



REPUBLIC OF KENYA



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Ndungu t/a Mwandunga Commercial Agencies v KCB Bank Limited (Civil Suit E001 of 2017) [2024] KEHC 9089 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9089 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT E001 OF 2017
RN NYAKUNDI, J
JULY 16, 2024**

BETWEEN

**SAMMY NG'ANG'A NDUNGU T/A MWANDUNGA COMMERCIAL
AGENCIES PLAINTIFF**

AND

KCB BANK LIMITED DEFENDANT

(Coram: Before Justice R. Nyakundi Wambua Kigamwa & Co. Adv G&A Advocates LLP)

JUDGMENT

1. The background facts to this case are fairly straightforward. The Plaintiff took a loan facility from the defendant sometimes in January, 2016. The Defendant advanced him a sum of Kshs. 550,000/=, which amount he claimed to have been promptly servicing. The Plaintiff averred that the defendant without any reasons forwarded his name to the Credit Reference Bureau, depicting him as a loan defaulter. According to the Plaintiff, due to the defendant's malicious actions, he has been affected psychologically and mentally since his reputation has been injured nationally and internationally as he cannot secure a loan from any other financial institution, yet he is a businessman.
2. The plaintiff vide a plaint dated 4th January, 2017 and an amended one dated 28th April, 2021 sought the following orders;
 - a. An order compelling the defendant to rectify the situation by clearing the Plaintiff's name from the Credit Reference Bureau as well as general damages for the psychological torture he has undergone as a result of the defendant's action.
 - b. An assessment and an award of damages for loss of business at an annual rate of Kshs. 1,000,000 from the financial year 2016 until the date of judgment, general damages and aggravated damages.



- c. Costs of the suit plus interest and any other remedy this court may deem fit to grant.
3. The defendant in response filed a statement of defence dated 24th April, 2017 and an amended one dated 5th July, 2021 following the Plaintiff's amendment.
 4. According to the defendant, they entered into a tripartite insurance premium agreement with the Plaintiff on 1st November, 2015. This agreement was for a loan facility of Kshs. 565,451 which the defendant disbursed to the Plaintiff's account on 31st December, 2015. The terms of the contract were that the Plaintiff would make monthly instalments of Kshs. 67,384/= for a total of 10 instalments.
 5. However, in total breach of the said contract, the Plaintiff fell immediately into arrears and the loan remained unserviced for the month of January – and February 2016 with the Plaintiff making a first instalment in March 2016. Even then the total amount was not as agreed.
 6. The Defendant further averred that the Plaintiff remained in default and as a result, on 10th May, 2016, the defendant furnished the Plaintiff with a letter notifying him that he was in arrears of Kshs. 61,523.90 with a total outstanding balance of Kshs. 390,879.25. The letter demanded payment of his outstanding loan balance within 14 days. The Plaintiff did not act upon the demands in the letter but made some deposits which in no way cleared the arrears in the month of May 2016. Consequently, the defendant served the Plaintiff with a letter dated 6th June 2016 demanding payment of his outstanding arrears within 7 days. Equally, the Plaintiff subsequent to this letter made some deposits in his account but in no way rectified the default as he remained in arrears.

Plaintiff's case summary

7. The plaintiff contends that as a consequence of the defendant's action, the Plaintiff has suffered psychologically since his reputation has been injured as he is unable to secure loans from financial institutions yet he is a business person. The negative listing with the Bureau has specifically occasioned the rejection of his applications for loan facilities with various institutions to wit; on 2nd December 2016, Equity Bank (k) Ltd declined his application for a loan and on 8th December, 2016, Co-operative Bank of Kenya Limited declined his application for a loan facility of Kshs. 9,000,000. It is his case that he has since suffered loss of businesses at an average annual rate of Kshs. 1,000,000 from 2016 and thus seeks relief as pleaded in his amended plaint.

Submissions on behalf of the Plaintiff

8. Learned Counsel Mr. Wambua advanced this case on behalf of the Plaintiff by way of written submissions dated 2nd August, 2023. It was counsel's contention that from the evidence it is not in dispute that there was a contractual relationship between the Plaintiff and the defendant bank. This resulted in which loan facilities were advanced to the Plaintiff totalling Kshs. 550,000/=. This amount according to learned counsel was repaid in full leaving the Plaintiff with a clean credit score.
9. Learned Counsel further argued and submitted that unknow to the Plaintiff, the defendant Bank had circulated and listed the Plaintiffs within the policy guidelines as stipulated in the Credit Reference Bureau. Learned Counsel further argued and submitted that this matter of listing by the CRB came to the knowledge and notice of the Plaintiff on 2nd December, 2016 equity bank declined to process his application for an overdraft or loan facility. This was also the case on 8th December 2016 when co-operative bank declined an application for a loan facility of Nine Million (Kshs. 9,000,000/=).
10. The bone of contention according to learned counsel is that the Defendant Bank never followed due process and as a consequence the negative listing a ruined his reputation, caused him



psychological trauma and loss of business. In learned counsel's submissions, despite many letters and correspondences, no offer of amends has been made by the defendant bank to restore the Plaintiff. This conduct according to learned counsel is actionable in damages which the Plaintiff seeks from this court. The Plaintiff complained that the defendant bank did not issue and serve a notice of intention to enlist him with the Credit Reference Bureau. That the responsibility of issuing and serving the notification is provided for by regulations 25(1) and 50 (1) (a) of the Credit Reference Bureau Regulations, 2013. He also faults the defendant bank for failing to inform him of the fact of enlistment after the same had been done, which responsibility is provided by regulations 25(8) and 50(1) (b) of the Credit Reference Bureau Regulations, 2013. The Plaintiff further submitted that the defendant failed to prove the fact of notification, by way of service of the letters dated 10th May 2016, 6th June 2016 and the pre-listing notification dated 1st September, 2016, to the required standard.

11. The Plaintiff's counsel urged the court to note that the defendant bank has fallen short of proving that it indeed served the Plaintiff with the notices. That the failure to serve the notices denied the Plaintiff an opportunity and a right to dispute the intended listing. He leaned on the observation made by the Court of Appeal in the case of Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited and the decision in Namalwa Christine Masinde v National Bank of Kenya Limited (2016).
12. On aggravated damages, learned counsel for the Plaintiff submitted that a case has been made for the same as the defendant acted recklessly in occasioning the adverse listing of the Plaintiff without notifying him and without attempting to engage him in dialogue. In support of this position, the Plaintiff cited the decision in Jamii Bora Bank Limited v Joash Ondiek Gisore.
13. Learned Counsel for the plaintiff urged the court to find in favour of the Plaintiff and proceed to grant relief as in the Plaintiff. In a nutshell learned counsel placed reliance on the following case law and authorities: Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others, Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited, Namalwa Christine Masinde v National Bank of Kenya Limited (2016) eKLR, Joseph Maina Mwaura v Equity Bank of Kenya Limited, Jamii Bora Bank Limited v Joash Ondiek Gisore. In addition, the Plaintiff invited this court to rely on the following document evidence:
14. Certificate of registration of a change of particulars, Tripartite Insurance Premium, Finance agreement made on 15th November, 2015, Metropol Customer Credit report, Petroleum Tankers for hire/reward risk note. Accountant and Auditors report dated 31st December, 2011, 31st December, 2012, 31st December, 2013, 31st December, 2014, 31st December, 2015, 31st December 2016 31st December, 2017, and 29th April, 2021.

Defendant's Case

15. Learned counsel Mr. Mwangi for the defendant bank filed submissions dated 20th March 2023. Counsel couched the following issues for determination:
 - a. Whether the Plaintiff was in default in the repayment of the loan.
 - b. Whether the Plaintiff was procedurally listed with the Credit Reference Bureau.
 - c. Whether the Plaintiff exhausted all remedies available before filing suit.
 - d. Whether the Plaintiff suffered any loss/injury as a consequence of being listed on the Credit Reference Bureau.
16. On the first issue, it was submitted by learned counsel for the Defendant bank that through DW1, it became apparent that the Plaintiff fell immediately into arrears and remained in arrears including



- before and after listing on CRB. Further that the Plaintiff asserted that he had been making payments for the loan yet he did not submit any deposit slips evidencing that he had been making the alleged payments.
17. Learned counsel for the defendant bank argued that they have established beyond conjecture that the Plaintiff was in default of his obligations to repay the loan under the tripartite agreement. That the defendant has established that the Plaintiff never cleared his loan which became non-performing leading to a write-off. Therefore, the assertion that he was erroneously listed with the CRB while he was to date on his payment is a blatant lie. The defendant maintained that the Plaintiff has his hands dirty even as he approaches the seat of equity.
 18. Further, Learned Counsel for the defendant bank submitted that the right to list the defendant had crystallized in law and the defendant was exercising its right provided for in the law in the event of default. That the listing of the Plaintiff's name on CRB was meant to protect the interests of the defendant as to the fulfilment of their contractual obligation as well as for purposes of collecting the loan amount inclusive of arrears.
 19. As to whether the Plaintiff was procedurally listed with the Credit Reference Bureau, the defendant submitted that it is a prerequisite that before a bank forwards the details of a defaulting customer to the CRB, the said customer must be in default from the start of the agreement and remained in default throughout the terms of the facility and in this case the Plaintiff remained in default and the facility eventually became non-performing and was written off with an outstanding balance of Kshs. 270,000/= . The defendant made reference to the Credit Reference Bureau Regulations and cited Regulation 50(1) and (2)
 20. The defendant's counsel maintained that the defendant not only followed the laid down procedure but went beyond that level. As a result of the default, and with the lapse of 30 days period, the loan became non-performing with the last payment being on 30th June, 2016. As a result, the defendant shared the Plaintiff's default status to the registered CRBs and issued the Plaintiff with the notice required under Regulation 50(2) of the CRB Regulations, 2013 vide letter dated 1st September, 2016.
 21. Learned counsel maintained that the Plaintiff at all times was aware of this default and was accorded not less than four chances to rectify his default which he failed to do. That the Plaintiff fails to acknowledge that he failed to honour his financial obligations which it appeared he never intended to repay. He admitted the postal address used was his address and that the same remains his to date.
 22. On the third issue, the defendant contended that the Plaintiff did not exhaust all remedies available before filing a suit. That regulation 35(5) of the CRB regulations requires one to write to the CRB in case of any erroneous or inaccurate information as a notification for necessary changes. On this counsel cited the decision in Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015) eKLR, Daniel Gachanja Githaiga vs Credit Reference Bureau Africa Ltd & 2 others (2013) eKLR, Gervase Maina Ndonga v Aar Credit Services Limited & another (2018) eKLR and Rural Technology Enterprises Ltd v Ecobank Kenya Limited (2021) eKLR.
 23. Finally, on the last to issues, counsel submitted that the Plaintiff has not suffered any loss as he was in breach of the loan agreement and was procedurally listed and if he suffered loss it was not attributed to the listing. The allegations that he was denied loan facilities from other banks is false since there is no evidence to support that. That the Credit Performance reports filed by the Plaintiff indicated that he had retained and was servicing other loans from NIC Bank as well as Co-operative Bank. According to the report the Plaintiff obtained a loan facility on 8th December, 2016 from co-operative bank despite



the fact that he had been listed in September 2016. It is therefore evident that the Plaintiff was still accessing loan facilities.

24. Counsel argued that the losses the Plaintiff has stated he lost per year amount to special damages. It is trite law that special/specific damages must be specifically pleaded and proved. That the Plaintiff has only managed to plead but has not proved.
25. In light of the above, the defendant submitted that the Plaintiff is not entitled to the reliefs sought as he was in default from the onset and he breached his contractual obligation by failing to service his loan. That as a result of the default, the defendant's right to list the Plaintiff in CRB had crystallized.

Analysis and Determination

26. I have considered the evidence as purposed by both the Plaintiff and the defendant. On the face of it, each of the parties elected to frame their own independent issues on the case. incidentally, both of them have one convergence. Thus:
 - a. First and foremost, whether the Plaintiff and the defendant had a contractual relationship, which constituted borrowing and lending of money to facilitate business growth of the Plaintiff.
 - b. Whether that relationship was governed by the *Banking Act*, primarily and secondly the attendant provisions of the Credit Reference Bureau.
 - c. Whether the loan advanced to the Plaintiff was liquidated within the terms stipulated in the agreement.
 - d. If the answer in clause (C) is in the negative, whether the defendant bank indeed did list and share information on the creditworthiness of the Plaintiff without his notice.
 - e. Whether that listing if any, did defame and destroy the long period reputation of the Plaintiff.
 - f. I clause (e) is in the affirmative, whether the Plaintiff is entitled on award of damages.
27. The dichotomy of this claim will be incomplete without first addressing the prerequisite requirement vested with the Plaintiff on the burden and standard of proof. In cases of this nature, the law is settled that he who alleges existence or non-existence of a fact or facts in issue and desires any court to give judgment as to any legal rights or liability dependent on the existence or non-existence of facts must discharge the burden of proof on a balance of probabilities. (See 107, 108 and 109 of the *Evidence Act*).
28. This essentially means that the burden of proof lies on the party alleging a fact which correlative rule is that he who asserts a matter of fact must prove but he who denies it need to prove it. In contested actions, a party succeeds whose evidence establishes a preponderance of probability or a balance of probability in his/her favor.
29. The court must form a judgment of this case on the balance of probabilities as to which fact presented by the Plaintiff, it accepts and which it does not before going on to find for either the Plaintiff or the defendant. In the persuasive case of *Re B (children)* UKHL 35, the court observed that:

“If a legal rule requires a fact to be proved, a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0-1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of



0 is returned and the fact is treated as not having happened. If he does discharge it the value of 1 is returned and the fact is treated as having been discharged or happened.”

30. Having said that, I now proceed to determine each and every issue identified for determination.

Whether the Plaintiff and the defendant had a contractual relationship, which constituted borrowing and lending of money to facilitate business growth of the Plaintiff

31. In determining what constitutes a contract, the Court of Appeal in *William Muthee Muthami v Bank of Baroda* (2014) eKLR stated that: -

“... In the Law of Contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach....”

32. Did the three elements of a contract exist in this case?

33. From the record, it is not in dispute that the parties entered into a Tripartite Insurance Premium Agreement with the Plaintiff on 1st November, 2015. The fact is not only admitted by both parties, but is as well demonstrated. The agreement was for a loan facility of Kshs. 565,451 which the defendant disbursed to the Plaintiff’s account on 31st December, 2015. The terms of the contract were that the Plaintiff would make monthly installments of Kshs. 67,384 for a total of 10 installments.

34. Therefore, the answer to this issue is in the affirmative. It is evident that the parties had a contract. The inevitable question which, therefore, begs for an answer is that if the Plaintiff was promptly making his monthly installment, why did the defendant bank forward his details for CRB listing?

Whether that relationship was governed by the *Banking Act*, primarily and secondly the attendant provisions of the Credit Reference Bureau.

Whether the loan advanced to the Plaintiff was liquidated within the terms stipulated in the agreement.

35. Having gone through the Plaintiff’s submissions and having established that there existed a valid contract, the question as to whether he defaulted is not in disputes. The Plaintiff rather largely argues that the defendant did not follow the due process in reporting the him for adverse listing with the Bureau. The Plaintiff complains that the defendant did not issue and serve a notice of intention to enlist him with the Credit Reference Bureau.

36. The Defendant on the other hand led evidence to establish the fact that the Plaintiff was in default of his obligation under the tripartite agreement. The defendants established that the Plaintiff never cleared his loan which became non-performing leading to a write-off. The defendant therefore concluded that the listing of the Plaintiff with the CRB was lawful. The terms of the agreement as captured by the agreement in question and as summarized by the defendant are as follows:

- a. The parties were Sammy Ng’ang’a Ndung’u T/A Mwadunga Commercial Agency of P.O Box 667-30100 Eldoret (the Plaintiff herein) of the first part, Kenya Commercial Bank Limited (the Defendant herein) of the second part and APA Insurance of the third part.
- b. The loan was to finance an insurance policy with APA Insurance over a motor vehicle with a policy start date of 15th November 2015 and end date of 14th November, 2016.
- c. The premium amount was Kshs. 632,835, with flat interest rate of 6.48%
- d. The monthly installments were Kshs. 67,384/= for a total of 10 installments.



- e. The Plaintiff was to repay the loan punctuality, without demand, deduction or set off.
37. In the case *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) KLR 126 where Kwach JA (as he then was) stated as follows: -
- “I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal. If courts are going to allow debtors to avoid paying their just debts by taking some of the defenses I have seen in recent times, for instance challenging contractual interest rate, banks will be crippled if not driven out of business altogether...”
38. In the case of *Godfrey Ngumo Nyaga vs Housing Finance Company of Kenya*, it was held that
- “Where a party has a statutory right of action, the court will not usually prevent that right being exercised except that the Court may interfere if there was no basis on which the right could be exercised or if it was being exercised oppressively. In this case, there was no ground for finding that the company had no basis for action and there is no evidence of oppression having in mind that the appellant is still indebted to the company....”
39. It is manifestly clear that the Plaintiff enjoyed a bank facility of which he has continued to be in default prompting the Defendant to have him listed with the CRB. The Plaintiff argued that he promptly made his payments but nothing was adduced in evidence to establish that fact. During cross examination he testified that he had not repaid the full loan by the time the 10th monthly installment was coming up in October, 2016.

Whether the listing of the Plaintiff with the Credit Reference Bureau was procedurally done.

40. It is not disputed that the Plaintiff was listed with a Credit Reference Bureau when he failed to honour repayment of a loan that had been advanced to him by the defendant.
41. Regulation 25(1) of the said Credit Reference Bureau Regulations states as follows –
- “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 thirty 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.”
42. It is on the foregoing provision that the defendant forwarded the Plaintiff’s name to the CRB. The defendant stated that the Plaintiff was in default throughout the term of the facility which eventually became non-performing and was written off with an outstanding balance of Kshs. 270,000/=.
43. The provisions of regulation 50(1)(a) of the Credit Reference Bureau Regulations 2013 stipulates:
- “An institution shall –
- (a) notify the customer within one month before a loan becomes non-performing that the institution shall submit to a Bureau the information on the loan immediately it becomes non-performing; Provided that for loans whose



repayment interval or period is less than one month, the notice shall be served two weeks before the loan becomes non-performing;

- (b) notify each customer, within thirty days of the first listing, that his name has been submitted to all licensed Bureaus;
 - (c) issue an adverse action notice to a customer against whom a decision has been taken or determination made, in whole or in part, that is adverse to the interests of the customer based on information obtained from a Bureau;
- (2) The adverse action notice issued under sub-regulation (1)(c), shall be provided at the time the adverse decision or determination is communicated to the customer and shall notify the customer-
- (a) that customer information played a role in the decision;
 - (b) the name, address and telephone number of the Bureau that provided the customer information;
 - (c) the customer's right to a free copy of the information provided by the Bureau, and
 - (d) the customer's right to dispute such information with the Bureau and, if erroneous or outdated, have it corrected.
- (2) An institution shall be considered to have notified the customer if they send the notification issued pursuant to sub-regulation (1) to the customer's last known address or contact details by any of responsibilities of institutions"

44. The foregoing legal provisions demand notice and right to dispute the allegations before the listing is done must be seen to secure the rights of the customer to be heard before an adverse action is taken against the Plaintiff. The mandate to communicate the intention has been expressed in clear terms and therefore not left to discretion by any institution whether to notify the customer or not. The defendant in support of notification argued that the Plaintiff was duly notified vide a letter dated 1st September, 2016. That the notice was similarly served on the Plaintiff through his last known address in similar manner as all the other notices.
45. The Plaintiff on the other hand argued that the defendant did not issue and serve a notice of intention to enlist him with the Credit Reference Bureau. That the defendant has failed to prove the fact of notification, by way of service of the letters dated 1st September, 2016 and 1st August, 2016.
46. I have examined the tripartite agreement the Plaintiff provided his address as P.O. Box 667-30100. That was the last known address for the Plaintiff. It was DW1 testimony that soon after the loan became non-performing, the defendant officers including the Eldoret West Branch Manager through phone calls and in person visits to the Plaintiff's place of business notified the Plaintiff of his default wherein the Plaintiff made promises to rectify his default but he never did. DW1 further testified that in 2016, the bank would purchase postage stamps and affix the same on the envelopes for postage and that is the manner in which the Plaintiff was served. The defendant held the position that the notices were received because shortly after the said letters were sent, the Plaintiff made several payments in May beginning 5th May, 2016 to 16th May, 2016 as evidenced in the loan statements. To this point, the court is inclined to find in favor of the defendant that the Plaintiff was duly served. I have had sight of the letters on record and I am persuaded that the Plaintiff was duly served given the fact that he started making frequent payments after the letters were served.



47. In any event, the Plaintiff was already in default. He equally had an opportunity under Regulation 35 of the regulations to notify the Bureau in writing of the information disputed. There is nothing on record to prove that fact.

Regulation 35 of the Credit Reference Bureau Regulation 2013 states: -

- (5) where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed.
- (6) within five working days of being informed that the information in a customer's credit report is disputed, the Bureau shall – (a) attach a note to the credit information report, warning that Kenya Subsidiary Legislation, 2014 the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and (b) give the institution or credit information provider that supplied the information a notice of dispute requesting confirmation from the institution or credit information provider as to the accuracy of the information.
- (7) The Bureau shall, within fourteen days, conduct investigation, based on the relevant information provided by the customer, and may contact any person who has furnished information.
- (8) Where an institution or credit information provider receives a notice of dispute from the Bureau it shall, within fourteen days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.
- (9) Where the investigation reveals an error, the Bureau shall remedy the error and inform all persons who may be affected by the information including the customer.
- (10) If the Bureau does not complete its investigation within twenty-one days, it shall delete the disputed information as requested by the customer.”

48. Again, the Plaintiff has not told the court whether the aforementioned process was initiated if at all the Defendant erroneously forwarded his name for listing with the CRB. I therefore find that the Defendant followed the due procedure in notifying the Plaintiff before listing him with the CRB.

Whether that listing if any, did defame and destroy the long period reputation of the Plaintiff.

49. The Plaintiff argued that the information which was forwarded to Credit Reference Bureau resulted in injury to his reputation since it painted him as inter alia, uncreditworthy and untrustworthy and as a result he could not access loan facilities from other financial institutions.

50. The Black's Law Dictionary, 10th edition as cited by the Court of Appeal in the case of Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited [2019] eKLR defines the tort of defamation as:

“Malicious or groundless harm to the reputation or good name of another by the making of a false statement to a third person.”



51. The courts have also established specific ingredients associated with the tort of defamation, and which a party ought to prove in order for his or her claim for defamation to succeed. I considered the ingredients laid out in the case of *Phinehas Nyagah v Gitobu Imanyara* [2013] eKLR thus:

“The elements of the tort of defamation are that the words must be defamatory in that they must tend to lower the plaintiff’s reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided...Secondly, the words must refer to the plaintiff...Thirdly, and the words must be malicious.”

52. The above ingredients were also brought out by the Court of Appeal in the case of *Musikari Kombo v Royal Media Services Limited* [2018] eKLR in the manner hereunder:

- a) The existence of a defamatory statement;
- b) The defendant has published or caused the publication of the defamatory statement;
- c) The publication refers to the claimant.

53. In the case of *Barbra Georgina Khaemba v Cabinet Secretary National Treasury & another* (2016) eKLR the Court at paragraph 31 held:

“I observe further that the Regulations mandate Credit Reference Bureaus to ensure the protection of the confidentiality of customer information; and the release or reporting of such customer information is only to be done to the customer, Central Bank, a requesting subscriber, (who under the Regulations is defined as an institution licensed under the *Banking Act* and which has subscribed to receive customer information from a Bureau) and a third party as authorized by the customer concerned as required by the law.” This can be seen from Regulation 26(1) which states that:

A bureau shall protect the confidentiality of customer information received in terms of these Regulations and shall only report or release such customer information.

- a. To the customer concerned;
- b. To the Central Bank;
- c. To a requesting subscriber;
- d. To a third party as authorized by the customer concerned; or
- e. As required by law.

37. The foregoing provisions in my view fall squarely within the tenets of the law as stipulated under Article 24 of *the Constitution* and I am satisfied that the release of information as stipulated under the *Banking Act* and the Regulations is to be done under reasonable circumstances and within the ambits of the law. This is my view does not in any way infringe on the right to privacy.”

54. In the instant cause, it has not been demonstrated that the Plaintiff’s information was supplied by a third party not allowed under the law and in a manner outside the provisions of the law.

55. I have evaluated the material evidence before me and equally found that the Plaintiff was procedurally listed with the CRB. The question I then ask myself is whether the Plaintiff has proved that the listing



was defamatory of him. Upon reading through the material and evidence in its totality, I did not come across anything to suggest that the appellant's reputation suffered negatively as a result of the CRB listing since from the onset the defendant bank was right in forwarding his details for reasons that he had defaulted. I therefore find that his reputation was not injured and the listing was not adverse.

56. Here the only form of injury that the plaintiff has reference in his complaint and provided evidence about it in his testimony and affidavit is in the form of embarrassment, shame, humiliation, emotional stress and harm to his reputation as a result of being listed as a defaulter in the repayment of his loan obligations as provided for in the letter of offer and acceptance with the defendant bank. In my considered view, it matters not from the lens the plaintiff looks at the entire spectrum of his contractual relationship with the defendant bank. The Credit Reference Bureau regulatory framework is very comprehensive and is part of our financial fidelity aimed at the borrowers to keep their part of the bargain from the very moment one agrees to seek financial support from duly registered financial institutions. Such injury alone must be assessed from the standpoint of the contribution or causation by the claimant or plaintiff triggering the listing by the Credit Reference Bureau.
57. Suffice it to say that the actual injury is not limited to out – of- pocket-loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood as pleaded by the plaintiff include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Although the approach in the foundation of common law one is allowed to recover damages without reasonable demonstrating by way of evidence the actual loss suffered that position cannot be presumed in favour of the plaintiff in this case, it is instructive to take note that the plaintiff asserted in his evidence that by virtue of being listed by the defendant bank as a loan defaulter that has denied him any access into financial credit facilities from other related banks like Equity and Co-operative Bank.
58. This court must not lose sight of our tortured history as a country in the 80's and 90's when many financial institutions collapsed or went into liquidation for reason of a crisis caused by non - payment of loans borrowed by the citizens at different levels and seasons.
59. One must be more concerned with character than reputation because character is what indeed defines our being of whom we are and what we purpose to be known for in life. While reputation is merely what others think you are. In defamation litigation, one must delve into the role of character and have it distinguished from reputation. In order for the plaintiff to protect his valuable endorsement as a reliable person, there was need to adduce cogent evidence regarding the interplay between character and his reputation.
60. In my view when it comes to defamation cases, character and reputation should not be used interchangeably for they are not synonymous. For as far as I appreciate these canons character is internal it that set or personality traits and moral values actually possessed by an individual whereas reputation is external. In the instant case, the plaintiff's concern is all about what his business associates may think of him for failure to access financial facilities due to the impugned Credit Reference Bureau listing. The subject matter here is very specific that the suit filed against the defendant bank is that a report that was made indicated he owed a debt to the bank.
61. The defendant bank in their evidence before this court introduced probative material to demonstrate the contractual relationship with the plaintiff with a reasonable conclusion to controvert the position taken by the plaintiff to agitate for the award of damages. The listing by the Credit Reference Bureau against the plaintiff only affected his credit score and could not be a component of his reputation. The public and his business associates may not even be aware of it in the first instance. I have always wondered as Abraham Lincoln aptly noted why the law on defamation is emphatic about reputation and not character. In his own words Abraham Lincoln observed character is like a tree and reputation



is like a shadow. The shadow is what we think of, the tree is the really thing. So how did a body of law develop that focus on the shadow other than the real thing.

62. It seems to me that properly speaking a man defamed as alleged by the plaintiff does not get compensation for his damage reputation. He gets damages if he satisfies the standard and burden of proof as illustrated in Section 107 (1), 108 & 109 of the *Evidence Act* to a measure of the degree on a balance of probabilities. It is an evidential burden vested with the plaintiff or the claimant in a civil suit. It is from this yardstick that one gets damages because he was injured in his reputation, that is simply because he was publicly defamed. For this reason, compensation by way of damages operates in two ways, as an indication of the plaintiff to the public and as a consolation for him for a wrong done. That is why it is necessary the plaintiff expresses its case on the nature and circumstances that may justify a ward of damages because he was injured in the reputation.
63. The plaintiff's evidence at the trial was mainly issues surrounding the decline responses he received from Equity and cooperative bank in respect of the applications for loans to be advanced to him for purposes of his business or as the case may be expended for his wealth creation. I am of the view that different banks or financial institutions licensed by the Central Bank of Kenya have different guidelines on loans and overdrafts as developed as a measure of their respective business models. That desecration exercised by the two respective banks based on the plaintiff's credit score cannot be fully attributed or inferred with the grievance of having been listed by the defendant bank. I take it from the legal principles on Credit Reference Bureau that a listing of a customer in the shoes of the Plaintiff only becomes a starting point in the approach taken by a bank or financial institution to determine whether the past history of loan repayment will significantly affect the suitability of the Applicant.
64. The court must read the words and statements of defamation complained of as a whole and eschew over-elaborate analysis and also too literal on approach in applying the test set out in defamation cases to find guilty the Bank of professional misconduct. My assessment of the report applying the ordinary reasonable reader context would accept and find that the plaintiff was lawfully sanctioned by the defendant bank arising out of the circumstances which presented themselves out of the loan agreement.
65. The facts of this case are contradistinguished with the statement in the Nation case as captured by A.G Noorami in the Economic and Political Weekly Magazine of 11.5.2002 in the following extract. " In the wrong of defamation the law presumes malice in the sense of wrongful act done intentionally by publishing defamatory matter but there is a lawful excuse for the publication of such matters as in the ordinary case of privileged communication or of fair comments upon a matter of public interest, the onus is upon the plaintiff to establish the fact of malice in order to maintain the action. It means that malice must be proved as a fact irrespective of the mere inference arising from the libellous character of the publication. When the plaintiff fails to prove malice by cogent evidence then he can be non suited on this ground. The burden of proving express malice both by extrinsic and intrinsic evidence lies on the plaintiff to show that the publications were actuated by some indirect or improper motive.
66. The individual interest in the guise of reputation cannot have supremacy over the large public interest and in this case the safeguards and regulations under the Credit Reference Bureau as promulgated are infused in that dominant interest. This a collective interest and not individualized perspective to control the sharing of information as pertains to the instrument governing financial institutions and the relationships undertaken to fulfill certain classified transactions. This is one of the instruments which contains reasonable restrictions. To this extent, reasonable implies intelligent care and deliberations that is the choice of a cause which reason dictates. The plaintiff has not shown that the sharing of information on his creditworthiness was arbitrarily or excessively undertaken by the



defendant bank to invade his rights to privacy, dignity, Social- Economic Rights or consumer rights for that matter.

67. The persuasive case in Lonrho p/c V Fayed (No. 5) 1994 1 All ER 188 puts the entire case on the plaintiff into perspective in the following extract. “ In the wrong of defamation the law presumes malice in the sense of wrongful act done intentionally by publishing defamatory matter but there is a lawful excuse for the publication of such matters as in the ordinary case of privileged communication or of fair comments upon a matter of public interest, the onus is upon the plaintiff to establish the fact of malice in order to maintain the action. It means that malice must be proved as a fact irrespective of the mere inference arising from the libellous character of the publication. When the plaintiff fails to prove malice by cogent evidence then he can be non suited on this ground. The burden of proving express malice both by extrinsic and intrinsic evidence lies on the plaintiff to show that the publications were actuated by some indirect or improper motive.
68. First, it is clear from the principles analyzed above a true statement can harm or injure one’s reputation. However, whether a true statement does in fact occasion harm or injury to a person’s reputation in a particular case depends on the knowledge and understanding of the person to whom the statement was communicated. The truth argument in defamatory suits is underpinned by the significant value of free speech in a democratic society in Article 33(1) (a) of *the constitution*. The dissemination of Credit Reference Bureau through statement to an account holder who has been advanced financial services with specifics of an overdraft or a loan is as far as possible protected by the law.
69. The upshot of it all is that the plaintiff has failed to discharge the standard and burden of proof on a balance of probabilities for this court to find merit on the claim within the rubric of defamation to make a finding on liability with consequential orders on award of damages. Accordingly, the defendant’s suit is dismissed with no orders as to costs.
70. Order accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 16TH DAY OF JULY 2024

In the Presence

Mr. Kigamwa for the Plaintiff

R. NYAKUNDI

JUDGE

