



REPUBLIC OF KENYA



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Mburu v Cooperative Bank of Kenya Limited & another (Civil Suit E097 of 2021) [2024] KEHC 10303 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEHC 10303 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E097 OF 2021
F WANGARI, J
APRIL 18, 2024**

BETWEEN

PATRICK MUNGAI MBURU PLAINTIFF

AND

COOPERATIVE BANK OF KENYA LIMITED 1ST DEFENDANT

METROPOL CREDIT REFERENCE BUREAU LIMITED 2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 14th September 2021, the Plaintiff pleaded among others that:
 - i. The Plaintiff operated an account jointly with one Alex Mwangi at the 1st Defendant bank.
 - ii. Sometimes in 2014, the said account was close and in fact the Plaintiff wrote a letter dated 12th November 2015 and delivered to the 1st Defendants informing that the account was closed in 2014.
 - iii. The Plaintiff approached Family Bank Limited to obtain a loan amount of Kshs. 40,000,000/= only to be astonished when the bank responded vide its letter dated 10th December 2020 that the Plaintiff would not qualify for the loan as his name was adversely listed with the 2nd Defendant.
 - iv. On follow up with the 1st Defendant as to why, the 1st Defendant vide its letter emailed letter dated 21st January 2021 confirmed to the Plaintiff that the listing was in error and would be corrected but this never happened.
 - v. Subsequently, the Plaintiff also sought a back loan from Equity Bank Limited on 21st January 2021 for Kshs. 20,000,000/- but received a letter dated 22nd April 2021, the said Bank also



declined the application for loan and referred the Plaintiff to first clear his name with the 2nd Defendant.

- vi. As a consequence, he incurred loss of profits and business at Kshs. 14,000,000/-per month for 3 months.
 - vii. The plaintiff avers that the listing was without prior notification to him and caused him economic and reputational damage.
 - viii. It was also averred that the 2nd Defendant negligently listed the Plaintiff knowing that there existed no liability as the subject account was closed.
 - ix. The Plaintiff blamed the defendants for listing him without seeking his prior comment.
2. The Plaintiffs thus prayed for the following reliefs
- a. Loss of profits and business at Kshs. 14,000,000/-per month for 3 years
 - b. General and aggravated damages
 - c. Damages in lieu of apology
 - d. A declaration that the actions of the Defendants violated the Plaintiff's constitutional rights under Articles 28,29 and 35.
 - e. An order barring the 1st Defendant from referring anybody to CRB and sanction to 2nd Defendant for failure to certify information.
 - f. Cost of the suit and interest.
3. The 1st Defendant filed its Defence dated 21st October 2021 and Amended on 26th September 2022 in which it was inter alia pleaded as follows:
- i. The cause of actions for defamation was time barred.
 - ii. The Plaintiff had not suffered in injury.
4. The 2nd defendant had filed a statement of defence dated 19th October, 2021.

Evidence.

5. On the part of the Plaintiff, he relied on his witness statement dated 14th September 2021 and further witness statement dated 28th July 2023.
6. He testified that he was the sole Director of his two companies; Gede Enterprises Limited and Hemwil Investments Limited. That prior to the year 2014 together with one Alex Mwangi, held an account with the 1st Defendant. That the said account was later closed in 2015.
7. All was well until he applied for a loan from Family Bank Limited and was notified on 10th December 2020 that the loan could not be issued unless among other things, he cleared with the 2nd Defendant having been listed as a defaulter. The plaintiff had followed up to know how he came to be listed by the 2nd defendant and he got to know that the 1st defendant had referred him to the 2nd defendant on allegations that he operated an account with the 1st defendant which was in arrears.
8. The Plaintiff then requested the 1st Defendant to cause his removal from the enlisting as he had not defaulted having closed the impugned bank account and he had received a letter dated 21st January, 2021 informing him that the listing was erroneous.



9. On the strength of this letter, he had approached his other bank, Equity Bank and sought a loan of Kshs.20,000,000/- and he was informed that he could not successfully get the loan as he was still listed with CRB. The plaintiff further testified that he had applied for another loan with Equity Bank on 12th April, 2021 and the result was similar to the first one.
10. It was his case that the listing was thus erroneous and had caused him embarrassment, mental and emotional anguish.
11. He also testified that both the 1st and 2nd Defendants did not notify him of their intention prior to the listing to give him the opportunity to clarify the position. That their actions had caused him to suffer economic and business loss as pleaded in the Plaint. He blamed the Defendants on account of negligence and defamation.
12. Upon being cross-examined by the 1st defendant's counsel, he told the court that the reference to CRB by the 1st defendant defamed him and that their action was malicious. That being the sole director of his company, he was unable to access credit facilities and his business had suffered loss as his income declined.
13. The 1st defendant did not call any witness.
14. The 2nd Defendant called one witness, Pharis Kiama. The witness adopted his witness statements and produced the documents in the bundle of documents dated 19th October 2021.
15. It was the 2nd Defendant's case that it received information from the 1st Defendant and was under statutory mandate to execute it thereby listing the Plaintiff as a defaulter.
16. Upon being cross-examined by counsel for the plaintiff, the 2nd defendant's witness stated that they had received a negative report of the plaintiff on the 31st December, 2015 from the 1st defendant. That they became aware of the negative listing when they received a letter dated 29th April, 2021 from the Plaintiff's advocate and that they never received the letter dated 21st January, 2021 from the 1st defendant.
17. It was his case that the 2nd Defendant did not verify the information through the Plaintiff because it was not necessary.

Submissions

18. The Plaintiff opposed to the limitations of actions and submitted that the suit was filed in time as the course of action occurred after he noticed that he was adversely listed.
19. On the merits, the Plaintiff submitted on both defamation and negligence and blamed the Defendants for not consulting him before proceeding to cause his listing as a defaulter
20. That there was bad faith in the listing because the Plaintiff had confirmed to the 1st Defendant that the subject had already been closed.
21. It was his case that the listing cost him economic and business loss and indeed defamation.
22. The 1st Defendant heavily submitted that the suit was bad for being time barred as the cause of action occurred in 2015 and the suit was filed in 2021. Both defamation and negligence as causes of action were attacked on the basis of filing out of time.
23. On the merits, it was submitted that the 1st Defendant correctly caused the listing of the Plaintiff and no compensation would be tenable in law.



24. The 1st Defendant however prayed that in the case of any compensation, Kshs. 400,000/- all-inclusive would be the maximum possible compensation in the circumstances of this case.
25. The 2nd Defendant maintained its case that it listed the Plaintiff based on the report received from the 1st Defendant and there was no legal obligation to notify the Plaintiff prior to the listing.

Analysis

26. The Court has perused the submissions filed by the parties as well as the authorities in support thereof. I appreciate the detailed legal analysis that the advocates have done to shape this Judgement. It is not for the lack of regard and appreciation that I do not set out the contents thereof seriatim in this Judgement.
27. The issue before the court is whether the Plaintiff has proved his case on a balance of probabilities as against the Defendants.
28. In analyzing this issue, the court will inevitably establish whether the Defendants' actions in causing the negative listing of the Plaintiff as a debt defaulter amounted to negligence and defamation.
29. On this subject, Section 107 (1) of the [Evidence Act](#), Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
30. Therefore, it follows that the Plaintiffs had the duty to prove their claim against the Defendants. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.
31. In *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the [Evidence Act](#), Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
32. It follows that the initial burden of proof lies on the Plaintiffs, but the same may shift to the Defendant, depending on the circumstances of the case.
33. Further, in *Evans Nyakwana –vs- Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the [Evidence Act](#), Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as Section 108 of the [Evidence Act](#) provides the burden lies in that person who would fail fi no evidence at all were given as either side.”



34. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau –vs- George Thuo & 2 Others* [2010] 1 KLE 526 stated that:
- “In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”
35. Similarly, Lord Nicholls of Birkenhead in *Re H and Others (Minors)* [1996] AC 563, 586 held that;
- “The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability.....”
36. Furthermore, in *Palace Investment Ltd –vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that:
- “Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-
- “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.
- This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”
37. Before I venture to determine the merits or otherwise of this suit, I wish to dispose of a preliminary issue raised by the 1st Defendant as to whether the suit is time barred.
38. I note that in its amended Defence, the 1st Defendant only pleaded that the suit was time barred on account of defamation. However, in the submission, negligence is also included so that the suit is submitted to be time barred both on defamation and negligence.
39. The 1st Defendant’s case is that the cause of action accrued on 31st December 2015 when the publication was done. In my understanding, the analogy imported by the 1st Defendant is not based on the correct date of the accrual of the cause of actions based both on negligence and defamation. I say so because it was uncontested that Sometimes in 2014, the impugned bank account was closed and in fact the Plaintiff wrote a letter dated 12th November 2015 and delivered to the 1st Defendants informing that the account was closed in 2014.
40. Section 4(2) of the Limitations of Actions Act is specific that an action based on the tort of negligence ought to be filed within three years from the date the action arises. Also, an action based on defamation is to be filed within 12 months of the cause of action. Consequently, as the cause of action arose on



- 10th December 2020, the cause of action based on defamation would be time barred by 9th December 2021 and the cause of action based on negligence would time barred by 9th December 2023.
41. The Plaintiff's suit was filed on 23rd September 2021 and cannot be said to be time barred on both defamation and negligence. I consequently dismiss this objection for being devoid of merit.
 42. Therefore, as at 31st December 2015, no cause of action can be said to have accrued because there were negotiations between the Plaintiff and 1st Defendant following which the Plaintiff had reason to believe that the 1st Defendant confirmed the account as having been closed and the matters settled.
 43. The only consternation for the Plaintiff arose when he discovered, upon applying for a loan with Family Bank on 10th November 2020 that he could not be awarded the loan because according to the letter dated 10th December 2020 from the Bank, he was listed with the 2nd Defendant as a debt defaulter. Consequently, I understand 10th December 2020 to be the date when the cause of action arose.
 44. I have also stated above that there were ongoing negotiations in 2014 and 2015. The 1st Defendant caused the Plaintiff to be listed as a defaulter when the Plaintiff informed them that the account had already been closed. This action, without a doubt, was made in bad faith.
 45. I have considered the letters exchanged between the Plaintiff and the Defendants and in particular, in respect of the loan facilities. I do not find any letter from the 1st Defendant requesting the Plaintiff to settle a debt of any sort.
 46. It is not in dispute that neither of the Defendants notified the Plaintiff of its intention to list his name with CRB, or thereafter notified him that they had caused his name to be listed in default of payment.
 47. I understand the Credit Reference Bureau Regulations, 2013 are established under the [Banking Act](#), and are operationalized under Section 31 and 34 of the [Microfinance Act](#), who are mandated to submit both positive and negative information the performance of the credit facilities extended to its customers.
 48. Further, under Regulation 14 (1) of the [Banking Act](#) (Credit Reference Bureau Regulations, 2008) as read with Section 31 (4) of the [Banking Act](#), the 2nd Defendant is mandated to facilitate the sharing of information concerning non-performing customers between institutions licensed under the [Banking Act](#).
 49. It follows that the 1st Defendant, under the Act, has an obligation to forward to the 2nd Defendant names of customers who default in their obligations to service their loans, and the 2nd Defendant has a corresponding duty to receive such information. See also *Co-operative Bank of Kenya Ltd Vs. Peter Ochieng* (2018) eKLR.
 50. It is not disputed that the 1st Defendant did not notify the Plaintiff of its intention to list his name with the 2nd Defendant during and or before the negotiations were completed. Up to that stage, and on the understanding that the subject bank account had been closed, there was no plausible reason as to why the 1st Defendant took the action it did. This action was clearly undertaken in bad faith, and not warranted at all. No material was even laid before court to demonstrate that there was a liability on the part of the Plaintiff.
 51. There is no contestation that the Bank listed the Plaintiff as a defaulter with the 2nd Defendant and in fact did so without giving the Plaintiff notice of its intentions to list negative information against the Plaintiff, and that even after doing so, it deemed it not necessary to inform the Plaintiff, and kept him in ignorance up until he discovered by himself upon applying for a loan with Family Bank.



52. Even after the Plaintiff thought he had clarified the issue to the 1st Defendant and he should have been cleared, he was still subsequently perturbed upon applying for a loan from Equity Bank who responded declining the Application and referring him to clear his name first.

53. Under Section 25(1) of the Credit Reference Bureau Regulations, 2013 provides thus

“A credit information provider furnishing negative information to a Bureau regarding credit extended to a customer or arising from a product or service rendered to a customer shall, in writing or through electronic means, issue to the customer a notice of intention to submit the negative information within 30 days before submitting of the negative information to a Bureau or within such shorter period as the contract between the credit information provider and the customer may provide”

Section 25(2) provides that if the credit information provider has reasonable cause to believe that the information is incorrect, it shall not furnish the information to the credit bureau.

Section 25(3) further provides that if the customer has notified the provider that the specific information is inaccurate, it shall not furnish such information to the Credit Bureau; but under Subsection (4), it may do so, if the provider has addressed the customer’s concern over the inaccuracy by re-affirming the accuracy or rectifying the inaccuracy 25(8) is specific that;

A credit information provider who has furnished credit information to a Bureau shall, within thirty days from the date the information was furnished to a bureau, notify the customer that his credit information has been forwarded to the Bureau.

54. Therefore, the Bank was under an obligation to comply with the duties to the customer as provided under the Credit Reference Bureau Regulations cited above. It failed to exercise reasonable care in dealing with the matter in controversy regarding the Plaintiff.

55. Further, under Regulation 18(2) of CRB Regulations provides that

(2) information kept in accordance with subsection (1) may not be used, solely to affect the customers’ chances of obtaining credit, but to inform the decision making process.

56. As I have already noted above, it was not prudent, that while the Plaintiff’s account was closed and negotiations revealed this fact, and without notice or at all, the 1st Defendant proceeded to list the Plaintiff as a defaulter with the 2nd Defendant, upon an inaccurate information.

57. Based on the foregoing, I find and hold that the 1st Defendant’s actions amounted to negligence and breach of statutory duty of care with the Plaintiff, from which the Plaintiff suffered loss and damage.

58. Also, a party is entitled to be given all information upon which an adverse action may be taken against him before, to facilitate remedy, if possible. This is the essence of Article 35 (1) (b) of *the Constitution* that states thus:

Every citizen has the right of access to

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.

59. I note in this case that the Plaintiff variously sought information as to why the 1st Defendant had caused his listing. The enquiries reached a dead end. The information would definitely serve the purpose of or provision of adverse information to his creditworthiness but was arbitrarily denied by the 1st Defendant. The 1st Defendant as such based its claim on inaccurate information.



60. Regulation 28 (3) (4) and (5) places a duty on the institutions licensed under the *Banking Act*, the 1st Defendant included, when providing information to Reference Bureaus to:
- i. To provide accurate information to credit bureaus
 - ii. To update all submitted customer information on a monthly basis or within such earlier time as an update is necessary.
 - iii. To give an amendment notice when seeking to delete any inaccurate information and to replace the deleted information with correct information whenever such institutions become aware that the information previously submitted is inaccurate.
61. I find that the discovery of the listing of the Plaintiff by the 2nd Defendant as a defaulter no doubt caused him financial embarrassment when it became known to him that he could not be accorded any financial facilities due to the listing, as proved by the denied facilities sought from Family Bank and Equity Bank.
62. In my view, the Plaintiff has proved by his evidence, including documentary, that he was unaware of the 2nd Defendant's listing after the negotiations with the 1st Defendant which left him in honest believe that the subject account had been closed.
63. Consequently, I am satisfied that the Plaintiff proved his case on negligence to the required standard.
64. On defamation, I understand the Plaintiff to contend that by the 1st Defendant's publication of the alleged non-performing loans of the Plaintiff, the Plaintiff, was defamed in his character, from which he seeks general and aggravated damages.
65. The meaning of defamation was succinctly put by this Court in *S M W vs. Z W M* [2015] eKLR:-
- “A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”
66. Similarly, *Windeyer J. In Uren John Fair Fax & Sons Pty Ltd* 117 CLC 115 at 115 stated.
- “Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person.”
67. Further, *Halsbury's Laws of England* defines a defamatory statement as:
- “A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”
68. It was held in the case of *John Patrick Machira Vs Wangethi Mwangi & Another Nairobi HCCC No. 1709 of 1996* that: -
- A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him



69. I also refer to Order 2 Rule 7(1) of the Civil Procedure Rules which provides thus:
- (1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense.
70. The 1st defendant had on 21st January, 2021 written to the plaintiff's advocate while responding to their letters dated 11th December, 2020 and 15th January, 2021. The letter, which was produced as part of the plaintiff's exhibits is titled, "Erronous Listing Of Patrick Mburu For Account No.xxxxxxxx." The 1st defendant had indicated that they had attended to the matter and the same was "satisfactorily closed." However, on 24th January, 2021, the plaintiff had again received a letter from Equity Bank informing him that "We have reviewed your request and we wish to inform you to first clear your CRB which has an overdraft with over 500 days in default."
71. As was held in the case of Christopher Orina Kenyariri Vs. Barclays Bank of Kenya Ltd & Credit Reference Bureau Africa Ltd (2012) eKLR, the court is obligated to decide on the nature and effect of the words complained of. The Defendant too must be able to know the exact claim that it faces. From the communication above, the 1st defendant was well aware of the letter to the 2nd defendant dated 31st December, 2015 and the resultant effect on the plaintiff's reputation was a great embarrassment before rightful thinking members of society, in this case his other bankers and suppliers.
72. In Alice Njeri Maina Vs. Kenya Commercial Bank Ltd (2018) eKLR, this court, faced with issues similar to the present ones made findings that the Defendant Bank in publishing to the CRB the Plaintiff's non-performing loan was not actuated by malice, though negligent, and that by diverging confidential information of a customer, a Bank may not be in itself defamatory pursuant to the CRB Regulations 2013, under which the Bureau is mandated to protect the confidentiality of a customer information so received, and only to release such to (a) the customer concerned, (b) to the Central Bank and (c) to a requesting subscriber (d) to a third party as authorized by the customer, or as required under the law.
73. I have carefully considered the Plaintiff's evidence, including the material facts in support of the claim for defamation. The actions by the 1st defendant, who never called any evidence to dispute the claim, amounted to defamation. Considering the entirety of evidence therefore, and considering the Defenses by the Defendants, I come to a finding that the claim on defamation was proved to the required standard as against the 1st defendant.
74. I also note that the Plaintiff damages for loss of business at the rate of Kshs. 14,000,000/- per month for at least 3 years. It is stated that the Plaintiff was importing several classes of motor vehicles which were sold in various show rooms owned by the Plaintiff.
75. I understand the claim of Kshs. 14,000,000/- to be a special damage claim. With special damages, the rule is strict and somewhat mathematical. The court has to discern pleaded damages and proceed to find their proof. It is not based on estimates. The Court of Appeal in Jogoo Kimakia Bus Services Ltd vs. Electrocom International Ltd [1992] KLR 177 where it was stated that:

"The law on damages stipulates various types of damages. The distinction between general and special damages is mainly a matter of pleading and evidence. General damages are awarded in respect of such damages as the law presumes to result from the infringement of a legal right or duty. Damages must be proved but the claimant may not be able to quantify exactly any particular items in it. Special damages are the precise amount of pecuniary loss



which the claimant can prove to have followed from the particular facts set out in the pleadings. They must be specifically pleaded.”

76. Special damages are thus very specific and constitute liquidated claim which must be pleaded and proved.
77. The plaintiff had in his evidence stated that in the year 2019 and 2020, he had made profits translated to Kshs.16,000,000/- per month. That subsequently, as a result of the negative listing, he was unable to secure a loan facility to enable his business run profitably. He thus suffered loss.
78. The 1st defendant submits that it is the plaintiff's companies that had made losses and not the plaintiff. From the documents filed in court by the plaintiff and the evidence tendered, it is clear that the plaintiff suffered loss. He had applied for a loan through one of his companies and the response from the Bank was made to him as an individual.
79. The plaintiff claims that he suffered loss for three years. He was first denied a loan by Family Bank as a result of the negative listing and informed of the decision on the 10th December, 2020. He was later denied another loan by Equity Bank for the same reasons and informed vide a letter dated 24th January, 2021 and 22nd April, 2021.
80. The plaintiff had written to the 1st Defendant on the 29th April, 2021 and no explanation was forthcoming save that they were still investigating. This suit was initiated on 23rd September, 2021. The plaintiff in his evidence told the court that he was later cleared by CRB and secured a loan facility. Having found herein above that the 1st defendant was negligent, I do find that the negligence of the 1st defendant caused the plaintiff loss of earnings.
81. The account statements, sale agreements, import documents and the bill of lading produced before court as exhibits prove that the plaintiff had been doing well in business prior to the negative listing. That later his income dwindled and he was unable to import as many vehicles as he did in the years before.
82. The parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as follows: -

“ 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....



...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

83. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

84. I find the claim for loss of user merited. In his submissions, the plaintiff states that it could have taken him three years to “repurpose and retool.” From the period he learnt that he was erroneously listed, that is in December, 2020 to the time he wrote to the 1st defendant on 11th December, 2020 and 15th January, 2021 is a period of one month. A second letter from Equity Bank dated 22nd April, 2021 informed the plaintiff that he was still negatively listed.
85. On the 28th May, 2021, the 1st defendant had informed the plaintiff that they had written off the overdraft and cleared his name from CRB. This is a period of one month. The plaintiff thus suffered loss for a total of one and a half months and not the exaggerated period of three years as prayed.
86. I proceed to assess damages payable in respect of the claim for negligence, defamation and loss of earnings which I have found meritorious.
87. In Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; TransUnion t/a Credit Reference Bureau Africa Limited (Interested Party) [2020] eKLR the court awarded damages of Kshs. 400,000/- as damages for wrongful listing with the CRB. In the said case, the plaintiff had been listed with a CRB and could not secure a loan facility of Kshs. 700,000/- from Trans-National Bank and another one of Kshs. 6,500,000/- from Housing Finance Corporation.
88. Each case must be determined on its merit. In the instant case, the plaintiff had applied for an initial loan of Kshs. 40,000,000/- from Family Bank and the same was adversely affected by a negative listing. The same re-occurred when he applied for a loan of Kshs. 20,000,000/- from Equity Bank.
89. The 1st Defendant submitted for an award of up to Kshs. 400,000/- as appropriate compensation.
90. Considering the conduct of the 1st Defendant leading to unjustified and negligent listing of the Plaintiff and refusal to remedy this action even upon information by the Plaintiff, having considered relevant case law on the awards of damages for loss of similar nature I come to the conclusion that a sum of Kshs. 3,500,000/- would be fair and sufficient, to remedy the loss and damage.
91. The damages shall be paid by the 1st Defendant. The 2nd Defendant cannot be blamed for the negligent acts and omissions of the 1st Defendant having not contributed to the Plaintiff’s woes. As the Plaintiff testified that the 2nd Defendant unlisted him and he in fact moved on to obtain a loan with Equity Bank after being removed from the adverse list of debt defaulters, I release the 2nd Defendant without any



sanctions also because the listing was instigated by the 1st Defendant and the 2nd Defendant was only committed to its statutory duty. The claim against the 2nd Defendant is therefore dismissed.

92. In respect to defamation, the plaintiff submits that an award of Kshs. 50,000,000 would suffice. The 1st defendant submits that it is the plaintiff's company that suffered and in any event he later secured a loan on June, 2021. Section 16A (1) of the *Defamation Act* provides inter alia as follows; " 16A (1) In any action for libel, the court shall assess the amount of damages payable in such amounts as it may deem just."
93. In the case of Peter M. Kariuki Vs Attorney General (2014) eKLR the Kenyan Court of Appeal cited the Supreme Court of Uganda decision in Coussens v Attorney General (1999) 1 EA and stated "The object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury..... where the injury in question is non pecuniary loss. assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money rather it is being awarded as a substitute for that which is generally more important than money. and that is best that a court can do in the circumstances."
94. Keeping the above authority in mind, I opine that an award of Kshs. 2,000,000/ would adequately compensate the plaintiff as the malicious listing exposed him to be denied credit by two banks on a total of three occasions.
95. On loss of earnings, as stated above (from para. 77), I find the total period that he reasonably lost his earnings was only one and a half months.

Determination

96. In the upshot, I allow the Plaintiffs suit and make the following Orders:
 - a. The Plaintiff shall have general damages of Kshs. 3,500,000/- payable by the 1st Defendant for wrongful listing.
 - b. General damages for defamation at Kshs. 2,000,000/ payable by the 1st Defendant.
 - c. Loss of earnings assessed at Kshs. 21,000,000/= payable by the 1st Defendant.
 - d. Interest of (a) (b) and (c) above court rates from the date of this Judgement.
 - e. Costs awarded to the Plaintiff, payable by the 1st and the 2nd Defendants.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 18TH DAY OF APRIL, 2024.

.....

F. WANGARI

JUDGE

In the presence of:-

Njoroge Mwangi Advocate for the Plaintiff

Cheruiyot Advocate h/b for Kongere Advocate for the 1st Defendant

Kiarie Mungai Advocate for 2nd Defendant

Barile, Court Assistant

