



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 551 of 2013**

DANIEL GACHANJA GITHAIGA :::PLAINTIFF

**- VERSUS -**

CREDIT REFERNECE BUREAU AFRICA LTD. ::::::::::::::: 1<sup>ST</sup> DEFENDANT

CFC STANBIC BANK LTD. ::::::::::::::::::::::::::::::: 2<sup>ND</sup> DEFENDANT

JOSHUA NGWATHA NJENGA ::::::::::::::::::::::: 3<sup>RD</sup> DEFENDANT

**RULING**

1. The application before the court is a **Notice of Motion** dated **4<sup>th</sup> June 2012**. It is filed under Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act and all other enabling provisions of the law. The application seeks the following orders:-

1. The Honourable Court be pleased to certify this application as urgent and grant a priority hearing date for the same.

2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants be ordered/directed to retract any statements or advice issued against the Plaintiff by way of notification in anyone of the major local dairies pending hearing and determination of this application.

3. Motor vehicle registration number KBL 905 M be impounded and sold by public auction to offset any outstanding amounts owed to the 2<sup>nd</sup> Defendant if at all as the case may be.

4. Costs of this application be provided for and be borne by the Defendants in any event.

2. The application is supported by the grounds set out therein and also by the affidavit of the Plaintiff dated 4<sup>th</sup> June 2012 and a further affidavit also by the Plaintiff dated 2<sup>nd</sup> July 2012 with their annexures.

3. The application is opposed by both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The 1<sup>st</sup> Defendant opposed through affidavit in reply by **ANTONY A. MASENO** dated 18<sup>th</sup> June 2012 while the 2<sup>nd</sup> Defendant has done that through Replying Affidavit date by **ERIC OTONGLO** dated 14<sup>th</sup> June 2012.

4. The 3<sup>rd</sup> Defendant does not oppose the application.

5. Briefly the history of the application is that the Plaintiff alleges that whereas he has never been a

customer of the 2<sup>nd</sup> Defendant at all, the 2<sup>nd</sup> Defendant has nonetheless referred the Plaintiff to the 1<sup>st</sup> Defendant as a defaulter, and that the 1<sup>st</sup> Defendant has subsequently availed this fact to all banking institutions. In July 2011, the Plaintiff/Applicant's application for loan from Equity Bank Limited was allegedly rejected on the grounds of the alleged reference. The Plaintiff/Applicant now seeks the orders of this court to reverse the same.

6. On their part the 2<sup>nd</sup> Defendant maintains that the Plaintiff/Applicant is a customer of the bank and operates an account including a Hire Purchase Agreement. Having defaulted, and in compliance with the relevant law, the 1<sup>st</sup> Defendant duly referred the Plaintiff to the 1<sup>st</sup> Defendant which is the Credit Reference Bureau.

7. On their part the 1<sup>st</sup> Defendant states that any party against the alleged referral has the obligation to follow the law in an attempt to have his name removed, and that this application is premature as the Plaintiff has not followed the law.

8. It was submitted for the Applicant that in light of the admissions by the 3<sup>rd</sup> Defendant that he forged the signatures of the Applicant and other documents and opened an account with the 2<sup>nd</sup> Defendant, this application should be allowed forthwith. The 3<sup>rd</sup> Defendant has admitted having fraudulently implicated the Plaintiff while he was the sole beneficiary of the alleged loan. In light of this admission, the Applicant submitted that the 2<sup>nd</sup> Defendant's defence fizzles out and by extension the reference made to the 1<sup>st</sup> Defendant as it was based on false information.

9. For the 1<sup>st</sup> Defendant it is submitted that there is a lawful and mandatory procedure allowed for an aggrieved party under the Banking Act, Cap 488 Laws of Kenya and regulations made thereunder – Credit Reference Bureau Registration 2008 - and that the Applicant has not complied with these regulations and so this application is premature to say the least.

10. For the 2<sup>nd</sup> Defendant it is submitted that the Plaintiff/Applicant as a customer failed to repay the loan and that the 2<sup>nd</sup> Defendant had the right to refer the Applicant to the Credit Reference Bureau.

11. I have carefully considered the opposing submissions. It is clear that the 3<sup>rd</sup> Defendant has not opposed the application. Indeed the 3<sup>rd</sup> Defendant has written a letter dated 3/10/2011 addressed to the Plaintiff/Applicant apologizing for forging documents and using the Plaintiff's name without the Plaintiff's approval. That letter is attached to the Plaintiff's supporting affidavit as annexure number DGG1. Further, it is also clear that the 2<sup>nd</sup> Defendant has not dealt with the Applicant in any way. If the contrary were true, the 2<sup>nd</sup> Defendant should have shown evidence of how the Plaintiff's opened the alleged accounts. Where are the photographs, account opening form etc. Of greater importance, how come the 2<sup>nd</sup> Defendant released the Hire Purchase Motor vehicle KBL 905M to the 3<sup>rd</sup> Defendant if indeed the Plaintiff was the account holder at all material times?

12. What I gather however, is that there could be an attempt of collusion from two fronts. The first front is a possible collusion between the Plaintiff/Applicant and the 3<sup>rd</sup> Defendant. The second front is a possible collusion between the 3<sup>rd</sup> Defendant and officer or agents of the 2<sup>nd</sup> Defendant.

13. Whichever collusion it may be, it is clear to me that there are serious issues which need to be investigated during a trial which may militate against issuing mandatory injunction at this stage. The issues for trial are whether or not the Plaintiff/Applicant is a customer of the 2<sup>nd</sup> Defendant; whether he purchased the aforesaid motor vehicle under Hire Purchase terms; whether he defaulted in repayment of the Hire Purchase loan, and whether or not the 2<sup>nd</sup> Defendant referred him to the 1<sup>st</sup> Defendant as a defaulter. A determination of these issues can only come after a trial.

14. Prayer (3) of the application is of a mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to retract any statements or advice issued against the Plaintiff by way of notification in any one of the newspapers pending the hearing and determination of the suit. Prayer (4) is also in the nature of a mandatory injunction seeking to compel the impounding and selling of motor vehicle registration number KBL 905M.

**Halsbury's Laws of England, 4<sup>th</sup> Edition Reissue, Volume 24** at page 444 states that -

**“where the injury done to the Plaintiff cannot be estimated and sufficiently compensated for by**

**damages, or so serious and material that the restoration of things to their former condition is the only method where justice can be adequately done, or where the injury complained of is in breach of an express agreement, the court will exercise its jurisdiction and grant a mandatory injunction.”**

At page 445 it states that -

**“A mandatory injunction can be granted an interlocutory application as well as at the hearing but in the absence of special circumstance, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and which can be easily remedied or if the Defendant attempts to steal a march on the Plaintiff, a mandatory injunction will be granted on an interlocutory application.”**

The foregoing position was affirmed by the Court of Appeal in **STEPHEN KIPKEBUT T/A RIVERSIDE LODGE AND ROOMS - VS - NAFTALI OGOLA – NAIROBI COURT OF APPEAL CIVIL APPL. NO. 146 OF 2008** where the court stated at page 3 that a case has to be unusually strong and clear before an interlocutory mandatory injunction can be granted. This is owing to the fact that an interlocutory injunction has the effect of granting a major part of the relief claimed by an Applicant at an interlocutory stage.

15. In paragraphs 3 and 4 of the 2<sup>nd</sup> Defendant’s replying affidavit, two current accounts were opened in the names of the Plaintiff and the 3<sup>rd</sup> Defendant, and each of them elected to be a signatory to and could operate the other’s account. An application for hire purchase was also made in the name of the Plaintiff to the 2<sup>nd</sup> Defendant for an asset finance facility of Kenya Shillings three million, eight hundred and thirty two thousand, three hundred and twenty (Kshs.3,832,320/=) to purchase a Mitsubishi FH 215 Truck registration number KBL 905M. The truck was thereafter registered jointly in the name of the 2<sup>nd</sup> Defendant and the Plaintiff, and the same placed as security through a Chattels Mortgage in favour of the 2<sup>nd</sup> Defendant.

16. The Plaintiff has alleged that all this was as a result of fraud perpetrated upon him but has not particularized the same in either the Plaint or application. In my view that allegations of fraud are serious and weighty issues and can only be canvassed and conclusively proved during the full hearing of the main suit with each party calling *viva voce* evidence as was held by Musinga, J. in **ELIUD CHEPTOO & 2 OTHERS – VS - COUNTY COUNCIL OF BARINGO & ANOTHER – NAKURU HIGH COURT CIVIL CASE NO. 24 OF 2005**. Accordingly, the full hearing of the main suit is the appropriate forum where it can be conclusively be determined whether or not the Plaintiff was indeed the 2<sup>nd</sup> Defendant’s customer and applied for the asset finance facility, or whether any fraud was perpetrated upon him as alleged.

17. Further, the Plaintiff has not placed before the court the material that he wishes the court to direct the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s to retract, and accordingly, neither the court nor the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have the benefit of sighting and perusing such material. Consequently, there is nothing before the court to be retracted and any order of mandatory injunction will be in a vacuum and incapable of being complied with by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff’s case is therefore neither a clear one, nor does it exhibit any special circumstances to warrant the granting of an interlocutory mandatory injunction. Even assuming that there was material evidencing the publication, prayer (3) of the application could still not properly be granted as it would determine at an interlocutory stage that the Plaintiff was not the 2<sup>nd</sup> Defendant’s customer and therefore any reference to the 1<sup>st</sup> Defendant was not justified.

18. The Plaintiff in prayer (4) of the application also seeks that motor vehicle registration number KBL 905M be impounded and sold to recover any monies owing to the 2<sup>nd</sup> Defendant. As I have noted earlier the issues whether the Plaintiff was the 2<sup>nd</sup> Defendant’s customer and indeed applied for an asset finance facility can only be determined at full trial and upon calling evidence by both parties. The sale of the motor vehicle at the interlocutory stage would fundamentally change the complexion of the suit, as the subject matter would be sold without each party calling evidence to demonstrate how the same was acquired. This would conclusively determine the case in the Plaintiff’s favour without him calling evidence and proving the weighty allegations of fraud.

**19.** Finally, in my view, the application is premature as the procedure for correction and/or deletion of a customer's information shared with the 1<sup>st</sup> Defendant is clearly and intricately provided for under Regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008, which procedure *inter-a-alia* requires a customer to notify the 1<sup>st</sup> Defendant in writing that he disputes the reference, after which the 1<sup>st</sup> Defendant carries out investigations and decides whether to delete or retain the reference. The Plaintiff has not invoked and/or exhausted the aforesaid procedure, and therefore this application is pre-mature.

**20.** The upshot of the foregoing is that the Plaintiff's application lacks merit and ought to be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendant.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI  
THIS 12<sup>th</sup> DAY OF APRIL 2013**

**E. K. O. OGOLA**

**JUDGE**

**Present:**

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Nduati for Plaintiff

Otieno for 1<sup>st</sup> Defendant

M/s Wambui H/B for Okwiri for 2<sup>nd</sup> Defendant

Teresia – court clerk