked to be given damages for defamation. In the body of the judgment, I stated that there was no proof of defamation. I therefore decline to grant any.

18. In paragraph (d), the plaintiffs sought for punitive damages for breach of statutory duties owed to them. I find this prayer as properly established. None of the parties suggested a figure. I grant ksh.100,000/= on this head to the 1<sup>st</sup> plaintiff.

19. In prayer (e) the plaintiffs have asked to be paid punitive damages for negligence leading to loss of business. Again on this head, there was no cogent evidence showing the actual anticipated loss. I grant

on this prayer a sum of kshs.100,000/=.

20. The 2<sup>nd</sup> defendant has beseeched this court to make an order directing the 1<sup>st</sup> defendant to indemnify it. I have made no adverse orders against the 2<sup>nd</sup> defendant save that it may be required to settle costs of its advocates. I think that is an expense the 1<sup>st</sup> defendant should meet.

21. In the end, I enter judgment in favour of the 1<sup>st</sup> plaintiff and against the 1<sup>st</sup> defendant in the following terms:

i. **Damages for publication of inaccurate information**      **ksh.200,000/=**

ii. **Damages for breach of statutory duties**      **ksh.100,000/=**

iii. **Damages for negligence**      **ksh.100,000/=**

**Total**

iv. **The 1<sup>st</sup> defendant to pay costs of the suit to the 1<sup>st</sup> plaintiff.**

22. The suit by the 2<sup>nd</sup> plaintiff is dismissed with no order as to costs.

23. The suit as against the 2<sup>nd</sup> defendant is dismissed with costs being met by the 1<sup>st</sup> defendant in form of indemnity.

Dated, Signed and Delivered in open court this 25<sup>th</sup> day of May, 2017.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant