



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 234 OF 2018

FESTUS MUTHIANI.....PLAINTIFF

-VERSUS-

METROPOL CREDIT REFERENCE BUREAU.....1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT

RULING

- 1) Festus Muthiani, the Plaintiff herein, applied for a commercial loan from Equity Bank Ltd.
- 2) The Bank sought for clearance from Metropol credit Reference Bureau Ltd the 1st Defendant herein on the Plaintiff's creditworthiness.
- 3) Jiweze Ltd, the 2nd Defendant herein forwarded details of credit worthiness of the Plaintiff to the 1st Defendant which in turn forwarded the information to Equity Bank Ltd.
- 4) The information indicated that the plaintiff was a loan defaulter. The Plaintiff formed the opinion that the information was false and malicious hence he was prompted to file this action against the Defendants vide the Amended plaint dated 2nd November 2018.
- 5) In the aforesaid plaint the plaintiff sought Judgment against the Defendants as follows:
 - a) **A declaration that the Defendant's report blacklisting the Plaintiff was unlawful and malicious.**
 - b) **An injunction to restrain the Defendants, their agents, servants or whomever from publishing, making any such or similar defamatory remarks of and concerning the Plaintiff.**
 - c) **An order directed to the Defendants to expunge the defamatory report about the Plaintiff from its system or any other place where it is displayed.**
 - d) **General damages for loss of business.**
 - e) **Aggravated and/or exemplary damages to be assessed by the Honourable court for defamation.**
 - f) **Costs and interest incidental to this suit.**
- 6) When served with the plaint, the 1st Defendant filed a defence wherein he raised a preliminary objection to the effect that the Plaintiff's suit is premature in that the Plaintiff had failed to use the alternative dispute resolution mechanisms provided for by law before filling this suit. The preliminary objection is the subject matter of this ruling.
- 7) Learned counsels recorded a consent order to have the preliminary objection disposed of by written submissions. It is the submissions of the 1st Defendant that the Plaintiff failed to use the alternative statutory procedure provided for under Regulation 35 of the Banking (credit Dereference Bureau Regulations.) 2013 before filing this suit hence this suit is prematurely before this court therefore it should be struck out.
- 8) The 1st Defendant urged this court to find that the Plaintiff bypassed a statutory remedy hence his suit is incompetent and improperly before this court. The 1st Defendant relied on the case of **Jamlick Gichuchi Mwangi Vs Kenya Commercial Bank Ltd and Another**

[2016] eKLR where this court held inter alia as follows:

“...the application is premature as the procedure for correction and/or deletion of a customer’s information shared with the 1st Defendant is clearly and intricately provided for under Regulation 20 of the Banking (credit Reference Bureau) Regulations, 2003 which Procedure inter alia a customer to notify the 1st Defendant in writing that he disputes the reference after which the Defendant carries out investigations and decides whether to delete or retain the reference. The Plaintiff has not involved and or exhausted the aforesaid procedure and therefore this application is premature.”

9) In response to the 1st Defendant’s submissions, the Plaintiff argued that under Regulation 35 (5) of the Banking (Credit Reference Bureau) Regulations 2013, the word may is used hence it is not mandatory to first use the procedure prescribed therein before approaching the court. The Plaintiff also pointed out that he wrote to the 1st Defendant about the false and inaccurate information about his credit worthiness but the 1st Defendant did not make any initiative to address the issue. He also pointed out that the Regulations imposed a duty upon the 1st Defendant to inform the customer of his right to refer a dispute to an alternative dispute resolution mechanism or to court.

10) Having considered the rival submissions, it is apparent that there is no dispute that the Plaintiff did not utilize the alternative dispute resolution mechanism prescribed under Regulation 35 (5) of the Banking (Credit Reference Bureau), Regulations, 2013. The question which should be answered is whether the failure to use the alternative dispute resolution mechanism prior to coming to court is fatal?

11) I have carefully perused the provisions of Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013 and note that the word ‘May’ is used. Regulation 35 (5) provides as follows:

“(5) 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.”

12) A critical examination of Regulation 35(5) will reveal that it is not mandatory for a customer to first use the procedure provided under the Regulations before approaching the court. In my humble view, the failure to use the alternative dispute resolution mechanism before approaching the court is not fatal. I am not therefore persuaded by the decision of my sister Mumbi Ngugi J in **Amy Kagendo Mate Vs Prime Bank Ltd & Credit Reference Bureau & Another [2013] eKLR**.

13) The Plaintiff’s list of documents include a demand letter written to the 1st Defendant dated 5th November 2018 in which the Plaintiff demanded from the 1st Defendant to disclose the source and basis of the false and malicious report. The Plaintiff also demanded from the 1st Defendant to withdraw the erroneous report within 7 days.

14) The 1st Defendant did not meet the Plaintiff’s demands hence prompting the Plaintiff to this suit.

15) Regulation 28(ii)f of the Banking (Credit Reference Bureau) Regulations, 2013 provides as follows:

“The right of a customer to refer a dispute to an alternative dispute resolution mechanism or a court of law where he feels that his dispute has not been resolved to his satisfaction.”

16) With respect, I agree with the submissions of the Plaintiff that Regulation 28(iii) (f), makes it optional for a party to either utilize the alternative dispute resolution mechanism or the court. In this case, the Plaintiff was entitled to approach this court when the 1st Defendant failed to address the issues raised by the Plaintiff vide his advocates demand letter dated 5th November 2018.

17) In the end, I find this suit not premature but properly before this court. Consequently, the preliminary objection is found to be without merit. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Nairobi online via Microsoft Teams this 6th day of May, 2020

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J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant