



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KAKAMEGA.

CIVIL CASE NO. 2 OF 2015.

NAMALWA CHRISTINE MASINDE :::::::::: PLAINTIFF.

VERSUS

NATIONAL BANK OF KENYA LTD. ::::: DEFENDANT.

J U D G M E N T.

1. By a plaint dated 18th December, 2014 the plaintiff seeks the following reliefs. General damages for unlawful listing under the **Credit Reference Bureau** hereinafter referred to as CRB, Financial, moral and social embarrassment, cost and interest.

2. The plaintiff avers that on 20th May, 2014 the defendant maliciously and unlawfully caused her to be listed under CRB as a loan defaulter and as a result she was unable to access credit facilities at KCB. Upon service with summons, the defendant filed defence denying allegations dated 4th May, 2015 and pleaded that it never maliciously cause plaintiff to be listed under CRB as a loan defaulter.

3. Further, the Defendant pleaded that the plaintiff, was advanced credit facilities at its Kakamega branch and in 2013, there was a restructuring of its loan portfolio that affected repayment period of most loan facilities in its system including the plaintiff account.

4. It further stated that upon notification by the plaintiff of the erroneous listing it (defendant) promptly rectified the situations and had the plaintiff delisted.

Plaintiff's case.

5. The plaintiff testified that she is a High School teacher and a holder of A/c. No. 01117070627200. She took loan with defendant which was serviceable through a check off system on her salary. She properly serviced the loan. She sought loan credit facilities with KCB but she could not secure the same as she learned that the defendant had caused her to be listed as a defaulter with CRB as a defaulter. This made KCB not to extend credit facilities to her.

6. The plaintiff avers that she suffered financial embarrassment and delay in processing her loan facilities as at a later stage she was delisted. She terms the listing unlawful and malicious thus claims damages.

Defendant's case.

7. The defendant DW1 testified that upon notification by the plaintiff of her listing with CRB, the bank on its own motion promptly rectified the situation and caused her to be delisted. He further stated that upon notification that KCB had denied plaintiff a loan facility on account of the listing, it communicated

using the interbank communication system and informed KCB that the listing was out of error hence it should not use it as a reason to deny the plaintiff the loan facility. The KCB later confirmed to the defendant that the plaintiff was advanced the facility sought/applied for.

8. The plaintiff was called to the DW1's office after KCB loan was approved and personally apologized for the inconveniences caused.

9. In the cross-examination, he stated that he regretted the incident and stated that it was out of an error which the bank itself took steps to rectify the situation and that the plaintiff never suffered any inconvenience given that the loan was later approved.

10. After close of the defence case, the parties agreed to file and exchange submissions which they did. After going through the materials before the court and the submissions by the parties advocate. I find the following issues emerge.

1. Whether the defendant was diligent in providing CRB with plaintiff's financial status thus being listed as a loan defaulter?

2. Whether plaintiff suffered damage?

3. What is the order as to costs?

11. The plaintiff's case is that she was listed with CRB as a loan defaulter without any notice and without her having committed any default in loan repayment. This was a check off system type of loan servicing where plaintiff's salary was being deducted. The defendant admits that the listing at CRB as a loan defaulter of the plaintiff was an error. The same was occasioned by the restructuring of loan portfolio system. It is not shown whether any other customer was affected by the same error.

12. The plaintiff was not notified of the action by the bank of listing her at CRB. The bank did not communicate to the plaintiff over the same not even a notice to show cause why she should not be listed as a loan defaulter.

13. From the evidence on record, the bank does not demonstrate it was diligent in enlisting the plaintiff with CRB as a loan defaulter. The Bank prima facie acted negligently. It is common sense and good practice to notify customer in default of an intention to enlist the customer as a loan payment defaulter so that if there was an error or mistake, same can be rectified. The court thus finds the defendant liable for the unlawful listing of the plaintiff as a loan defaulter with the CRB.

14. On damages, the plaintiff says that though later delisted to enable her get credit facility with the KCB, her image remained tainted as a financially unstable customer. She, via her advocate, submits that she has proved on a balance of probabilities that she is entitled to damages. She relies on **BRYANT VS. TRW INC 689 F. 2ND 72 (1982) US Court of Appeal**, 6th circuit where plaintiff was awarded damages for unlawful listing and was later delisted and mortgage approved later. She also relies on the case of NAI HCC 547/08. Also relied on the case of **Hon. Ombija – J. VS KCB LTD** where he was awarded Ksh. 2.5 million for defamation arising over financial transaction embarrassment.

15. The defendant conceded the error and did call the plaintiff to apologize after delisting and informing the KCB that the listing was erroneous. The plaintiff also got the loan she sought with the KCB. The act of the defendant is submitted by defence goes along way to show that the listing was not malicious.

16. However, the damage was already done and the belated move by the defendant, can only act as mitigating factors. The listing remained unlawful upto the date of the delisting. The plaintiff had her loan denied for a span of time as KCB took her as a loan defaulter. The defendant submits relying on the case of Equity **Bank vs. Gerald Wangombe (2015) eKLR** that, under **order 2 Rule 10 (1) CPR**, it is cardinal principle of law that a party claiming damages out of an occurrence must supply and prove particulars which would lead to award of such damages.

17. The plaintiff has pleaded that she had not defaulted in loan payment, she was unlawfully listed as a loan defaulter with CRB and as a result the credit facilities sought from KCB was denied until she was delisted. These are adequate particulars which would lead to award of damages. The defendant in any case never sought further and better particulars if same were not adequate. Further, the defendant relied on the case of **PATEL VS. MUTUNGA (1994) eKLR** where court held that pleading must contain the necessary particulars of any claim so as to put defendants on their guard and tell them what they have to meet when the case comes for trial.

18. The plaint contained the adequate particulars which in any case was admitted by defence and explained in a mitigatory mode by the defence. The court thus finds that the plaintiff is entitled to damages. However, the court has to distinguish the instant case with **HON. OMBIJA case Supra** ; in that case, the facts and circumstances were different and the award was based on defamation. In our instant case the claim turns on financial embarrassment meted to the plaintiff by the defendant.

19. The defendant has accepted the error and acted in mitigation in getting plaintiff delisted and urging KCB to advance loan to the plaintiff. The court thus finds that the plaintiff did not suffer a great deal of damages as testified by her. She has not demonstrated any loss arising from delay, in getting the KCB loan.

20. The court therefore awards the plaintiff on financial embarrassment and unlawful listing with CRB as a loan defaulter by an award of general damages of Ksh. 200,000/= costs and interest.

SIGNED, DATED and DELIVERED this **13TH** day of **DECEMBER, 2016**.

C. KARIUKI.

JUDGE.

In the presence of:-

Akinyi for Nandwa for the Plaintiff.

Getanda for Bogonko for the Defendant

Anunda Court Assistant.