



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL CASE NO. 199 OF 2018**

**WASHE ARTHUR DENJE.....PLAINTIFF**

**VERSUS**

**EQUITY BANK SAVINGS & CREDIT CO-OP SOCIETY.....1<sup>ST</sup> DEFENDANT**

**CREDIT REFERENCE BUREAU**

**AFRICA T/A TRANSUNION.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application dated 30/7/2019 and the application dated 22/8/2019 together with the preliminary objection dated 26/10/2020 were heard simultaneously. This ruling is therefore in respect of the two applications and the preliminary objection.

2. The application dated 30/7/2019 filed by the 1<sup>st</sup> defendant seeks orders that:

1. **THAT the interlocutory judgment against the 1<sup>st</sup> Defendant be set aside for reasons that the 1<sup>st</sup> Defendant has a plausible defence.**
2. **THAT the 1<sup>st</sup> Defendant/Applicant be granted leave to defend.**
3. **THAT the costs of this application be awarded to the 1<sup>st</sup> Defendant/Applicant herein.**

3. It is stated in the affidavit filed by the Loans Manager, Equity Bank Savings and Credit Co-operative, the 1<sup>st</sup> defendant (hereinafter Sacco), that the Plaintiff was its customer and used to borrow and save with the Sacco. That the Plaintiff has an outstanding loan of Kshs. 87,825 with the Sacco. That the Sacco has a plausible defence. The delay in filing a defence herein is attributed to the time taken to obtain necessary documents and to instruct the advocates. It is further averred that the delay is not inordinate or unreasonable and that no prejudice will be visited on the plaintiff if the application is allowed.

4. The application is opposed as for the Grounds of Opposition dated 27/8/2019 which state as follows:

1. **The Application is frivolous, vexatious and abuse of the court process.**
2. **The Application is fatally incompetent the same having been filed under a wrong provision of the law.**
3. **The Application does not exhibit/demonstrate that the Applicant/1<sup>st</sup> Defendant has a plausible defence.**
4. **The Application does not meet the threshold for setting aside Interlocutory Judgment.**

5. The application dated 22/8/2019 filed by the 2<sup>nd</sup> defendant seeks orders that:

1. **THAT the Honourable Court be pleased to strike out the Plaintiff and accordingly dismiss the suit as relates to the 2<sup>nd</sup> Defendant.**

6. The application is premised on the grounds set out therein and the supporting affidavits sworn by the 2<sup>nd</sup> Defendants Legal Manager. It is stated that the 2<sup>nd</sup> Defendant, Credit Reference Bureau Africa (hereinafter Bureau), received information from the Sacco. That the plaintiff herein had loan arrears of Kshs. 87,824.80 and the Bureau accordingly listed the plaintiff.

7. It is averred that the cause of action arose on 10/3/2015 and that the Sacco is therefore statute barred pursuant to Section 4(2) of the Limitation of Actions Act. That the plaintiff failed to utilize the dispute resolution mechanisms set out in Regulations 35(5) of the Banking Act CAP 488 Laws of Kenya. It is further averred that the suit ought to have been filed before the Co-operative Tribunal by dint of Section 76(1) and (2) of the Co-operative Societies Act.

8. The application is opposed. The plaintiff stated in his replying affidavit that the suit is before a court of competent jurisdiction and does not fall under the ambit of section 76 of the Co-operative Societies Act No. 2 of 1997. That the suit is not statute barred as the listing of the Plaintiff by the Bureau is a continuing injury. It is further contended that the Bureau was negligent in listing the Plaintiff's name as a loan defaulter, which information was not true.

9. The Preliminary Objection dated 26/10/2020, filed by the 1<sup>st</sup> Defendant is based on the following points:

1) **THAT the jurisdiction of this Honourable Court to hear and determine this matter is disputed.**

2) **THAT the Plaintiff's claim falls within the jurisdiction of the Co-operative Tribunal as contemplated by the provisions of Section 76 of the Cooperative Societies Act CAP 490 Laws of Kenya.**

10. I have considered the two applications, the responses thereof, the Preliminary Objection and the submissions filed by the respective counsel for the parties.

11. The preliminary objection and the application dated 22/8/2019 both challenge the jurisdiction of the court to hear the suit herein. The court was referred to Section 76(1)(2) of the Co-operative Societies Act CAP 490 Laws of Kenya. The said provision stipulates as follows:

**(1) If any dispute concerning the business of a co-operative society arises—**

**(a) among members, past members and persons claiming through members, past members and deceased members; or**

**(b) between members, past members or deceased members, and the society, its Committee or any officer of the society; or**

**(c) between the society and any other co-operative society,**

**(2) A dispute for the purpose of this section shall include—**

**(a) a claim by a co-operative society for any debt or demand due to it from a member or past member, or from the nominee or personal representative of a deceased member, whether such debt or demand is admitted or not; or**

**(b) a claim by a member, past member or the nominee or personal representative of a deceased member for any debt or demand due from a co-operative society, whether such debt or demand is admitted or not;**

**(c) a claim by a Sacco society against a refusal to grant or a revocation of licence or any other due, from the Authority.**

12. It is not in dispute that the Plaintiff is a former member of the Defendant's Co-operative Society. The plaintiff's claim as per the amended plaint dated 17/9/2018 is for:-

**a) An order declaring that the Plaintiff was unlawfully listed in the Credit Reference Bureau.**

**b) General Damages unlawful listing under the Credit Reference Bureau.**

**c) General Damages for Breach of statutory rights.**

**d) General Damages for Negligence.**

**e) Costs of the suit.**

**f) Interest on (b), (c), (d) and (e) above.**

**g) Any other or further relief as this Honourable Court may deem fit to grant.**

13. The background to the Plaintiff's claim as stated in the plaint as the listing by the 2<sup>nd</sup> Defendant following the malicious information given by the 1<sup>st</sup> Defendant that the Plaintiff was a loan defaulter.

14. This court's view after considering the reliefs sought in the plaint is that the Plaintiff's case is founded on the breach of the statutory rights and the tort of negligence. As the suit stands, I have not seen any prayer for damages for defamation. The question is whether the suit falls within the ambit of Section 76 of the Co-operatives Act which provides for disputes concerning the business of the Co-operative Society to be heard by the Co-operative Tribunal.

15. The term "business of the society" has been interpreted by the High Court in various cases. In the case of **Gatanga Coffee Growers V. Gitau (1970) E.A. 361** and in **Murata Farmers Sacco Society Ltd Vs. Co-operative Bank of Kenya Ltd (2001) eKLR** it was held as follows:-

**"...business of the society is not confined to the internal management of the society but covers every activity of the society within the ambits of its by-laws and rules."**

16. The plaintiff's case is not a claim in respect of any debt. Whereas the question of loans is part of the business of the Sacco, the alleged unlawful listing with the Bureau and the consequences thereof would in my view not fall within the business of the Sacco. In that regard, I am persuaded by the case of **Republic Vs. Matheka Kithome & 4 others (2011) eKLR** cited by the plaintiff where the court held as follows:

**"In my view, a dispute concerning the business of a cooperative society must be construed to mean a dispute or claim arising from, related or connected to the performance of the profession, trade or operations of the cooperative society towards the achievement of the subject of cooperatives as given under section 4(a) of the Act being "the promotion of the welfare and economic interests of its members." It includes in terms of section 76(2) of the Act a debt or demand by a member against a cooperative society and vice versa. The dispute must be so closely related to the business (profession, trade, service or operations) for which the cooperative society is established as to be part of its activities or operations as guided by cooperatives law, by-laws and rules. Such dispute must be referred to the Cooperatives Tribunal which is under section 77 of the Act...."**

For disputes between members and the cooperative society or among members or between societies, which are outside the area delineated above in paragraph 6, the ordinary court system must be used. For instance, a member who misappropriates society's funds cannot avoid the criminal prosecution which may be preferred against him; a member who willfully destroys society's property or commits torts against the society or its officers or members must be taken through court process; and so also the society when it fails to pay salaries (if any) to its members as employees or takes disciplinary action against its members or officers. In such cases the disputes are outside the restricted purview or the provisions of section 76 of the Act. See **LUKENYA RANCHING V. KAVOLOTO 1970) E.A. 414** and **WAKIRO V- COMM. OF BUGISU COOP 1968 ) EA 523."**

17. In **Benard Mugo & others Vs. Kagaari South Farmers Co-operative Society & 4 others (2015) Eklr**, the court after analyzing the claim and the prayers sought held as follows:

**" I come to the conclusion that the claim does not fall within the description of the business of the society. It is a suit challenging the legality of the decision of the society alleged to have the effect of infringing the rights of the plaintiffs. The matter is outside the ambit of Section 76 (1) and (2) of the Act and therefore falls squarely under the jurisdiction of this court."**

18. In the case at hand, a case of negligence and a claim for breach of statutory rights cannot be said to be closely related to the business of the Sacco. It has not been established that the Sacco's by-laws and rules envisage such an activity to be part of the business of the Sacco.

19. It has been submitted by the Defendants that this suit is time barred by dint of Section 4(2) of the Limitations Act CAP 22 which provides:

**"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date."**

20. As already stated above, this court's view is that is a suit based on the case of negligence and breach of statutory rights. The suit herein not being a suit of defamation is therefore not time barred by view of Section 4(2) of the Limitation of Actions Act. The listing and delisting is pleaded in the plaint to have occurred in the year 2015 and 2016. The plaint was filed on 16/8/2018 and was therefore filed within time.

21. This court was referred to 19(1) of the Credit Reference Bureau Regulations, 2013 which provides as follows:

**"A suit, prosecution or other legal proceedings shall not lie against the Central Bank, Bureau, an institution or chairperson, director, member, auditor, adviser, officer or other employee or agent of such Bureau or institution or any other person authorised under these Regulations to submit, receive, use or share credit information, for any loss or damage caused or 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".**

22. This court was also referred to Section 31(5) of the Banking Act CAP 488 Laws of Kenya which states:-

**"No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to—**

**(a) the Central Bank or to another institution; or**

**(b) a credit reference bureau established under subsection (4), in the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure.**

**(c) a deposit-taking microfinance institution licensed under the Microfinance Act, 2006.”**

23. The foregoing provisions in this court’s view insulate the institutions mentioned therein when it comes to information shared in good faith in the course of duty. The Plaintiff stated in the plaint the particulars of malice, malafides, illegalities, negligence and breach of statutory rights on the part of the Defendants. The details thereof will come out by way of evidence.

24. Turning to Section 35(5) of the Banking Act which the court has also been referred to, the same stipulates as follows:-

**“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.”**

25. Although the above provision not coached in mandatory terms, I am of the view that the provision obligates an aggrieved party to exhaust all available remedies before filing suits in court.

**(See for example Eusebio Isaac Wachira Munene Vs. NIC Bank Limited (2020) eKLR and Daniel Gachanja Gitahiga Vs. Credit Reference Bureau Africa Ltd & 2 others (2013) eKLR)**

26. The averments in the plaint refer to the exchange of correspondence between the Plaintiff and the 1<sup>st</sup> Defendant in relation to the Plaintiff’s complaints as to whether he owed the 1<sup>st</sup> Defendant any money. The Plaintiff further claimed in paragraph no. 13 of the plaint is that he wrote to the 1<sup>st</sup> Defendant demanding an apology and a withdrawal of the reference made to the Bureau and copied the letter to the Bureau. It is averred in the paragraph 13A of the plaint that the plaintiff was delisted by the Bureau on 25/10/2015 following advice from the Sacco.

27. From the foregoing, particularly taking into account the averments of delisting, the process envisaged under Section 35(5) above was exhausted. The Plaintiff is therefore not prematurely before this court in claim for unlawful listing.

28. The principles applicable in determining whether to set aside an *ex-parte* judgment were laid out by the Court of Appeal in the case of **Pithon Waweru Maina v Thuka Mugiria [1983] eKLR** as follows:

**“a) Firstly, there are no limits or restrictions on the judge’s discretion except that if he does vary the judgment he does so on such terms as may be just...The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at 76C and E b*). Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. *Shah v Mbogo [1967]EA 116at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.c*). Thirdly the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. *Mbogo v Shah [1968]EA 93*.**

29. Interlocutory Judgment was entered against the 1<sup>st</sup> Defendant on 14/11/2018. The 1<sup>st</sup> Defendant was served on 23/8/2018 with the summons to enter appearance. The affidavit of service sworn by the process server, Simon Nevema Velela, is not in dispute. Although it is stated that the Sacco has a good and valid defence, the draft of the same has not been exhibited herein. The court is therefore not able to weigh whether there is a defence on merits or not. There is also no satisfactory explanation why it took above eight months For the Sacco to obtain documents and instruct the advocates. The delay is unreasonable.

30. Notwithstanding the foregoing observations the hearing of this case is yet to take off. Formal proof has not been conducted. It is therefore possible to bring the Sacco on board without prejudice to the plaintiff’s case. The plaintiff can be compensated by an award of costs.

31. With the foregoing, the upshot is that the preliminary objection and the application dated 22/3/2018 are hereby dismissed with costs. The application dated 30/9/2019 seeking orders that the Interlocutory Judgment herein be set aside is allowed with throw away costs to the Plaintiff. The 1<sup>st</sup> Defendant to file and serve its statement of defence within 14 days from the date hereof.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JUNE, 2021**

**B.THURANIRA JADEN**

**JUDGE**