



REPUBLIC OF KENYA



**Muyundo v KCB Bank Kenya Limited (Civil Appeal E409 of 2022)
[2024] KEHC 13166 (KLR) (Civ) (15 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13166 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E409 OF 2022**

**AM MUTETI, J
OCTOBER 15, 2024**

BETWEEN

MUYAKA SOLOMON MUYUNDO APPELLANT

AND

KCB BANK KENYA LIMITED RESPONDENT

(Being an appeal from the Ruling of the Chief’s Magistrate’s Court at Nairobi, Milimani Commercial Courts Hon. J.A Aduke -RM date 17th May 2022 in Chief Magistrate’s Court Civil Suit No. E11528 of 2021)

JUDGMENT

Introduction

1. The appellant in this matter filed a suit before the Milimani Commercial Courts Chief Magistrates Court following his listing by the Credit Reference Bureau Africa Ltd trading as “Trans Union”. The listing was occasioned by reference to the Bureau by the respondent Bank.
2. The appellant in his plaint alleged that when he learnt from Stanbic Bank of the listing, he approached KCB disputing the adverse listing since he had never operated a loan account or any account bearing the particulars given by the Credit Reference Bureau.
3. The respondent informed him that they had resolved the issue with Trans Union only for Stanbic Bank to decline to review a loan request he made to them citing the adverse listing.
4. The appellant further contended that he wrote to the respondent and Trans Union disputing the listing but that yielded nothing thus prompting the suit.



5. The respondent upon being served with the pleadings filed a notice or Preliminary Objection dated 14th February 2022 to the suit citing Regulation 35 (5) of the Credit Bureau Regulations, 2013 which according to the Respondent provided alternative mechanism for dispute resolution which the appellant had not exhausted.
6. The respondent's position was that the entire suit is ex-facie incompetent, frivolous and premature thus in the respondent's view the same ought to be dismissed for want of jurisdiction.
7. The learned Honourable magistrate held in favor of the respondent.
8. The appellant has aggrieved by the decision moved to this Court.

Analysis

9. The appellant in the Lower Court sought to recover damages on the basis of negligence and malice attributed to the Respondent.
10. He maintained that in publishing his details with the Credit Bureau the respondent was negligent for according to him the information was incorrect, inaccurate and adverse.
11. He contended further that the respondent acted in breach of duty of care owed to the appellant.
12. The appellant thus sought punitive damages for breach of statutory duty owed to the plaintiff costs and interests.
13. The respondent through his preliminary objection held the view that the suit was premature and that the appellant ought to have exhausted the procedure provided for under the Credit Bureau Regulations in particular Rule 35 (5) of the Credit Reference Bureau Regulations 2013.
14. The appellant has set out the following grounds of appeal in his memorandum of appeal:-
 1. The trial magistrate misdirected herself in law by holding that the Respondent's Preliminary Objection on jurisdiction was merited.
 2. The trial magistrate misdirected herself in law by failing to appreciate that Regulation 37 (15) of the Banking (Credit Reference Bureau) Regulations, 2020 does not prejudice a party's right to pursue any other available remedy.
 3. The trial magistrate misdirected herself in law by applying Regulation 72 (2) and 4 of the Banking (Credit Reference Bureau) Regulations, 2020 to the present case whose correctional mechanism lies under Regulation 37 of the Banking (Credit Reference Bureau) Regulations, 2020.
 4. The trial magistrate erred in law by failing to consider AT ALL the full tenor of the Appellant's submissions on the nature of reliefs sought and the precedents of this Court on the unavailability, in Regulations, of the remedies sought in the suit.
 5. As a result of this decision, a travesty of justice has occurred to the Appellant's detriment.
15. The issues that arise in this appeal are:-
 - a. Whether the suit as presented was premature, incompetent and frivolous for failing to exhaust the procedure provided for under Regulations 35(5) of the Credit Reference Bureau Regulations, 2013.



- b. Whether the Court had jurisdiction to entertain the suit as filed considering the reliefs sought by the appellant.
16. The appeal raises the all important issue of jurisdiction of the court to entertain the suit. The issue of jurisdiction takes precedence thus the Court following the wisdom of Nyarangi, JA expressed in the Owners of Motor Vessel Lillian “S” Vs. Caltex Oil (K) Ltd [1989] EKLK that jurisdiction is everything and without it a Court must down its tools , I venture to determine whether the suit as instituted by the appellant was proper and whether the Chief Magistrate’s Court could try it.
17. The issue of jurisdiction of this Court was taken up by the Respondent Citing the provisions of Regulation 35 (5) of the Credit Reference Bureau Regulations , 2013.
18. The Regulations reads:-
- “ 35 (5) where a customer believes that the information contained in the data base is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed”.
19. The respondent’s notice of preliminary objection read as follows:-
- Take Notice that at the hearing hereof the Defendant shall raise a Preliminary Objection to be determined in limine:
- (a) There being an alternative statutory mechanism under Regulation 35(5) of the Credit Reference Bureau Regulations, 2013 and the plaintiff having failed to utilize the same, therefore the entire suit herein is ex-facie incompetent, frivolous and premature and the Honourable court does not have jurisdiction to determine the matter herein at this stage.
20. It is clear from the notice of preliminary objection that the respondent’s objection to jurisdiction of the Court was hinged on Regulation 35(5) of the Credit Reference Bureau Regulations, 2013.
21. A preliminary objection by its nature must be determinable on a pure point of law. The Court proceeds to determine the same with the assumption that the facts pleaded by the party are correct.
22. The point of law is either pleaded or must arise from a clear implication out of the pleadings and if which if argued as a preliminary point may dispose of the suit.
23. It there follows that if the facts are disputed the preliminary objection cannot succeed. See Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd [1969] EA 696 at Page 700 Law, J stated:-

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded



by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...

24. In this suit the respondent did not appear nor did they file a defence.
25. The set of facts presented by the appellant in his pleadings were therefore the only facts the Court could look at to determine whether the preliminary objection could hold were those set out in the pleadings.
26. The Court therefore ought to have presumed the facts to be true for there was no contestation by the Respondent by way of defence.
27. The appellant has set out concisely the steps he took to address the issue of improper listing and the respondent has not countered that.
28. Regulation 35(5) only requires him to raise the matter with the Reference Bureau and that he has pleaded he did.
29. The appellant has also pleaded that he took up the matter with the Respondent to no avail and that again has not been authorized.
30. A reading of the pleadings being the only pleading available for scrutiny indicates compliance with Regulation 35(5).
31. The Regulation in any event does not provide any remedy for erroneous listing by the credit bureau thus the jurisdiction of the Court cannot be said to be ousted.
32. The appellant cannot be said to have avoided making use of the mandatory procedure as submitted by counsel for the Respondents.
33. The respondent cited the case of Rural Technology Enterprises Ltd Vs. Ecobank Kenya Ltd 2021 eKLR in support of its argument that under the doctrine of exhaustion a party must utilize the procedure provided under the statute.
34. Whereas that is the position in Law the issue that arises in the present case is on the face of the pleadings can the appellant be said to be guilty of failing to adhere to statutory procedure?
35. The Court has no benefit any other material other than that presented by the appellant and in his pleadings. The appellant pleads as follows:-
 1. The Plaintiff is a male adult of sound and disposing mind residing and working for gain in Nairobi within the Republic of Kenya. His address for service for this suit shall be care of Limo & Njoroge, Advocates, Suite 62, Lower Hill Duplex Suites, Lower Hill Road, Upper Hill, P.O. Box 9892- 00100 Nairobi. 0768-140 294, Email: flimo@limonjoroge.com & copy to pamba@limonjoroge.com.
 2. The Defendant is a limited liability company incorporated as such under the laws of Kenya and licensed to carry on banking business within the Republic of Kenya. Its registered address is Kencom House, 8th Floor, Moi Avenue, P.O. Box 48400-00100 Nairobi. (Service of summons and process shall be done through the Plaintiff's Advocates Offices).
 3. At all times relevant to this suit, the Plaintiff is a Director/Shareholder of Hezelsoft Solutions Limited, a Private Limited Company carrying on business in Nairobi within the Republic of Kenya.
 4. Sometime in the month of May 2021, Hezelsoft Solutions Limited applied for a loan from Stanbic Bank Kenya Limited Galleria Branch ("Stanbic") in order to raise Working Capital for



a designated tender. Stanbic reviewed the company's financial statements and informed that it would qualify for an unsecured loan of average of KES 810,000.

5. The Plaintiff states that Stanbic moved to assess the credit worthiness of the Company's Director/Shareholders as part of the loan approval prerequisites and sought the Plaintiff's Credit Reference Report from Credit Reference Bureau Africa Limited trading as TransUnion ("TransUnion").
 6. On 11th June 2021 Stanbic received the Plaintiff's report from TransUnion with listings under various categories. Account Reference PDPD0829XXXX was listed by the Defendant's Head Office on 18th March 2011 for the amount KES 2,359,736.09 with both the balance and arrears amount at KES 2,361,688.94.
 7. The Plaintiff states that of all the listings, only Account Reference PDPD0829XXXX had its Account Status marked, "Non-performing" thereby lowering his credit score. Following this the Loan Application was declined.
 8. The Plaintiff asserts that upon being informed of his credit status by Stanbic, he contacted the Defendant disputing the listing and his complaint booked as ref KCB-130123XXXX and made various follow ups which were ignored by the Defendant's employees and servants.
 9. Consequently, the Defendant informed the Plaintiff through text message query ref KCB-130123XXXX had been resolved.
 10. On 22nd June 2021, the Plaintiff requested Stanbic to review the loan application on the strength of the Defendant's communication. Stanbic sought another credit report, which had Account Reference PDPD0829XXXX listed contrary to the Defendant's communication to the Plaintiff that the query ref KCB-130123XXXX had been resolved.
 11. Accordingly, the Plaintiff, through his Advocates, formally wrote to the Defendant and TransUnion disputing the adverse listing on 1st July 2021 and 19th July 2021 respectively upon which TransUnion issued a Notice of Dispute in line with the applicable regulations.
 12. The Plaintiff avers that on 12th August 2021, TransUnion wrote to inform that in response to the Notice of Dispute, the Defendant advised them to delete the information since it was insufficient.
 13. The Plaintiff strongly contends that he has never operated a loan account or any account of such particulars with the Defendant and that the actions of the Defendant of submitting adverse information about him for listing are negligent, malicious, reckless and in breach of both the statutory and duty of care owed to him.
36. It is therefore clear to me that the appellant did do that which the Regulations cited by the respondent required him to do.
 37. The plaint has not been answered by the respondent thus the preliminary objection in my view had no basis in the face of the uncontested matters set forth by the appellant.
 38. The respondent also relied on the case of Geoffrey Mutinja Kabiru & 2 others Vs. Samuel Munga Henry & 1756 Others [2015] eKLR. The Court in this decision held that Courts should be the fora of last resort which I quite agree.
 39. Taking into account what the appellant has pleaded it is discernible from the plaint that he has exhausted that procedure and only approached this Court as a last resort.



40. It should be important for this Court to state that the Regulation 35(5) procedure does not address the aspect of malicious listing of customers by the Bureau on account of information provided by the financial institutions.
41. That aspect is particularly important in the present day, Kenya where all employers request for Credit Bureau Reference Clearance Certificate as a pre-condition to being recruited. It speaks to the need for financial institutions and the Bureau to exercise due care before forwarding information for listing to the Bureau and the Bureau acting on such information.
42. The listing of an individual wrongly or erroneously can have very devastating consequences on the life of an individual.
43. The duty to exercise utmost care before listing individuals and the need to verify the correctness of the information before publication is acute considering the requirements of Chapter Six of Kenya. It can lead to one being barred from serious responsibility due to erroneous listing.
44. The individuals who fall victim of such listing and prove to the Court that the listing has caused them a disadvantage and injury in Law, the Courts must be available to remedy such wrongs.
45. The Right to Privacy under Article 31 of *the Constitution* requires that information relating to one's private affairs should not be unnecessarily required or revealed.
46. The listing of an individual by the Credit Bureau is disclosure of one's state of financial probity. It should bother everyone that a financial institution can forward information that is incorrect to the Bureau for publication against an individual as alleged by the appellant.
47. It should never be the case that the Bureau can erroneously list one and seek to hide behind the provisions of Rule 35(5) of the Regulations to avoid scrutiny by the Courts.
48. It follows therefore that where there is a right there is a remedy. The remedy in this case can only be provided by the Court of Law in view of the plea by the appellant in his plea.
49. In any event the procedure under Regulation 35(5) does not provide for any damages for negligence which would then be a matter for the Court.
50. The 2013 Regulations were repealed by Rule 73 of the 2020 Credit Reference Bureau Regulation.
51. The 2020 Credit Bureau Reference Regulations introduced under Regulation 63 responsibilities of institutions and Credit Information Providers. The requirements there under place heavy responsibility on institutions such as the Respondent.
52. In a nutshell the preliminary objection preferred by the Respondent did not meet the test of what qualifies to be a preliminary objection.
53. The same having been raised under a repealed regulation should have been dismissed by the Court suo motu.

Determination

54. The preliminary objection was incurably defective having been premised on a reviewed provision of the Regulations and secondly the contents of the plea if the Court were to proceed on the assumption that they were correct, the appellants case was property before the Court.
55. In the end I allow the appeal reinstate the suit and order that the Lower Court file be immediately remanded to the Lower Court for further proceedings.



56. It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 15TH DAY OF OCTOBER 2024.

A. M. MUTETI

JUDGE

In the presence of:

Kiptoo: Court Assistant

Ramba for the Appellant

Nygangena for the Respondent

