



**Ndege v Equity Bank Ltd (Civil Appeal 20 of 2022)
[2024] KEHC 14601 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 20 OF 2022
TA ODERA, J
NOVEMBER 13, 2024**

BETWEEN

THOMAS RIOBA NDEGE APPELLANT

AND

EQUITY BANK LTD RESPONDENT

*(An Appeal arising from part judgment/decree in KISII CMCC NO.664
of 2018 dated 28.02.2022 by P.K. Mutai –Senior Resident Magistrate)*

JUDGMENT

Introduction

1. The appellant moved this court by way of memorandum of appeal setting aside of the judgment of Hon. Mutai (Senior Resident Magistrate) dated 28.2.22 on the grounds that:
 - a. The learned trial magistrate erred in law in finding that there was insufficient material or evidence on record to hold that the appellant is not indebted to the appellant in respect of the claim in the statement of defence.
 - b. The learned trial magistrate erred in law in not awarding costs to the applicant.
 - c. The Learned Trial Magistrate erred in law in not awarding general damages to the appellant once it made a specific finding that the respondent illegally listed the appellant with the credit Reference Bureau.
 - d. The Learned Trial Magistrate erred in law The Learned Trial Magistrate decided the case against the weight of the evidence on record in favour of the appellant.



Back ground

2. The facts of this case are that in the year 2011 the respondent financed the appellant to purchase motor vehicle registration number KBE ---V at Kshs. 1,000,000/=. The appellant defaulted in repayment of the said loan and in the year 2015, the said vehicle was attached and the respondent filed Kisii Chief Magistrate's civil suit no. 447 of 2015 challenging the said sale. The respondent filed a counterclaim. Both the suit filed by the appellant and the respondent's counterclaim were dismissed. The appellant later filed Kisii CMCC No. 668 of 2018 seeking that his listed by the defendant with Credit Reference Bureau (CRB) be removed and that he be paid general damages for wrongful listing. The trial court held that he could not tell with certainty whether there were outstanding balances or not. The court also found that there was non compliance with Section 28 of the CRB regulations which required that a notice of negative listing within 30 days from today. The court declined to grant general damages but no reasons were stated for the same.

Submissions

3. The appeal proceeded by way of written submissions.
The appellant submitted that the magistrate erred in failing to award the appellant general damages as pleaded and put in the written submissions. He relied on the case of *Eunice Nganga v Higher Education loans board & 2 others* (2021) eKLR.
4. The appellant also faulted the trial court for failing to award costs and yet he won the case and that it is trite law under section 27 of the *Civil Procedure Act* that costs will follow the event.
 5. The respondent submitted that *Mutabi v Co-operative Bank of Kenya & another* (Civil Case 358 of 2012) [2022] KEHC 13962 (KLR) (Civ) (Judgment) where it was held that "Regulation 19 (1) further states that." A suit cannot lie against the Central Bank, Bureau, an institution of chairpersons --- or any other person authorised under these Regulations --- for loss or damage caused or which is likely to be caused by anything, which is done or intended to be done in good faith in pursuance of these regulations or guidelines issued hereunder."
37. The above provisions, in my considered view are applicable if the thing complained of was done in good faith. Where the institution is found to have been reckless and negligent and in breach of the institutions duty of care to the customer, then, a suit for negligence and sequential damage will lie.
38. The onus lies on the plaintiff to prove that the bank or institution did not act honestly and was actuated by malice."
5. This is an appellate court whose duty is to re-evaluate the entire evidence on record and arrive at its own decision bearing in mind that it neither saw nor heard the witnesses during their testimonies in court as was held in the case of *Sielle v Associated motors* EA 1968 EA 123.
6. I have carefully re-evaluated the entire evidence on record and the able submissions by both counsel herein considered the entire evidence on record.
7. The issues arising for determination are; -
 - a. Whether the appellant proved that he was entitled to damages for illegal listing in CRB.
 - b. Whether the appellant was entitled to costs of the suit.



Determination

8. On whether the appellant proved that he was entitled to damages for illegal listing in the CRB, the appellant submitted that having proved that he was wrongly listed in CRB against the provisions of section 28 of the CRB regulations then he was entitled to damages.
9. In the case of *Barclays Bank of Kenya Ltd v Denis Amolo Owuor* [2022] eKLR Hon. Justice Kiarie Waweru cited the case of Eunice Nganga (*supra*)
10. The respondent urged me to follow the decision in *Eunice Nganga v. Higher Education Loans Board & 2 Others* [2020] eKLR where Makau J at paragraph 92 held:

“From the above it is clear that the Credit Information provider, 1st Respondent herein, before furnishing negative information to the Bureau, herein the 2nd and 3rd Respondents, was bound to give notice to the Petitioner of adverse information and give her an opportunity to be heard before listing her. The 1st Respondent in forwarding the Petitioner’s name for listing acted in breach of Article 47 of the *Constitution* and Section 4(3) of the *Fair Administrative Action Act*. The Petitioner’s right to fair hearing as enshrined under Article 50 of the *Constitution* was violated by the 1st Respondent. This further violated the Petitioner’s rights and resulted in her being denied financial facilities from Banks, who accessed that adverse information. The Petitioner had the right and legitimate expectation to be notified of the adverse Report and to be given a chance to be heard before being adversely listed as required contrary to the procedure chosen by the 1st Respondent to forward the adverse information to the Bureau to have Petitioner listed contrary to the constitution and statute and therefore illegal and unlawful.”

11. The circumstances in the instant case are different from those that obtained in the Eunice Nganga (*supra*) case. Eunice was listed while she had no arrears but the respondent herein was listed while he had substantial arrears. Though the appellant had an obligation to inform him, in my view, he did not deserve to be awarded any compensation. The information to CRB was correct and the loan was paid a year later after the listing.”
12. In the instant case, the listing was done on 2.5.13. The court in CMCC NO. 447 of 2015 dismissed the claim of the appellant and the counterclaim by the respondent in the sum of Kshs 259,000/= . There is evidence that the appellant was granted a loan by the respondent and he defaulted as a result of which his vehicle which had been financed by the respondent was repossessed and sold. The respondent says there was a balance of the said loan which remained unpaid as at the date of listing. In CMCC no. 664 of 2018 the trial court held that appellant was illegally listed in the CRB as no notice was served. The court held that “I have looked at the judgment; it is indicated that the prayers sought in the counterclaim could not be granted as the copy of the pleadings were not availed. It is now difficult for this court to know exactly what orders were dismissed in the counterclaim. From the evidence the court cannot tell with certainty whether there are outstanding balances or not” .
13. It is trite law that he who alleges must prove. The court proceeded to order for removal of the name of the appellant from CRB. In this case as in the said Denis Amolo case (*supra*), it is true that there was history of the appellant owing the respondent owing the defendant and hence the attachment and sale. The fact that the name of the appellant was removed from CRB for want of procedure did not sanitize his default record as the issue was left hanging as per the impugned judgment herein. It is trite law that “ubi juris ibi remedium” and that out of wickedness there is no cause of action. There was no right of the appellant which was violated to entitle him to a remedy of damages as he was in default



of the loan sum. There was no evidence that the listing was without a reasonable cause or maliciously. The appellant was not entitled to damages in the circumstances. I find that the trial court did not err by not awarding general damages.

14. On the issue of costs, it is trite law that costs follow event. Section 27 of the [Civil Procedure Act](#) provides:

“(1)Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

15. In the case of *Levben Products v Alexander Films (SA) (PTY) Ltd 1957 (4) SA 225 (SR)* at 227 that it stated:

“It is clear from authorities that the fundamental principle underling the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion ...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at.... In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.

16. Due to the convoluted circumstances of this case, the trial magistrate was right in not awarding costs to the appellant.

17. The appeal is thus devoid of merit and I proceed to dismiss it. Each party to bear its own costs due to the circumstances of this appeal.

T.A ODERA

JUDGE

13.11.24

DELIVERED VIRTUALLY VIA TEAMS PLATFORM IN THE PRESENCE OF:

Soire for the Appellant

Ondande for the Respondent

Court Assistant - Oigo

