REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. E017 OF 2019

SAMCHI TELECOMMUNICATIONS LTD.............PLAINTIFF/APPLICANT

VERSUS

SBM BANK LIMITED...DEFENDANT/RESPONDENT

RULING

1. This is the notice of motion dated 22nd January 2021 brought under sections 1A, 1B & 3A, Order 40 Rule 2, Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following orders:

i) Spent

ii) That pending the hearing and determination of the suit filed herein, a temporary order of injunction be and is hereby issued barring the defendant/respondent by themselves, their agents, assigns and/or servants from making and /or pre-listing the plaintiff/applicant on the credit reference bureaus as threatened by their letter dated 14th January 2021.

iii) That the defendant/respondent is ordered to seize permanently on listing the plaintiff/applicant on Credit Reference Bureaus and issuance of a public apology for erroneously listing them twice.

iv) Spent

v) That cost be awarded to the plaintiff/applicant.

2. The application is supported by the grounds on its face plus the sworn affidavit of Njeru Karuana the group advisor of the plaintiff/applicant. A summary of the grounds and averments is that the defendant/respondent has been erroneously listing the plaintiff/applicant on various credit bureaus which has injured the reputation and good standing of the applicant. The applicant on lodging a complaint, has been delisted by the bureau for reasons that the defendant/respondent is unable to provide supporting documentation for listing as required by the regulations guiding such listings.

3. It's the applicant's position that if an order stopping the defendant /respondent is not issued and an award of damages eventually made, the outcome cannot compensate the plaintiff/applicant for the damage to its reputation. Further, the applicant's case has overwhelming chances of success while on the other hand there cannot be a justifiable defence to the defamatory listing which has caused nuisance and embarrassment to the applicant.

4. The affidavit of Njeru Karuana reiterates the grounds already set out above. She avers that the defendant/respondent started off by listing them on the Trans-Union Credit reference who made a resolution to de-list the applicant (Annexed as NKI and NK2). The defendant/respondent yet again lodged a complaint on 16th December 2020 with Metropol Credit Reference bureau which they expunged the listing from the applicant's credit report. (Annexed as NK3 and NK4).

5. Annexture NK5 is a notice of pre-listing by 14th February 2021 from the defendant/respondent if the plaintiff/applicant does not comply with their allegations that they owe Chase bank money which she avers is not true. She depones that in the foregoing, it is expedient, fair and just that the orders asked for be granted.

6. A replying affidavit sworn by Ms. Pesian Ketere the Special Assets and debt Management Unit Manager of the defendant/respondent on 15th March 2021was filed in opposition to the application. She averred that the plaintiff/applicant owes them huge sums of money which they are trying to rightfully claim. That they have been masquerading under the guise of defamation in an attempt to run away from their financial obligation.

7. Annexture PK-1 is the customer account details statement dated 11th February 2021 showing arrears of account numbers 0012005701004 and 0012005701002 that the respondent has had for approximately 9 years and 7 years respectively. She has further annexed the statements of the said accounts showing the arrears of the accounts (annextures PK-2 and PK-3) clearly indicating arrears of Kshs. 9,608,454.37/= and Kshs. 44,246, 549/= respectively.

8. She avers that they received communication from Absa Bank Kenya dated 22/05/2017 indicating that the plaintiff/applicant was owing them money and had not settled (PK-5). That a full and final demand had been issued by the respondent to the plaintiff/applicant to settle the Kshs. 53,855.004.13/= prior to the listing (PK-6). They also issued a pre-listing notice (PK-7) on 14/01/2021 owing to the outstanding debt that the plaintiff/applicant acknowledges but refuses to pay.

9. She further avers that the plaintiff/applicant has not with sufficient proof shown or proved any defamation. The court should allow the defendant/respondent to proceed and list the applicant on the Metropol Credit Reference Bureau as the same is the only remedy left to recover the monies from the commercial transactions that are the core of the dispute.

10. With leave of the court the plaintiff/applicant through Njeru Karuana filed a further affidavit. She deponed that the respondent had missed the specific dispute in the application by addressing issues far from the dispute which is defamation. That the application is based on the nuisance of creating a circle of listing, deletion and pre-listing without proper documentation to the bureau.

11. She avers that she is not aware of any overdraft from the respondent though they had requested for a guarantee to the former Chase Bank which was never issued. She reckons that the defendant/respondent should have filed a Commercial claim to justify their allegations instead of defaming them.

12. She denies maintaining an account with the respondent, same for one with Chase Bank which was a trading account that had so many transactions. She depones that they have always disputed the sum claimed hence the objections to the CRB listing with the results of deletion.

13. The application was disposed of by written submissions. Mr. Gichecha for the applicant in his submissions gave a brief background of the matter and identified the issues for determination to be follows:

> *a) Whether a prima facie case has been established.*
>
> *b) Whether the balance of convenience lies to the applicant due to the persistent and incessant pattern of listing it on the CRB despite several deletions.*
>
> *c) Whether the plaintiff will suffer irreparable injury/loss that cannot be compensated by an award of damages if the application for temporary injunction is not allowed.*

14. On the first issue counsel relied on the case of **Mrao vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125** as follows:

> *"…….in civil cases, it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."*

15. He submitted that the key issues that run through the application are on whether the respondent availed the requisite support documents to show that their threat on the notice to relist the applicant with the credit reference bureau was made in good faith. Further, that without the supporting documents for the overdraft to the CRB and the applicant, it would appear that the respondent's threat or a re-list that had been listed and deleted had been actuated by malice.

16. For this submission he relied on the case of **Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited (2017) eKLR**

> *"In view of the different figures stated above, it was necessary for the defendant to provide an account to the Plaintiff. This would at least have been done during the hearing. The Plaintiffs were entitled to know which entries had been made to their loan accounts, interests applied and applicable penalties. It is thus clear that with no accounts rendered, the sums owed by the Plaintiffs', if any, are not known and will never be known."*

17. Counsel submitted that even though the defendant/respondent is bound by the bank guidelines No.1 of 2014, the manner in which they have treated the plaintiff/applicant leaves a lot to be desired. He referred to the **Regulations 26 (4)** which provides that;

> *"A credit information provider shall not furnish information relating to a customer to any Bureau if the credit information provider has been notified by a customer that the specific information is inaccurate."*

18. He also referred to Regulations 26(5) that states that;

> *"The credit information provider may submit the credit information to a bureau once it has addressed the customers concerns on the inaccuracy of the credit information."*

19. On the second issue Counsel submitted that the respondent seems not to be interested in pursuing a commercial suit yet the alleged overdraft is denied in total. The applicant denies ever applying for an overdraft with Chase Bank which was acquired by the respondent herein.

20. Counsel further relied on the case of **Ezekiel Osugo Angwenyi & Another v National Industrial Credit Bank Limited (2017) eKLR** where it was held that:

> "*Banks must keep proper records of account. It is on the basis of such record that a claim for or against a bank can be determined. Since between a bank and a borrower the former is the one obligated to keep a more dependable record and to avail statements of account, a bank, like in this case, which cannot keep and avail accountable record will be disqualified from making any claims against a borrower, and would be hard put to discharge any such claims by a borrower,"*

21. He further submitted that the applicant had raised serious issues for trial which have demonstrated that the application is not intended to buy time nor is it frivolous nor vexatious. He contended that the confusion created by the available documents produced by both parties creates doubts as to whether there was an overdraft or guarantee application which can only be resolved by a full hearing and not in a summary manner.

22. In arguing this he relied on the case of **Paul Gitonga Wanjau vs Gathuthi Tea Factor Company Ltd & Others (2016) eKLR** where the court held that:

> "*Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[17] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.(18)Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. [19] The court will seek to maintain the status quo in determining where the balance of convenience lies"*

23. On the third issue Counsel contends that if the injunction orders are not granted they stand to suffer irreparable injury. In determining whether the damages would be sufficient compensation, they invite this court to be alive to the fact that the business of telecommunication interacts a lot with the financial disrepute with other financial institutions they work with.

24. Submissions by learned counsel for the respondent M/s Mumbi are dated 23rd April 2021. She submitted that a party that seeks to obtain an injunction in this case an interlocutory injunction must show utmost good faith and a prima facie case.

25. She relied on the case of **Board of trustees of African Independent Pentecostal Church of Africa Church v Peter Mungai Kimani & 12 others (2014) eKLR**

> "*The court further held that the power of the court in an application for an interlocutory injunction is discretionary. The applicant must show a prima facie case, which is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. Being an equitable remedy, a party who comes before the court seeking an injunction must show utmost good faith."*

26. She further relied on **Giella vs Cassman Brown & Company Ltd (1973) EA 358** where the court held that:

> "……………….. First, an *applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."*

27. Counsel submitted that the conditions set out by the above have not been fulfilled by the applicant who at the same time has failed to adhere to the hallowed maxim of 'he who comes to court must come with clean hands. She cited the case of **Kawaijeet Singh Rekhi v Peter Wainana Kamau & 2 Others (2016)** where the court stated that:

> "*Having come to the conclusion that the appellant had knowledge of prior competing claims or interest in the suit premises, his defence that he was an innocent purchaser for value without notice cannot stand. Furthermore, that defence is one based on equity. As such, it requires one who seeks its aid to be of clean hands in line with the maxim that 'he who comes to equity must come with clean hands'. The appellant conduct however smacks of ill motive and mischief"*

28. Counsel submitted that the applicant is really pushing the defendant/respondent to sue them at the Commercial court in order to recover the debt the respondent are in the process of recovering. She further submitted that the applicant has set the record straight that they indeed owe amounts claimed and that they had indicated to the court that this was not a defamatory action but one of fair comment with truth and justification and a commercial nature.

29. She cited the Court of Appeal case of **Selina Patani & another v Dhiranji v Patani (2019) eKLR Civil Appeal No.114 of 2017** which

stated that;

> "*In rehashing, we note the ingredients of defamation were summarized in the case of John Ward -v- Standard Ltd, HCCC 1062 of 2005 as follows: -*
>
> *(i) The statement must be defamatory.*
>
> *(ii) The statement must refer to the plaintiff.*
>
> *(iii) The statement must be published by the defendant.*
>
> *(iv) The statement must be false."*

30. To support this she cited the case of **Megascope Healthcare Kenya Limited v Nation Media Group Limited & 4 others (2021) eKLR** Civil suit E094 of 2020 where the court stated:

> "*Normally the court would not grant an interlocutory injunction when the defendant pleads justification or fair comment because of the public interest that the truth should be out and the court aims to protect a humane, responsible, truthful and trustworthy defendant"*

31. She further cited on **Grace Wangui Ngenye v Chris Kirubi & another (2015) eKLR Civil Appeal 40 of 2010** where the court stated:

> "*An exposition of what Lord Philips, the President of the Supreme Court of England described as the outer limits of the defence of the fair comment is set out in the Supreme court of England decision in Spiller & another vs Joseph & another (2010) UKSC. In that case, Lord Philips adopted with approval what the court of Final Appeal of Hong Kong characterized as the five "well established" non-controversial matters" in relation to the defence of fair comment. First, the comment must be on a matter of public interest. Second, the comment must be recognizable as comment, distinct from an imputation of fact. Third, the comment must be based on facts, which are true or protected by privilege. Fourth the comment must explicitly or implicitly indicate, at least in general terms, what are the facts on which the comment is being made. The reader or hearer should be in a position to judge for himself how far the comment was well founded. Fifth, the comment must be one which would have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views*"

32. She then submitted that the reason behind the listing of the applicant on the Metropol Credit Reference Bureau was based on the non-performing account which made persistent losses while attracting interest to the point that it hit the interest ceiling and the in duplum rule had to be invoked.

33. Regulation 26(1) of the Banking (Credit Reference Bureau) Regulation 2020 states as follows regarding notification for prelisting on any credit reference bureau:

> "*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*"

34. She also relied on **Regulations 27(1) and 27(2) of the Banking (Credit Reference Bureau) Regulation 2020** which states as follows regarding the confidentiality of information provided when seeking to list an entity on any credit reference bureau:

> "*A bureau shall protect the confidentiality of a 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 authorized 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"*

35. She submits that nothing prohibits the respondent/defendant to have a defaulting customer who has refused to settle their arrears listed on a CRB as the same action of listing is fully, properly and legally sanctioned by law as one mechanism of recovering debt. Counsel submits that this application and entire suit is fallacious, vexatious, mala fides and a complete abuse of the court process and the same should be struck out in its entirety and costs be awarded to the defendant/respondent.

36. White submitting on the issue of costs Counsel relied on the case of **Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another**

(2016) where the court held as follows regarding costs:

> "*The words "the event" mean the result of all the proceedings to the litigation. The event is the result of the entire litigation. It is clear however, that the word "event" is to be regarded as a collective noun and is to be read distinctively so that in fact it may mean the "events" of separate issues in an action. Thus the expression "the costs shall follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue in this sense need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in the whole or in part"*

37. She further relied on the case of **Farah Awad Gullet v CMC v Group Motors Limited Civil Appeal 206 of 2015** where the Court of Appeal held as follows;

> "Even though awarding of costs is discretionary, costs ought to be awarded to the victorious party in a suit"

Analysis and Determination

38. Upon considering the notice of motion, affidavits, annextures, submissions and authorities cited by counsel for both parties, I find this application to be raising the following issues for determination:

> *a) Whether on the evidence and material placed before court, the plaintiff/applicant has satisfied the conditions upon which a temporary injunction can be granted.*
>
> *b) Who should pay costs.*

39. The conditions for consideration for granting an injunction were well settled in the case of **Giella vs. Cassman Brown & Company Limited (1973) E A 358.** They were stated to be as follows:

> "*First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."*

40. A right to a fair hearing and due process of the law is enshrined in Article 50 of the constitution. In the case of **Thomas Edison Ltd v Bathock 1912 15 C.L.R 679** it was held thus:

> "*There is a primary precept governing administration of justice that no man is to be condemned unheard and therefore, as a general rule no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence, but instances occur where justice could not be done unless the subject matter of the suit is preserved and, if that is in danger of destruction by one party or if irremediable by one party interim orders may issue to give room for the court to determine the dispute on the merits."*

It therefore means there are instances where an interim order for preservation of a subject may issue to await the full hearing of the matter.

41. On whether the plaintiff/applicant has established a prima facie case, it is clear that the respondent/defendant is hell bent on ensuring that they list the applicant to the Credit Reference Bureau. In this case the plaintiff/applicant finds the defendant/respondent's action to be unfair to it and done in bad faith. However, the respondent is of the view that listing the plaintiff /applicant is the right thing to do as it is allowed in law in order for its customers and stakeholders to be aware of their credit worthiness.

42. The court in the case of **Moses C. Muhia Njoroge & 2 others v Jane W. Lesaloi & 5 others [2014] eKLR** while citing **Mrao Ltd (supra)** defined a prima facie case as follows:

> "*A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".*

43. From the material placed before this court in the applicant's affidavit it has shown instances where the respondent/defendant has been listing and delisting it. It insists that this is not in good faith since the respondent never has full documentation at hand before going ahead and listing it and later delisting it. The applicant is of the view that this process is making it to be discredited by the public and the stakeholders hence making it lose business.

44. On the other hand, the respondent/defendant is of the view that the plaintiff/applicant is running away from the fact that it owes them money and has not been able to pay the said monies. It also finds this matter not to be a defamatory one but one of fair comment with truth and justification and being commercial in nature.

45. Justice Mabeya in a similar scenario where there were claims of defamation in the case of **Francis Atwoli & 5 others v Hon. Kazungu Kambi & 3 others Nairobi High Court Civil Suit No. 60 of 2015** stated as follows at paragraph 23:

"One other thing, even if the Plaintiffs were successful, it would have been difficult to grant the orders as sought. The orders sought as set out at the beginning of this ruling are too wide. I am doubtful if a court of law directing its mind properly can issue such an order. The order is too general, wide, imprecise and incapable of comprehension. A Defendant faced with such an order will be at a loss as to what words or statements that are defamatory that he is being restrained from using or uttering. To my mind, a Plaintiff who wants a court to issue an order of injunction in a defamation case, must set out the words sought to be restrained with precision and exactitude for purposes of enforcement of such an order. In the present case, I am afraid, the order sought was too general to have any precise meaning."

46. The defendant/respondent has insisted that the plaintiff/applicant owes it money dating back to nine (9) years. If that is the true position, then the defendant/respondent is expected to have all the documentation with it, and file its claim before the Commercial and Tax Division of the High Court. The issue of reporting the plaintiff/applicant to the CRB for listing and after a short while it is delisted is not adding up. Is it that some money is repaid or what exactly happens?

47. The annextures PK1-7 show debits plus communication between the parties over outstanding payments. The plaint and notice of motion dated 22nd January 2021 were prompted by a pre-listing notice by the defendant/respondent to the plaintiff/applicant dated 14th January 2021. The same was responded to by the plaintiff/applicant's counsel vide a letter dated 17th December 2020. The plaintiff/applicant's fear is that the listing and delisting is causing it a lot of embarrassment.

48. Regulations 26(1), (27(1) and (2) of the Banking (Credit Reference Bureau) Regulations 2020 give guidelines on how any negative information in respect of a customer is to be handled by a bureau. The plaintiff/applicant has not given any evidence showing that the bureau upon receiving information on it breached these regulations, or that information was passed to the bureau without it being notified.

49. The plaintiff/applicant's argument is that twice it has been listed by the Credit Reference Bureau (CRB) and upon objecting the bureau has delisted it, the reason being that the defendant/respondent did not supply sufficient documentation. In this case the body doing the listing and delisting is the Credit Reference Bureau (CRB) and not the defendant/respondent. The CRBs that listed and delisted the plaintiff/applicant are not parties to this suit.

50. The Defendant/respondent on the other hand has placed documents (PK1-7) before this court showing it is owed money by the plaintiff/applicant. This as I stated is a matter that should be resolved before an appropriate court and not being threatened by the letter from the defendant/respondent dated 24th January 2021 for another listing which is the crux of the case before this court. It is only fair that the listing be put on hold pending the hearing of this case.

51. The upshot is that the plaintiff/applicant has satisfied this court of the need to issue a temporary injunction in terms of prayer No.2 of the Notice of Motion dated 22nd January 2021. The same shall be in force for only six (6) months. The parties are therefore urged to have the matter heard and finalized within six (6) months. Prayer No.3 is declined.

Orders accordingly

DELIVERED ONLINE, SIGNED AND DATED THIS 6TH DAY OF JULY, 2021.

H. I. ONG'UDI

JUDGE