REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 97 OF 2012

HARRISON KARIUKI MURU…….....……PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA…….....….1ST DEFENDANT/RESP.

CREDIT REFERENCE BUREAU AFRICA LTD……..2ND DEFENDANT/RESP.

RULING

The plaintiff/applicant filed a Notice of Motion dated 1st February, 2013 principally seeking an order that the 2nd defendant be compelled to remove from its data base the listing of the plaintiff as a delinquent creditor pending the hearing and determination of a suit he has filed against the defendants/ respondents. The application is stated to be brought under **Order 40 Rules 1, 2, 3** and **4** and under the **Banking (Credit Reference Bureau) Regulations 15, 17, 18 and 20.**

The application was supported by the affidavit sworn by the applicant himself and filed in this court on 18th February, 2015. In that affidavit, the applicant deposed that he sued the 1st respondent in the **Nyeri Chief Magistrates' Court Civil Case No. 538 of 2009** for the respective sums of Kshs 66,578/= and Kshs 142,710/= which, as I understand the averments in the plaint, a copy of which was exhibited on the applicant's affidavit, comprise the payment the applicant made to facilitate a financial facility from the 1st respondent for purchase of shares in the stock market and the market value of those shares at the time the 1st respondent intended to have them disposed of. The applicant contended that he got the judgment he prayed for against the 1st respondent and thus the latter was decreed to pay the sums claimed.

The applicant also swore that while the suit was pending in court the 1st respondent caused him to be listed with the 2nd respondent as a delinquent creditor which information has been circulated to banks and other financial institutions which cannot advance the applicant any credit facilities because he has, in a way, been blacklisted.

It is the applicant's contention that even after he succeeded in the suit against the 1st respondent and brought this information to the attention of the 2nd respondent, the latter has declined to remove the applicant's name from the list of loan defaulters; consequently apart from his tainted reputation, the applicant's business also has suffered loss and damage since no bank or financial institution is willing to entertain a borrower that has a history of defaulting in repayment of his loans.

On 15th March, 2013, the 1st respondent filed grounds of objection to the applicants application in which it insisted that the applicant is a loan defaulter; it also contended that the issue of the applicant's default in repayment of his loan has never been a subject of litigation in the suit in the magistrates' court and thus

the listing of the applicant as a loan defaulter with the 2nd respondent was not as a result of the decree obtained in that suit. It is the 1st respondent's position that the question of removing the applicant from the list of loan defaulters can only be determined at the trial and not through an interlocutory application.

Apart from the grounds of objection, the 1st respondent also filed a replying affidavit which was sworn on its behalf by Susan Muchangi who described herself as the 1st respondent's credit officer at its Nyeri branch.

According to Susan Mwangi, the applicant was granted a term loan of Kshs 450,000/= on 19th April, 2008 to purchase Safaricom shares; Later, following the applicant's request and in "exercise of its statutory power of sale" the 1st respondent disposed of the applicant's shares on 30th September, 2009. According to Ms Mwangi, the proceeds thereof were credited to the applicant's loan account leaving a credit balance of Kshs 2,582.40 which was credited to the applicant's current account at the 1st respondent's bank.

The 1st respondent claimed that the applicant's current account was overdrawn and as at the time of filing the affidavit on 30th May, 2013, it had a debit balance of **Kshs 27, 230/=** which, according to the 1st respondent, the applicant had declined to settle. From what I gather, the listing of the applicant as what he has described as a delinquent creditor with the 2nd respondent and the latter's circulation of this information to other institutions that may be interested revolved around this particular sum.

From the statement of the applicant's bank account, a copy of which is attached to the affidavit of Susan Mwangi, debt in dispute was written off on 17th December, 2010 and at this time the debit balance stood at Kshs 31,299.55; the statement shows that the applicant has a nil balance after this amount was written off.

The 2nd respondent replied to the motion by way of a replying affidavit which was sworn by Anthony A. Maseno who identified himself as the head of Legal and Compliance Department of the 2nd respondent.

According to Mr Maseno, the 2nd respondent is licensed under the **Banking (Credit Reference Bureau) Regulations, 2008** and **section 31 (4) of the Banking Act Cap 488** and amongst the functions for which it is established is to maintain a database through which institutions licensed under the Banking Act share amongst themselves some prescribed credit information relating to their customers. I reckon it is on the wrong side of this data base that the applicant found himself in.

The deponent also swore that he was aware of not only the civil dispute in the magistrate's court between the applicant and the 1st respondent but the 2nd respondent also had information about the judgment entered in favour of the applicant; however, inspite of the suit and the judgment, it is the second respondent's view that the applicant cannot not be delisted from the list of loan defaulters because the 1st respondent had obtained a stay of execution of the decree derived from the judgment and in any event the 1st respondent had filed an appeal which had not been heard and determined.

By retaining the applicant on the loan defaulters' list, so Mr Maseno deposed, the 2nd respondent was within its mandate as prescribed in the Banking Act and the Regulations made thereunder. According to him, the 2nd respondent believed the information given by the 1st respondent on the applicant's credit status and that it is only the 1st respondent that can advise it to change that information from what it is currently on its data. In other words the applicant's suit and its outcome are of no consequence to the 2nd respondent and will stay put until the 1st respondent advises it otherwise.

That is as much as I have been able to take of the parties opposing contestations.

The disposal of this motion is based on written submissions filed by counsel for their respective parties. I

have duly considered those submissions and the cited decisions that counsel sought to rely upon in support of the positions they have adopted in the prosecution of and in opposition to the motion. Besides these authorities counsel have more less reiterated the factual positions that I have attempted to expose in the preceding paragraphs.

Being an application for interim orders awaiting the determination of the main suit I have to guard against the temptation of being drawn into the merits or demerits of the suit itself but only say as much as is necessary for the determination of this motion.

What I can gather from the material before me is that the dispute between the applicant and 1st respondent initially in the magistrates' court and now in this court where the 2nd respondent has now been sucked in is largely traced to the applicant's bank account or accounts with the 1st respondent at its Nyeri branch; it may be that the management of the account or accounts may or may not be an aspect of the dispute. It is apparent, however, that at one point the respondent borrowed some money from the 1st respondent for purposes of buying shares at the stock market. Apparently, it is also the same 1st respondent that was to facilitate the purchase of the shares with the borrowed funds. It is also common ground that the facility advanced to the applicant was repaid. What appears to have been dispute is whether the shares were purchased and disposed of as envisaged; that is whether the shares were purchased and sold at the price and time prescribed by the applicant. This appears to have been the issue or at least one of the issues that were the subject of the dispute in the **Nyeri Chief Magistrates' Court Civil Case No. 538 of 2009.**

Whether the 1st respondent's purchase of the shares for the applicant and their subsequent disposal was in accordance with the applicant's instructions may have, in some way, dictated the status of the applicant's account balances with the 1st respondent.

In the magistrates' court suit that has been referred to, the applicant sued **for** the money which the 1st respondent owed him; it is apparent from the plaint that sums claimed accrued from the transactions relating to the facility advanced to him and the purchase and disposal of his shares.

That the applicant succeeded in the pursuit of his claim is not in doubt and as of to date the applicant not only holds a decree against the 1st respondent for the sum of **Kshs 314, 905/=** but also the 1st respondent has deposited this decretal sum in a bank account held in the joint names of the representatives of the two parties.

Simply put, the applicant's case appears to me to be that if the dispute of who between him and the 1st respondent owed the other any money was resolved in his favour why should the 2nd respondent maintain his name on what one would call "the list of shame"?

The 1st respondent appears to be of contrary view; according to it the applicant's case in the magistrate's court had nothing to do with the listing of the applicant as a loan defaulter with the 2nd respondent; accordingly, the delisting of the applicant from the loan defaulters' list cannot and shouldn't be informed by the outcome in **Nyeri Chief Magistrates' Court Civil Case No. 538 of 2009.**

The 2nd respondent's position on this case is that the execution of the decree has been suspended and in any case the appeal against it has not been heard and determined and therefore, as I understand the 2nd respondent the dispute whether the applicant owes the 1st respondent any money and thus whether his name should be removed from the loan defaulters' list has not been concluded.

The respondents' arguments must be taken to their logical conclusion particularly on the relevance of the **Nyeri Chief Magistrates' Court Civil Case No. 538 of 2009** to the listing or delisting of the applicant with the 2nd respondent as a defaulter. In this regard, my attention has been drawn to the defence and the counter-claim filed on behalf of the 1st respondent in that suit. It is the counter-claim that is of particular interest particularly on the question whether the applicant owed the 1st respondent any money and

whether alleged debt was a subject of contention between them; I can do no better than reproduce the counter-claim verbatim:-

"COUNTER-CLAIM

> ***13. The defendant avers that on 13.5.2009, Kenya Commercial Bank Ltd custodial sold 21300 shares at the market price of 2.85 per share and forwarded their cheque no. 717120 being proceeds thereof amounting to Kshs 59,082.40, the said sum was credited to the plaintiff's account with the defendant (A/C No. 0113743106100) on 29.5.2009 to clear the outstanding loan, the surplus of Kshs 2,582.40 was credited to the current account (A/C No. 103043106100) leaving an overdrawn balance of Kshs 26,266.25 as at 31.5.2009 which has continued interest at the rate of 21% p.a. together with other costs.***
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> ***14. The defendant avers that despite demands and notice of intention to sue to the plaintiff to clear the debt, the plaintiff has severally ignored and neglected to settle the overdrawn sum of Kshs 29,866.85 as at 22.10.2009 in his current account."***

The 1st respondent proceeded to ask for judgment against the applicant for the sum of Kshs 29,866.85 together with interest at 21% per annum, the costs of the suit and interest thereof at court rates.

It is obvious from the 1st respondent's own pleadings that the debt which it is alleged to have been owed was a subject of an active court dispute in court between the applicant and the 1st respondent in the Chief Magistrate's Court. This is also clear from the submissions filed by the 1st respondent's counsel in which he has admitted that the applicant's indebtness to the 1st respondent was the subject of adjudication in the subordinate court and subsequently in this court as an appeal.

There is also no doubt that it is this same debt in dispute that formed the basis of the information given to the 2nd respondent to circulate to whoever is concerned that the applicant is a loan defaulter and therefore not creditworthy. This is clear from paragraph 8 and 10 of the 2nd respondent's affidavit in which Mr Maseno deposed as follows:-

> ***"8. THAT in relation to the foregoing, I am aware that on 6th January, 2011, the plaintiff lodged a dispute with 2nd Defendant alleging that his listing by the 1st Defendant was erroneous and that a civil case Nyeri CMCC No. 538 of 2009 with regard to the same was still pending in court.***
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> 10.***That through a letter dated 13th January, 2011, the 1st Defendant confirmed that the information they had listed in our data base relating to the plaintiff's credit information was accurate and that the plaintiff had indeed filed suit Nyeri CMCC 538 of 2009 against them."***

At least two things are clear from these depositions; first, contrary to the 1st respondent's argument, the debt alleged to be owing by the applicant was subject to active civil proceedings in court and second, the adverse information on the applicant's credit status was filed by the 1st respondent with the 2nd respondent for circulation while a suit on whether the applicant actually owed the 1st respondent as alleged was pending in court for determination.

A legitimate question that would follow from these undisputed facts and whose answer I am hesitant to give at this particular juncture is whether it was proper for the 1st respondent to subject the issue of the applicant's alleged financial liability for determination by a court of law and at the same time inform all and sundry that the applicant was a loan defaulter before the court seized of this question made a determination on whether the applicant was such a defaulter.

Collateral to this question is the obvious fact that the applicant's suit against the 1st respondent was ultimately allowed and judgment entered against the 1st respondent for the sums claimed; subsequently

the latter is said to have deposited the decretal sum in the respective parties' representatives, joint account.

In his affidavit Mr Maseno, has maintained that regardless of the outcome of the applicant's suit, the latter's adverse credit status must be maintained as captured in their data. The reasons given by Mr Maseno for the stance that the 2nd respondent has taken appear to me to be contradictory; in the first place he says the 2nd respondent is a stranger to the dispute between the 1st respondent and the applicant yet it is evident that it is acting on the 1st respondent's instructions; the point is the 2nd respondent cannot argue that it as a stranger to the dispute and at the same time take sides with one of the parties to the detriment of the interests of the other.

In a further demonstration of what I think are contradictory positions assumed by the 2nd respondent, Mr Maseno has deposed that if the 2nd respondent was served with what he refers to as "an amendment notice" by the 1st respondent, the 2nd respondent would oblige and publish the correct information regarding the applicant's credit status. At the same time he is, however, saying that he is aware that the judgment which, for all intents and purposes, determined the question of whether the applicant was liable to the 1st respondent has been stayed and thereby implying until the stay order has been lifted or the appeal against the judgment has been heard the applicant must content himself with the description or status attributed to him by the respondents.

Again, a legitimate question that would arise from the stance taken by the respondents is whether in the wake of the determination of the applicant's suit they can be allowed to continue acting as if a valid court decree does not exist; here I cannot resist pointing out that a decree by a court of competent jurisdiction remains a valid formal adjudication of the court until such a time that it is either varied, overturned or set aside.

It is true that the execution of a decree may in certain circumstances be stayed but such a stay order does not derive the decree of its legal potency; in this particular case, the decree in issue was a monetary decree and the effect of the stay order was to suspend the execution of the decree against the 1st respondent (and not the 2nd respondent) in satisfaction of the decretal sum for a limited period. Parties' positions changed the moment the court made its determination and subject to the outcome of the 1st respondent's appeal, the 2nd respondent, who was not party to the proceedings in the magistrates' court in any event, cannot continue depicting the applicant negatively in the eyes of his potential financiers as if the court has not resolved the issue that prompted his inclusion in the black list in the first place. In fact, as has been noted before, one of the issues that this court has to decide at the appropriate time is whether the applicant should have been enlisted as a loan defaulter when the debt which he is alleged to have defaulted in repayment was disputed and it was this very issue that was pending before a court of competent jurisdiction for determination.

From all I have said, I am satisfied that the applicant has made out a prima facie case with the probability of success. Again, I am persuaded that as long as he is depicted as a loan defaulter, his reputation amongst his potential financiers may also be on line and he is likely to suffer irreparable loss which would not be adequately compensated by way of damages. In a nutshell, I am persuaded that the applicant's application meets the threshold set in **Giella versus Cassman Brown (1973) EA 358** for grant of an interlocutory injunction.

The injunction sought is in the nature of a mandatory one and the respondents have taken issue with this aspect of the applicant's prayer with the 1st respondent arguing that if the injunction is granted there will be nothing left for determination at the trial. This is obviously not true because the applicant has not sought for a final order at the interlocutory stage and contrary to what he has prayed for in the plaint his application is clear that the injunction should be granted "*pending the hearing and determination of this suit*". I reckon that if the applicant will succeed in his suit, this prayer shall be confirmed but if, on the other hand it fails, the order shall automatically go with the suit.

Counsel for the 1st respondent relied upon the High Court decisions in **Civil Case No. 315 of 2014 (Nairobi) CFC Stanbic Bank Ltd versus Consumer Federation of Kenya** and **Civil Case No. 95 of 2014(Nairobi) Rev. Festus Kaburu Gitonga versus Rev. David Muhia Githii.** He also relied on the Court of Appeal decision in **Civil Appeal No. 332 of 2000 (Nairobi) Kenya Breweries Ltd & Another versus Washington O. Okeyo.**

In **CFC Stanbic Bank Ltd versus Consumer Federation of Kenya case** (supra) the learned judge (Mabeya J) cited with approval the decision in **Cheserem versus Immediate Media Services (2000) 1EA 371 (CCK)** to the effect that applications for interlocutory injunctions in defamation cases are treated differently from ordinary cases since they bring out a conflict between private and public interests. It was held in that case that though the conditions set out in the **Giella versus Cassman Brown case** (supra) apply in defamatory cases, those conditions apply in special circumstances. Further, the court held that over and above the test set out in that case, the court's jurisdiction to grant an injunction in defamation cases must be exercised with caution and only be granted in the clearest of cases.

The same point was emphasised in **Rev. Festus Kaburu Gitonga versus Rev. David Muhia Githii (supra).**

As for the mandatory injunction, the learned judge also cited with approval the decision in **Kenya Breweries Ltd & Another versus Washington O. Okeyo** (supra) that a mandatory injunction can be granted on an interlocutory application as well as at the hearing in special circumstances. In the same case it was held that a mandatory injunction would be granted if the defendant attempted to steal a match on the plaintiff.

Counsel for the 2nd respondent also submitted in the same breath and relied more or less on the same decisions that were cited by the 1st respondent's counsel but also referred to the English decision in **Shepherd Homes Ltd versus Sandham (1970) 2 ALL ER 402** where, speaking of mandatory injunction at interlocutory stage, Megarry, J. said before a court grants a mandatory injunction, it must feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted.

As for injunctions in defamation cases counsel for the 2nd respondent also cited the English decision in **Bonnard & Another versus Perryman (1891-4) ALL ER 965** at page 968 where Lord Coleridge said that the subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by an injunction before the trial of an action to prevent an anticipated wrong. The learned judge continued:-

> ***"The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and unless an alleged libel is untrue, it is not clear that any rights have been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the grant of interim injunctions."***

I am in total agreement with all the decisions cited by the learned counsel for the respondents. If I have to summarise what I am able to discern from these decisions in so far as they are relevant to the motion before court, I can say that the decisions are consistent that it is not abnormal to grant mandatory injunction at an interlocutory stage where circumstances so demand; such circumstances are what has been consistently referred to in those decisions as *"special circumstances"*. Special circumstances do not answer to any particular definition and would ordinarily vary from one case to another; at least none of the cited authorities has purported to offer definite prescription of what would amount to "special circumstances" within which a particular case must be encapsulated before a mandatory injunction can be granted; I have not come across any myself.

For the reasons I have given which I need not reiterate here the applicant's application is underpinned by what can properly be said to be special circumstances as to merit the grant of interlocutory injunction at this particular stage of the proceedings.

One other thing that is clear from the decisions cited by the learned counsel for the respondents is that much as the public is entitled to free speech and to information, the information on which they are fed must, at the very least, be true and whoever is publicising it must be cautious that he is not perpetrating a wrong. Of all the decisions cited none was as clearer on this issue as was the English decision in **Bonnard & Another versus Perryman;** I have reproduced verbatim hereinbefore the pertinent part of that decision. The learned judge emphasised in that case that free speech is a right that the public and individuals must possess and which they should exercise without any impediment but with the caveat that no wrongful act is done in the process.

For the reasons I have given, I am inclined to grant the applicant's application dated 1st February, 2013 with costs. It is so ordered.

Dated, signed and delivered in open court this 15th day of January, 2016

Ngaah Jairus

JUDGE