



Metropolitan Credit Reference Bureau Limited & another v Mongare & 2 others (Civil Appeal E048 & E049 of 2021 (Consolidated)) [2023] KEHC 19480 (KLR) (17 May 2023) (Judgment)

Neutral citation: [2023] KEHC 19480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
CIVIL APPEAL E048 & E049 OF 2021 (CONSOLIDATED)
RPV WENDOH, J
MAY 17, 2023**

BETWEEN

METROPOLITAN CREDIT REFERENCE BUREAU LIMITED APPELLANT

AND

EVANS MESSOP MONGARE 1ST RESPONDENT

NATIONAL BANK OF KENYA LTD 2ND RESPONDENT

**AS CONSOLIDATED WITH
CIVIL APPEAL E049 OF 2021**

BETWEEN

NATIONAL BANK OF KENYA APPELLANT

AND

EVANS MESSOP MONGARE 1ST RESPONDENT

**METROPOLITAN CREDIT REFERENCE BUREAU LIMITED 2ND
RESPONDENT**

(Being an appeal from the Judgement and Decree of Honourable Peter Nyagaka (PM) delivered on the 10/6/2021 in Migori Civil Case No. 525 of 2018)

JUDGMENT

1. These two appeals E048 of 2021 and E049 of 2021 emanate from the judgement and decree of Hon. Peter Nyagaka (PM) delivered on 10/6/2021 in Migori Civil Case No. 525 of 2018. They were consolidated on 17/1/2023 before J. Odera.



2. Evans Messop Mongare, the 1st respondent in both appeals was the plaintiff in the trial court while National Bank of Kenya the appellant in E049 of 2021 was the 1st defendant and Metropolitan Credit Reference Bureau the appellant in E048 of 2021 was the 2nd defendant. For the purposes and ease of writing this judgement, Metropolitan Credit Reference Bureau will be the 1st appellant, National Bank of Kenya the 2nd appellant and Evans Messop Mongare, the respondent.
3. The 1st appellant is represented by the firm of Nchogu, Omwanza & Nyasimi Advocates while the 2nd appellant is represented by the firm of Otieno Yogo Ojuro & Co. Advocates and the respondent is represented by the firm of Abisai & Co. Advocates.
4. By a plaint dated 20/7/2018, the respondent filed a suit against the appellants seeking general damages for breach of contract, loss of credit worthiness, defamation, permanent injunction restraining the appellants from further pursuing him and removing his name from the defaulter's list, costs, interest and any other relief.
5. The respondent pleaded that he had a financial agreement with the 2nd appellant to extend to him loan facilities; that on or about 6/5/2015, he settled the loan in full which at the aforesaid date stood at Kshs. 134, 481.60; that on or about 7/5/2015, the 2nd appellant wrote to the respondent confirming that the outstanding amount had been fully settled; that sometime from 2017 to the time of filing the suit, the 2nd appellant continued making demands against the respondent to pay further sums not due and owing by the respondent to the 2nd appellant to make good over an alleged non - existent loan.
6. Further, the respondent pleaded the particulars of harassment by the 2nd appellant, particulars of malice, recklessness and breach on the part of the 2nd appellant, particulars of negligence on the part of the 1st appellant and particulars of defamation. The respondent posited that as a result of the aforesaid, he suffered mental anguish, loss of credit standing. Loss of reputation, extreme shame, loss and damage at the behest of the appellants and he held them liable. The respondent further asked for an order of removal of his name from the appellant's list as a loan defaulter.
7. The 1st appellant filed a statement of defence dated 15/8/2018. It denied the allegations in the plaint and put the respondent to strict proof. Further, the 1st appellant contended that any information it publishes from the 2nd appellant in relation to the respondent, it receives it lawfully and it is a qualified privilege under regulation 15 and 18 of the [Credit Reference Bureau Regulations, 2013](#); that the suit was immature and incompetent for reasons that under section 31 (5) of the [Banking Act](#), cap 488 Laws of Kenya and regulation 19 (1) of the [Credit Reference Bureau 2013](#), a suit or legal proceedings against the 1st appellant are statute barred and the 1st appellant shall invoke regulation 35 (5) of the [Credit Reference Bureau](#) that provides for an alternative dispute resolution mechanism before referring the same to court.
8. The 2nd appellant filed a statement of defence dated 15/8/2018. The 2nd appellant amended the defence to include a counter claim dated 25/2/2020. The 2nd appellant denied each and every allegation of the respondent's claim. In its counter claim, the 2nd appellant stated that the respondent failed to clear a loan balance of Kshs. 75,037.00 to date; that the 2nd appellant claims Kshs. 75,037.00 together with costs and interest. On the particulars of malice, recklessness and breach on the part of the respondent, the 2nd appellant averred that the respondent failed to repay the loan advanced to him and the information presented to the 1st appellant was correct and not meant to be in the detriment of the respondent.
9. On the particulars of defamation, the 2nd appellant stated among others, that the publishing of the respondent's name was done correctly, the respondent was a defaulter and that is why he was reported



to the CRB; that the respondent had refused to clear the loan and the 2nd appellant had acted carefully to ensure that it had recovered its loan and report the respondent to hinder it from accessing credit facilities. The 2nd appellant averred that the suit was incompetent on account of prematurity and it ought to be struck out.

10. On 10/6/2021, the trial magistrate found in favour of the respondent jointly and severally against the appellants and awarded the respondent a sum of Kshs. 2, 500,000/= with interest thereon at court rates. The respondent was also awarded costs of the suit and the wrongful listing be removed.
11. Being dissatisfied with the judgement and decree of the trial court, the 1st appellant filed the instant appeal via a memorandum of appeal dated 6/7/2021. The appellant preferred eleven (11) grounds of appeal which can be summarised in the following seven (7) grounds:-
 - i. That the learned magistrate erred in law and fact in holding that the 1st appellant was liable for executing its statutory duty under the [Banking \(Credit Reference Bureau Regulations\) 2013](#) in publishing the respondent's name as a credit defaulter in instructions of the 2nd appellant;
 - ii. The trial court erred in failing to make a determination whether the publication of the respondent was subjected to qualified privilege;
 - iii. That the trial court erred in law and fact in closing its mind to and disregarding procedures of listing and delisting a credit defaulter as provided by statute, the [Banking \(Credit Reference Bureau Regulations\) 2013](#);
 - iv. That the trial court erred in law in failing to find that the respondent's claim for defamation was unsubstantiated for failure to plead defamatory words verbatim in his pleadings;
 - v. That the trial court erred in law and in fact in failing to make a determination whether the respondent suffered any injury as a result of the statutory publication;
 - vi. That the trial court erred in law and in fact in awarding the sum of Kshs. 2,500,000/= as general damages which amount is highly speculative, inordinately high without any basis and entirely erroneous estimate;
 - vii. That the trial court erred in law and in fact in failing to appreciate the principles applicable therefore arriving at an erroneous finding.
12. Thus, the appellant prayed as follows: -
 - i. That the appeal be allowed;
 - ii. The impugned judgement and decree of the Magistrate at Migori Law Courts in CMCC No. 525 of 2018 delivered on 10/6/2021 be set aside and all consequential proceedings and orders thereto be set aside;
 - iii. This court substitutes the impugned judgement of the Magistrate with an order dismissing the 1st respondent's suit with costs to the appellant;
 - iv. That the costs of this appeal be awarded to the appellant.
13. In Civil Appeal No. E049 of 2021, the National Bank of Kenya, the 2nd appellant, preferred the following grounds of appeal:-
 - i. That the learned Magistrate erred in law and in fact in failing to find that the respondent was not entitled to the award given;



- ii. That the trial court erred in law and in fact by failing to take into account the fact that the respondent had failed to pay monies deposited in his account pursuant to a loan given to him;
 - iii. That the trial court erred in law and in fact by wrongly evaluating the evidence on record and hence coming to a wrong decision;
 - iv. That the trial court erred in failing to evaluate the documents presented by the 2nd appellant in court;
 - v. That the trial court erred in dismissing the 2nd appellant's counter claim.
14. The appeal was canvassed by way of written submissions. The 1st appellant filed its submissions dated 9/3/2023 on 22/3/2023. The respondent filed his submissions dated 16/1/2023 on even date and the 2nd appellant filed its submissions dated 10/2/2023 on 13/2/2023.
 15. On whether the trial court erred in finding the 1st appellant liable, it was submitted that the functions of the 1st appellant are governed by the *Banking Act* and the *Credit Reference Bureau Regulations*; that the functions of the 1st appellant are outlined in regulation 15 (1) which mandates the 1st appellant to publish a customer (respondent's) information as received from the 2nd appellant without any alterations; that the regulations do not require the 1st appellant to authenticate the accuracy of the information provided; that the 2nd appellant is required to ensure the accuracy of the information as provided for under regulation 50 (3) and (4). The 1st appellant relied on the case of *Anthony Kinyua Mwaniki & another v Kenya Commercial Bank Limited & another* (2017) eKLR where it was held that the 1st appellant was merely performing its statutory duty but the duty to ascertain the accuracy of the information lies with the 2nd appellant. The same holding was made in *Kennedy Odhiambo Nyagudi v Central Bank of Kenya & 3 others* (2013) eKLR.
 16. Further, it was submitted that on the supposed negligence on the part of the 1st appellant, the respondent alleged that he issued a notice to the 1st appellant to remove his name from the database; that he produced a letter dated 6/6/2018 addressed to the 1st appellant but on cross - examination he admitted that the demand letter was not signed and there is no proof of service.
 17. The 1st appellant submitted there is an elaborate process on how delisting can be done and it is provided for in regulation 35(8). The 1st appellant relied on the case of *Daniel Gachanja Gitbaiga v Credit Reference Bureau & 2 others* (2020) eKLR where the court held that a credit reference bureau could not possibly delete information provided by an institution without the authority or advice of the institution. Further the 1st appellant submitted that the trial court failed to recognize that regulation 19 (1) protects the 1st appellant from liability while executing its mandate.
 18. On whether the respondent proved his case against the 1st respondent, it was submitted that the respondent failed to plead the defaming words verbatim as it was held in the case of *Daniel Gachanja Gitbaiga (supra)*. The 1st appellant also submitted that the trial Magistrate also failed to analyze the required ingredients to satisfy the court of defamation; that the respondent did not also demonstrate that the 1st appellant was in breach of this information and that it shared his credit information with another person outside those entitled by law to access the information.
 19. The 1st appellant submitted that it invoked the defence of qualified privilege in executing its mandate and it is protected from liability for its lawful actions under regulation 19 (1). The 1st appellant stated that in the case of *Jamlick Gichuhi Mwangi (supra)* the court held that the plaintiff having failed to establish malice as against the 2nd defendant's agents, they cannot maintain a tortious claim against them.



20. On whether the damages were inordinately high, it was submitted that the trial court erred in relying on the case of *Nicholas R.O. Ombija v Kenya Commercial Bank Ltd* (2009) eKLR which was set aside by the Court of Appeal and the respondent was a Judge but the respondent herein is a probation officer and the two cannot be compared. The 1st appellant submitted that comparable cases like *Alice Njeri Maina v Kenya Commercial Bank Ltd* (2018) eKLR and *Co-operative Bank of Kenya Limited v Peter Ochieng* (2018) eKLR where the courts awarded a sum of Kshs. 200,000/= as global award. The 1st appellant asked this court to re- assess the damages.
21. On the issue of costs, it was submitted that since the 1st appellant has proved that is not liable, it is prudent that the respondent be condemned to pay the costs. The 1st appellant asked the court to allow the appeal and set aside the judgement and decree of the trial court against the 1st appellant.
22. The 2nd appellant submitted that it raised a preliminary objection dated 15/8/2018 on the grounds that there was an alternative statutory mechanism under regulation 35 (5) of the *CRB Regulations, 2013* which the respondent failed to utilize and the suit was therefore premature. The 2nd appellant relied on the findings in *Jamlick Gichubi Mwangi v Kenya Commercial Bank Limited & another* (2016) eKLR and *Gerald Kaura Muthamia v Co-operative Bank of Kenya Limited* (2017) eKLR where the courts discussed the procedure under regulation 35 (5) of the *CRB Regulations, 2013*.
23. It was also submitted that the trial court lacked jurisdiction to entertain the suit under section 14 and 15 of the *Civil Procedure Act*. It was submitted that the jurisdiction of filing a suit is not limited to where the defendant is domiciled; that the place where the cause of action arose is a consideration as envisaged under section 15 of the *Civil Procedure Act* and it is evident that the subject agreement was executed in Kisii. The 2nd appellant relied on the case of *Aly Jamal v Erastus Geroge Momanyi & 2 others* (2014) eKLR where the court made a finding that the cause of action arose in Nairobi where the subject matter agreement was executed.
24. The 2nd appellant further submitted that sometime in 2017, some money was remitted into the respondent's account to the tune of Kshs. 98, 537.99 where after deduction of Kshs. 23, 500/= was made, the balance owed to the 2nd appellant was Kshs. 75, 037/=. The error was discovered and the respondent was asked to remit back the funds which he did not. The appellant thus submitted that the other issue which arose was whether the bank could lawfully debit its customer's account without reference to that customer and later deduct the said amount on the basis that the remittance was erroneous for having made the mistake.
25. The 2nd appellant argued that this is a unique circumstance with no particular precedence but urged the court to be persuaded by the findings of the decision in *Lazarus Masayi Onjallah v Kenya Commercial Bank Ltd* (2004) eKLR. The 2nd appellant submitted that although the mistake was occasioned by the respondent and in fairness and justice, the respondent was entitled and accountable to pay out the money to the 2nd appellant and urged this court to allow the appeal and set aside the judgement and decree of the lower court.
26. In his submissions, the respondent faulted the 1st appellant's appeal for being incompetent contrary to order 42 rule 2 and 13 (4) (f) of the *Civil Procedure Rules*. The respondent stated that the record of appeal does not contain a copy of the memorandum of appeal. The respondent therefore urged this court to find that it lacks jurisdiction to entertain the 1st appellant's appeal and strike it out. The respondent further relied on the cases of *Bwana Mohammed Bwana v Silvano Buko Bonaya & 2 others* (2015) eKLR, *Samuel Mathenge Ndiritu v Martha Wangare Wanjira & another* (2017) eKLR and *Richard Mogire v Le Palanka Restaurant* (2021) eKLR.



27. On whether there exists an agency relationship between the appellants, it was submitted that the 1st appellant has no direct relationship with the respondent but its participation is invoked by the 2nd appellant who forwarded the details of the respondent for listing as a defaulter; that the 1st appellant has argued that the listing is a statutory duty and they want the court to ignore that the said listing is a consequence of an existing relationship which listing is by extension a punishment to loan defaulters. The respondent urged this court to find that there exists a principal agency relationship between the appellants and the 2nd appellant is vicariously liable for the actions of the 1st appellant and vice versa.
28. On whether the appeals are merited, the respondent submitted that his claim is based on bank - customer relationship that is contractual in nature and it imposes a duty of care on the bank, to exercise reasonable care and skill in dealing with its customers as it was held in the case of *National Bank of Kenya Ltd v Isaac A. Ogetta* (1999) eKLR. It was also submitted that the duty of care may arise in both tort and contract and the customer may elect to pursue one or both taking into account the issues of limitation periods as it was stated in the case of *Andrew Kiriti Gathii v Equity Ltd* Nairobi HCCC No. 37 of 2016 (UR) cited in the case of *Eric Omuodo Ounga v KCB Ltd* (2017) eKLR; that there is no contention that the 2nd appellant listed the respondent as a defaulter with the Credit Reference Bureau over an amount of Kshs. 98,537.99 though it has initially informed the Respondent that he had no arrears; that it is also not disputed that the aforesaid action was done without giving the respondent prior notice.
29. The respondent submitted that section 25 (1) of the *Credit Reference Bureau Regulations, 2013* 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; that section 25 (3) further provides that if the customer notified the provider that the specific information is inaccurate, it will not furnish the information to the credit bureau. The respondent stated that the bank was under an obligation to comply with the duties to the customer as provided for in the Credit Bureau Reference Regulations but it failed to exercise reasonable care over the entire relationship with the respondent.
30. On the damages awarded, the respondent submitted that it is a matter of judicial discretion and the appellate court should not interfere with the same. The respondent also urged this court to be persuaded by the findings in *Reuben Kioko Mutyaene v Kenya Commercial Bank Limited; Transunion t/a Credit Reference Bureau Africa Limited (Interested Party)* (2020) eKLR.
31. On whether the respondent suffered damages as a result of the appellant's actions, it was submitted that article 35 (1) (b) of the *Constitution* entitles every person to be given information; that the respondent was never given any pending financial obligations to the bank till such a time that he received a notification that his details had already been forwarded to the Credit Reference Bureau for listing; that the bank had *vide* its letters dated 7/5/2015 and 8/6/2015 written to the respondent affirming that it had no arrears; that as a result, he was denied a loan because he was listed as a defaulter and he suffered financial embarrassment when he could not be accorded financial facilities due to the listing. The respondent submitted that the appeals have been filed as a matter of right but they are not merited and they ought to be dismissed with costs.
32. The locus classica on appeals is the case of *Selle & another v Associated Motor Boat Company Ltd & others* (1968) 1EA 123 it was held:-

“.....this court is not bound necessarily to accept the judgment of fact by the court below. An appeal to this court therefore is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

33. The same position was taken in *Peters v Sunday Post Limited* (1958) EA 524 it was held:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas* (1), [1947] A.C. 484."

34. The principles which can be derived from the above cases on the duty of an appellate court are:-

- a. The appellate court is under duty to re-evaluate the evidence on record and reach its own conclusion.
- b. In re-evaluating the evidence, the appellate court should bear in mind it did not have the advantage of seeing and hearing the witnesses testify before it.
- c. It is not open for the appellate court to review the findings of the trial court simply because it would have reached different results as if it was hearing the matter for the first time.

35. Guided by the above principles, I have carefully considered the memorandum and record of appeals and the party's respective submissions. The issues for determination arising therefrom are:-

- i. Whether the 1st appellant appeal is competent.
- ii. Whether the trial court had jurisdiction to hear and determine the respondent's claim.
- iii. Whether the respondent owed the 2nd appellant any outstanding loan amount.
- iv. Whether the listing of the respondent to the credit reference bureau by the appellants was procedural.
- v. Whether the 1st appellant was to be held liable for the listing of the respondent.
- vi. Whether the 2nd appellant's counter claim was merited.
- vii. What are the damages deserving to the respondent?

36. Whether the 1st appellant's appeal incompetent. The respondent stated that the 1st appellant's record of appeal does not contain a copy of the memorandum of appeal which is listed as no. 1. order 42 rule (13)(4)(a) - (f) provides the documents which the appellate court should be satisfied are on record and they have been served on either party. The record of appeal should mainly contain all the documents which were used in the trial court. A memorandum of appeal is the document which is used to initiate the proceedings in the appellate court. In my view, it is not necessary for the memorandum of appeal to form part of the record of appeal as long as the court is satisfied that it forms part of the documents on record and the other parties were served. The appeal is therefore competent before this court.



37. On whether the trial court had territorial jurisdiction to hear and determine the respondent's claim, it was contended that the loan agreement was signed in Kisii and any dispute thereof could only be filed in Kisii. The 2nd appellant further relied on the provisions of sections 14 and 15 of the *Civil Procedure Act*. The 2nd appellant raised a notice of preliminary objection challenging the jurisdiction of the trial court dated 15/9/2018. The court record shows that a ruling on the preliminary objection was delivered on 18/6/2019 but the contents of the ruling are not known. The 2nd appellant did not appeal against the said ruling and therefore, the court properly proceeded with the main hearing. The challenge of the trial court's jurisdiction at this juncture is overtaken by events.
38. I have carefully examined the proceedings in the trial court. The issue which stands out is that, by the admission of the 2nd appellant's witness Mr. Nicholas Ogolla, the respondent had fully paid his loan using a cheque from the Kenya Commercial Bank. Mr. Ogolla testified:-
- “In brief, the plaintiff took a loan from National Bank of Kenya. The loan was fully paid using a cheque from Kenya Commercial Bank. The client was issued a letter showing the loan was cleared.”
39. Upto this point, there was no valid claim that the 2nd appellant had against the respondent on any outstanding loan. On the reasons why the 2nd appellant referred the name of the respondent to the CRB, Mr. Ogolla testified:-
- “On 17/6/2015, an error reversal was done for Kshs. 98,223 which the plaintiff withdrew using his ATM card. The bank did make calls to the plaintiff and even did an email concerning the erroneous reversal. The bank was able to receive two check offs of Kshs. 11, 593 from the client's employer leaving a balance of Kshs. 75, 037. The balance has not been paid upto date...on 9/7/2015 the plaintiff's account was credited with Kshs. 98, 223. Thereafter then series of withdrawals from ATM starting 10/7/2015 to 16/7/2015.”
40. The respondent admitted as much in his testimony when he stated:-
- “I regularly used the ATM card for withdrawal of Kshs. 98,223/= which was deposited into my account. The money was deposited in my account by National Bank of Kenya headquarters as a refund of over charge.”
41. The respondent used the amount of Kshs. 98, 223/= knowing that it was in his account as an overcharge of his loan amount. There was no mistaken belief by the respondent that the amount in his account was there erroneously. On cross - examination, the 2nd appellant admitted that the reversal was erroneous. The 2nd appellant did state that it communicated to the respondent to refund the amount but he did not, and through the intervention of the respondent's employer a cheque of Kshs. 11,593 was issued leaving a balance to Kshs. 75, 037. The 2nd appellant was not able to prove the communications done to the respondent requesting that the erroneous amount deposited be refunded. The 2nd appellant did not also produce the purported copy of cheque paid into the respondent's account by his employer. Since the amount which the 2nd appellant claimed against the respondent in his counter claim was Kshs. 75, 037/=, this court will accept the evidence that the sum of Kshs. 11,593 was actually paid in settlement of the alleged erroneous reversal.
42. The question then becomes whether the 2nd appellant was justified in listing the respondent with the CRB, the 1st appellant herein. As earlier observed, the respondent was given a clearance letter dated 7/5/2015 in regard to the repayment of the loan. The 2nd appellant further wrote to the respondent's



employer vide a letter dated 8/6/2015 confirming that the respondent had fully paid his loan. The ordinary meaning of the term loan is a form of a debit incurred by an individual or other entity. For there to be said that a loan has been advanced, there has to be a lender and a borrower. Usually, the terms thereof of the loan are agreed upon by the parties before the agreed amount is advanced.

43. In my view, I do not think that the alleged erroneously reversed amount can be termed to be a loan facility advanced by the 2nd appellant to the respondent. The respondent was already cleared of his obligations in repaying the advanced loan. Unless proper communication was done to him informing him of the error, there was no reason to believe that the money in his account was sent there erroneously. The mistake was on the part of the 2nd appellant but they did not prove to the trial court the necessary steps they took to recover the erroneously reversed the amount from the respondent.
44. The 2nd appellant is an institution which has adequate resources. It ought to have marshalled all the necessary means to reach the respondent and inform him of the error and the consequences thereof it was to take if the respondent was not going to reverse the alleged erroneous reversal. In [*Viable Deco Solutions Limited v Co-operative Bank of Kenya Limited*](#) (2014) eKLR the Court discussed the necessity of notice to a customer as follows:-

“Notice to the customer of important matters touching on the account held in a bank is almost an indispensable necessity. And although methods of communication are various and varied, most banks have adopted technology in communication of important matters to the customer; a method that is fast and almost instantaneous. The necessity of communication arises from the fiduciary nature of Customer-Bank relationship which is undergirded by absolute faith and trust. Ordinarily, full disclosure of any action taken by the Bank, especially those which are adverse to the Customer is imperative aspect of that relationship. Therefore, whereas the Applicant agreed “to comply, observe and be bound by the Terms and Conditions made by you [read the Bank] and in force from time to time or as amended by you [read the Bank] pertaining to such account (s) ... and the General Terms and Conditions documents”, any such terms and conditions so made must be brought, one way or other, to the attention of the Applicant without delay. Equally, any adverse action taken by the Bank on the account held by the Applicant must be brought to the attention of the Applicant without any delay.”

45. The personal loan application form shows that the 2nd appellant had all the details pertaining to the respondent including his place of employment, residence and the referees. There is no doubt that it is the 2nd appellant which failed to discharge its mandate in properly communicating to the respondent.
46. In addition, the trial court found that the 2nd appellant should have reversed the credited amount instead of debiting the loan account which had been fully paid. This court agrees with the position taken by the trial court. The 2nd appellant, on account of its own mistake should not have proceeded to list the respondent with the 1st appellant.
47. It is indeed true that there is not much jurisprudence on the recourse a bank has when it has erroneously deposits money in its customer’s account. I have considered the case of [*Lazarus Masayi Onjallah*](#) (*supra*). The court considered the circumstances where money is paid by a third-party person to the bank directly. The court held that when money is paid by a third party to the bank directly or on account of a bank’s customer, it is refundable even if it established that it was paid by mistake of fact and the mistake has been brought to the attention of the bank before the bank has paid it out. In this scenario, the money in the customer’s account was credited by the bank but not a third party.



48. I have considered an almost similar scenario which played out in the case [*National Bank of Kenya v John Eloy O. Nyasoro*](#) (2006) eKLR as in the instant case. In the aforementioned case, the plaintiff being the bank, advanced some loan amount and deposited the same in the defendant's personal account. The defendant proceeded to withdraw the amount without perfecting the securities in favour of the plaintiff. The plaintiff sued the defendant to recover the amount. The court found that the defendant was liable to repay the money as he took advantage of the fact that the securities had not been perfected and he withdrew the money. While in the aforementioned case, there was no mistake in depositing money, unlike in the present circumstances, the plaintiff sued the defendant for recovery of the money which it was not entitled to prior to perfection of the security. I suppose that should have been the course of action taken by the 2nd appellant against the respondent as opposed to listing him with the CRB.
49. Be that as it may, the actions of the respondent are equally telling. The respondent being a citizen of good standing, and a public officer who is guided by the principles and values of practicing good ethics, when he was confronted with money which he could not account for, he ought to have taken the necessary steps to visit the 2nd appellant and inquire on the money which he found in his account. The respondent knew very well that he did not deposit the money in his account neither did he expect any such monies. The evidence is that he withdrew the money within 6 days from 10/7/2015 -16/7/2015. The respondent "made hay while the sun till shone" and took advantage of the favourable situation before the unusual luck slipped away from his grip. Either way, the respondent is to carry the blame as had he not taken the opportunity to utilize the money which even himself, could not account for, he contributed to the unfortunate turn of events.
50. On whether the listing was procedural, the 2nd appellant contended that it followed the proper procedure before listing the respondent to the credit reference bureau. Section 26 (1) of the [*Credit Reference Bureau Regulations 2020*](#) provides:-
- "A credit information provider who furnishes negative information to a bureau with respect to a customer shall, in writing or through electronic means, notify the customer of the intention to submit the negative information at least thirty days before submitting the negative information to the bureau or within such shorter period as the contract between the credit information provider and the customer may provide."
51. The 2nd appellant did not tell the trial court whether it adhered to the regulations of informing the respondent of the intended listing to the CRB.
52. The 2nd appellant did not act diligently as required of it. The bank's duty to its customers must be exercised with reasonable care and skill in regards with its operations with its customers. The 2nd appellant's actions were reckless and negligent. Therefore, I find that there was negligence and wrongful listing of the respondent by the 2nd appellant, thus the 2nd appellant is liable.
53. On the part of the 1st appellant, I agree that they are not to blame for the listing of the respondent or any defaulter. They are simply mandated to perform their statutory duty and they solely rely on information from financial institutions. There is also no evidence that the respondent informed it as required under regulation 37 (5) of the supposed erroneous listing.
54. On the counter - claim by the 2nd appellant, it sought that the respondent be compelled to pay the outstanding balance of 75, 037/=. As this court has held above, the respondent cannot be faulted for failing to repay money which is claimed to be a loan whereas it was the mistake of the 2nd appellant when



it credited the respondent's account. The 2nd appellant should have filed a suit claiming the money as opposed to listing the respondent with the CRB. The counter claim therefore fails.

55. On the issue of damages, the respondent alleged that the listing in the CRB caused him to be denied a loan as he had been listed as a defaulter. The respondent stated that he suffered financial embarrassment. In support of this, the respondent produced two emails from one xxxx@gmail.com which indicated that his loan request of KCB Mobi Loan of Kshs. 3,000/= could not be processed due to the listing at the CRB. It can be deduced that the loan which the respondent intended to apply and was declined was for Kshs. 3,000/=. The 1st appellant urged this court to find that the damages of Kshs. 2,500,000/= was inordinately high and asked this court to award a sum of between Kshs. 100,000/= to 200,000/= as general damages.
56. In the case of *Butt v Khan* (1977) KAR 1, Law J.A stated that the court can interfere with the award of damages when the aggrieved persons satisfies one of two conditions:-
- a. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or
 - b. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.
57. In as much as the respondent claimed that he suffered loss and damage as a result of the listing in the CRB, he did not place evidence or demonstrate before the trial court how the decline of the loan application of Kshs. 3,000/= caused him to suffer the financial embarrassment or loss despite his name being listed in the CRB. There is also no evidence produced how the actions defamed his character or personality. It is trite law under section 107 of the *Evidence Act* that whoever alleges must prove.
58. The question which this court can interrogate closely is whether the listing itself is defamatory. The *Halsbury Law of England* Volume 32 (2019) at page 509 defined a defamatory statement as follows:-
- “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 disparage him in his office, profession, calling, trade or business ”
59. For a claim of defamation to succeed, the following have to be proved:-
- a. The statement was defamatory.
 - b. It was false and referred to the person.
 - c. The defamatory words were published to a third party.
 - d. It was maliciously published.
60. Section 27 of the *Regulations* guides the CRBs in handling any information submitted to it by the banks as follows:-
- (1) A bureau shall protect the confidentiality of customer information in its possession or control under these Regulations and only report or release such information —
 - (a) to the customer;
 - (b) to the Central Bank;
 - (c) to a requesting subscriber;



- (d) to a third party as authorised by the customer concerned; or
- (e) as required by the Act, *Microfinance Act*, 2006, the *Sacco Societies Act, 2008*, these Regulations or any other relevant written law.

61. The CRBs are precluded from divulging any information given to them on the credit status of a customer except in the circumstances outlined above. What would have been defamatory is if the CRB had released the information to third-parties contrary to Section 27 of the *Regulations* thus putting the respondent in a position of ridicule to other right-thinking members of the society. To this end, I find that no evidence was tendered on the allegations of defamation.
62. Although the respondent did not demonstrate how the decline of a loan of Kshs. 3,000/= caused him to suffer financial loss, damage and embarrassment, I still find that the actions of the 2nd appellant to list the respondent after clearing him of his loan obligations, was not proper. This court also found that the respondent cannot be absolved of blame since he knowingly used money which he knew was not rightfully his. The respondent has to shoulder some blame.
63. In the end, I find that the respondent is entitled to damages of Kshs. 20,000/= for the wrongful listing which made him to be denied a Mobile Loan amount of Kshs. 3,000/=. The 2nd appellant will bear the loss suffered by the respondent. The 1st appellant is absolved of any blame since it was only performing its statutory duties.
64. I hereby make the following findings.
- i. The 1st appellant's appeal dated 6/7/2021 has merit and the same is allowed. The respondent's case against the 1st appellant is hereby dismissed with costs.
 - ii. The 2nd appellant's appeal dated 4/7/2021 partially succeeds and the following orders in favour of the respondent against the 2nd appellant do issue:-
 - a. The respondent is awarded a sum of Kshs. 60,000/= as general damages for financial embarrassment. The 2nd appellant will bear the costs of this general damages.
 - b. The respondent is awarded half the costs of this appeal and half of the costs of the lower court's suit.
 - c. Interest on (a) and (b) above, shall run from the date of the judgement of the trial court.
 - d. The 2nd appellant shall at its own costs within fourteen (14) days from the date of this judgement, cause the name of the respondent be delisted from the Credit Reference Bureau.
 - iii. The counterclaim by the 2nd appellant be and is hereby dismissed.
 - iv. The Judgement and decree of the Hon. P. N. Areri dated and delivered on 10/6/2021 on the award of damages be and is hereby set aside.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 17TH DAY OF MAY, 2023.

R. WENDOH

JUDGE

Judgement delivered in presence of;-

Mr. Ondigi 1st Appellant



Mr. Odhiambo 2nd Appellant
No appearance Respondent
Emma / Phelix - Court Assistant

