



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 567 OF 2011**

**NICASIO NJIRU NJAGI ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CREDIT REFERENCE BUREAU AFRICA LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. In his plaint dated 16<sup>th</sup> December 2011, *Nicasio Njiru Njagi* instituted suit against the *Kenya Commercial Bank Limited* (1<sup>st</sup> defendant) and *Credit Reference Bureau Africa Limited* (2<sup>nd</sup> defendant) seeking the following reliefs:

- a. General damages for defamation*
- b. Aggravated damages for defamation*
- c. General damages for negligence*
- d. Interest*
- e. Costs of the suit*
- f. Any other relief the court may deem fit to grant.*

2. The plaintiff's claim is that at all material times, he was a customer of Equity Bank Limited; that on or about 14<sup>th</sup> March 2011, he applied for a loan of KShs.250,000 from Equity Bank's Embu Branch to finance his education at Chuka University College. He later got to learn that his loan was not processed as the 2<sup>nd</sup> defendant whose service Equity Bank subscribed to had listed him as a loan defaulter at the instance of the 1<sup>st</sup> defendant.

3. The plaintiff further pleaded that upon making enquiries from the 1<sup>st</sup> defendant's Embu Branch, he was informed that his listing by the 2<sup>nd</sup> defendant as a defaulter was erroneous as the actual loanee was a teacher, a customer at the bank's Kitui branch.

The credit report submitted by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant which was published to Equity Bank showed that as at 30<sup>th</sup> November 2010, his alleged indebtedness to the 1<sup>st</sup> defendant stood at KShs.800,582.60. The report shared with the 2<sup>nd</sup> defendant is reproduced at paragraph 11 of the plaint.

4. The plaintiff alleged that the publication was defamatory as in its ordinary meaning, it meant, *inter alia*, that he was a loan defaulter and was not credit worthy; that he was a financial embarrassment; that he was a fraudster who had obtained money from the 1<sup>st</sup> defendant with a promise to pay it back while he knew that he had no capacity to do so.

5. The plaintiff further asserted that the publication by both defendants was false and was actuated by malice with the aim of lowering his standing in the eyes of the financial community, his family, peers, professional colleagues and right thinking members of the society as he had never operated any account with the 1<sup>st</sup> defendant or obtained any loan from it; that despite notifying the defendants of this position, neither of them deleted his name from its record of loan defaulters or withdrew the publication or apologized to him.

6. In addition, the plaintiff pleaded that in making the publication, the defendants were negligent and acted in breach of their statutory duty; that as a consequence, he was unable to obtain a loan from Equity Bank or any other financial institution resulting in the disruption of his

education; that this caused him embarrassment and emotional distress.

7. On being served with summons, both defendants denied the plaintiff's claim in their separate statements of defence filed on 18<sup>th</sup> April 2012 and 23<sup>rd</sup> March 2012 respectively.

8. On its part, the 1<sup>st</sup> defendant denied all the allegations attributed to it in the plaint and put the plaintiff to strict proof thereof. In particular, the 1<sup>st</sup> defendant pleaded that one *Nicasio Njiru Njagi* of national identity card number 9062309 applied for a check off loan in the sum of KShs.728,668 under the Teachers' Service Commission scheme which loan was approved and disbursed on 26<sup>th</sup> February 2010; that the borrower failed to service the loan as agreed as a result of which the 1<sup>st</sup> defendant submitted his details to the 2<sup>nd</sup> defendant to have him listed as a loan defaulter.

9. The 1<sup>st</sup> defendant further pleaded that upon receiving the plaintiff's complaint about his erroneous listing by the 2<sup>nd</sup> defendant, it launched internal investigations which established that the plaintiff, a customer at its Embu Branch shared similar names with the borrower and his code identification number 724 had been erroneously used to refer to the borrower in the information dispatched to the 2<sup>nd</sup> defendant.

10. The 1<sup>st</sup> defendant denied that the erroneous publication of the plaintiff's information to the 2<sup>nd</sup> defendant was malicious and asserted that upon realizing its mistake, it immediately advised the 2<sup>nd</sup> defendant to remove the plaintiff's details from its record of defaulters and replace them with those of the borrower.

11. The 1<sup>st</sup> defendant also specifically denied all the allegations of negligence and breach of statutory duty pleaded against it in the plaint.

12. In its defence, the 2<sup>nd</sup> defendant started by challenging the competence of the plaintiff's suit. It claimed that the suit was statute barred pursuant to *Section 31 (5) of the Banking Act (the Act)*.

13. The 2<sup>nd</sup> defendant in the alternative denied all the allegations of defamation, breach of statutory duty and negligence made against it in the plaint. It contended that it had a statutory duty to publish information received from financial institutions including the 1<sup>st</sup> defendant and that it published the information shared by the 1<sup>st</sup> defendant regarding the plaintiff in good faith in the exercise of that duty; that upon being served with a notice of amendment by the 1<sup>st</sup> defendant on 25<sup>th</sup> March 2011, it deleted the plaintiff's details on 28<sup>th</sup> March 2011 and issued a notice of change to Equity Bank on the same date.

14. At the hearing, the plaintiff testified in support of his case and did not call an additional witness. The defendants on their part called one witness each.

15. In his evidence, PW 1 adopted his witness statement dated 16<sup>th</sup> December 2011 and produced as Exhibits 1 to 10 the documents itemized in his list of documents filed on 19<sup>th</sup> December 2011. He emphasized that as a result of the defendant's action, he was unable to obtain a loan to clear his school fees at Chuka University and to get a laptop in a programme ran by the university.

16. During cross examination, the plaintiff stated that his Identity Card Number was 9821585 and his postal address was Box 202 Kiritiire-60113. He maintained that he did not have an account with the 1<sup>st</sup> defendant and that he did not have any loan facility with it. He confirmed that upon receiving his complaint, the 1<sup>st</sup> defendant in its letter dated 24<sup>th</sup> March 2011 advised the 2<sup>nd</sup> defendant to delete his name from the list of loan defaulters and that in its email dated 1<sup>st</sup> April 2011, the 1<sup>st</sup> defendant directed him to go for his clearance certificate from the 2<sup>nd</sup> defendant which he obtained vide a report dated 5<sup>th</sup> April 2011 (Exhibit 8).

17. In further cross examination, the plaintiff admitted that the 2<sup>nd</sup> defendant did not publish information received from the 1<sup>st</sup> defendant to any other person or entity except Equity Bank; that the 2<sup>nd</sup> defendant in a letter dated 28<sup>th</sup> March 2011 notified Equity Bank that he had been delisted as a defaulter and that he did not thereafter apply for a loan from Equity Bank or any other bank.

18. *Mr. Derrick Obwaka* testified on behalf of the 1<sup>st</sup> defendant as DW1. He adopted his witness statement dated 26<sup>th</sup> June 2013 and denied that the publication of the plaintiff's name as a loan defaulter was malicious. He reiterated the averments in the 1<sup>st</sup> defendant's defence that the publication was a genuine error made by its internal system due to the similarity of names of its two customers; that the bank meant to submit the details of its Kitui Branch customer who was the defaulter but by mistake, its automated system known as T24 merged the accounts held by the two customers into one and submitted them together to the 2<sup>nd</sup> defendant; that on discovering the error, the 1<sup>st</sup> defendant moved swiftly and ensured that the same was corrected by the 2<sup>nd</sup> defendant.

19. *Ms Vivian Kasudi*, the 2<sup>nd</sup> defendant's Legal and Compliance Manager testified as DW 2. She adopted her witness statement dated 26<sup>th</sup> June 2017 and produced in evidence the documents in the 2<sup>nd</sup> defendant's list of documents dated 23<sup>rd</sup> March 2012. She testified that the 2<sup>nd</sup> defendant is a credit reference bureau which relies on credit information received from subscribing financial institutions which included the 1<sup>st</sup> defendant; that on 25<sup>th</sup> March 2011, the 1<sup>st</sup> defendant advised the 2<sup>nd</sup> defendant that the information previously given about the plaintiff was erroneous and that the same should be deleted; that the 2<sup>nd</sup> defendant effected the 1<sup>st</sup> defendant's instructions on 28<sup>th</sup> March 2011 and notified Equity Bank accordingly on the same date.

20. DW2 denied that the 2<sup>nd</sup> defendant was liable to the plaintiff in any way but added that in the event the 2<sup>nd</sup> defendant was found liable, it will be seeking indemnity from the 1<sup>st</sup> defendant.

21. At the close of the hearing, the court invited the parties to file written submissions. Learned counsel on record for each of the parties subsequently highlighted their submissions buttressing their clients' respective cases.
22. In his submissions, the plaintiff reiterated that his claim against the defendants was premised on the tort of defamation and negligence as well as breach of statutory duty. He contended that the defamatory statement was the credit report published by the defendants which was false and inaccurate; that the 1<sup>st</sup> defendant published the report to the 2<sup>nd</sup> defendant maliciously since the plaintiff has never been its customer and had therefore not taken any loan with the 1<sup>st</sup> defendant nor supplied it with his personal details.
23. The plaintiff further submitted that the 1<sup>st</sup> defendant's failure to comply with *Regulation 28 (3)* of the *Banking Credit Reference Bureau Regulations (the Regulations)* which required banks to forward only accurate information to credit reference bureaus and *Regulation 28 (1)* which required banks to notify their customers within 30 days of listing the bureau to which their information had been submitted was not only evidence of negligence and breach of statutory duty but was further evidence of malice.
24. With respect to the 2<sup>nd</sup> defendant, the plaintiff submitted that failure to verify the accuracy of the information received from the 1<sup>st</sup> defendant before publishing it was evidence of malice.
25. In addition, the plaintiff submitted that the defence of qualified privilege mounted by the 2<sup>nd</sup> defendant was inapplicable in this case since the publication was inaccurate and malicious.
26. Relying on the persuasive authority of *Nickson Muthoka Mutavi V Kenya Agricultural Research Institute, [2016] eKLR*, the plaintiff asserted that the defendants owed him both a statutory and common law duty of care which they breached by publishing, in reference to him, inaccurate credit information as a result of which he not only suffered damage to his reputation but also suffered loss in that he was unable to obtain a loan to pay for his education at chukka university and also failed to get a *wezesha* laptop and a voucher for KShs.9,000 from the university.
27. To counter the plaintiff's case, the 1<sup>st</sup> defendant started its submissions by inviting the court to find that the plaintiff's suit was premature and was thus defective as it was instituted before the plaintiff had exhausted the dispute resolution mechanism set out under *Regulation 20 (8)* of the *Regulations*. For this proposition, the 1<sup>st</sup> defendant relied on the persuasive authorities of *Jamlick Gichohi Mwangi V Kenya Commercial Bank Ltd & Another, [2016] eKLR* and *Daniel Gachanja Githaiga V Credit Reference Bureau Africa Ltd & 2 Others, Nairobi HCCC No. 551 of 2011*.
28. On the claim for defamation, while admitting that the information shared with the 2<sup>nd</sup> defendant was inaccurate, the 1<sup>st</sup> defendant submitted that the plaintiff had failed to prove that the information was defamatory as he had not led evidence to prove that it damaged his reputation in the eyes of right thinking members of society. The 1<sup>st</sup> defendant further re-iterated its claim that the publication was not malicious as it was caused by a genuine error in its internal system and that once the mistake was discovered, it was rectified expeditiously.
29. The 1<sup>st</sup> defendant also denied that it was negligent or that it breached any statutory duty owed to the plaintiff. According to the 1<sup>st</sup> defendant, it had a duty to share the credit information with the 2<sup>nd</sup> defendant under *Section 31 (5)* of the Act.
30. On its part, the 2<sup>nd</sup> defendant challenged the competence of the suit claiming that it was statute barred in view of the provisions of *Section 31 (5)* of the Act.
31. Relying on the authority of *Jamlick Gichohi Mwangi V Kenya Commercial Bank Ltd & Another, [supra]* and *Section 31 (5)* of the *Banking Act*, the 2<sup>nd</sup> defendant submitted that it had published the information submitted to it by the 1<sup>st</sup> defendant to one of its subscribers in good faith in compliance with its duty under the *Regulations* and that once it was notified about the erroneous listing, it took active steps to correct the information within the ten day period allowed under *Regulation 20 (5)* of the *Regulations*.
32. The 2<sup>nd</sup> defendant further submitted that communication concerning a person's creditworthiness to its subscribers was a statutory duty and that since it was a matter of public interest, it was subject to qualified privilege.
33. It was also the 2<sup>nd</sup> defendant's case that the plaintiff's claim for negligence and/or breach of statutory duty was misplaced as the *Regulations* of 2008 only created a statutory duty and without express provisions, they cannot create a co-extensive duty of care under the common law tort of negligence. For this proposition, the 2<sup>nd</sup> defendant relied on the English Court of Appeal decision in *Keith Smeaton V Equifax PLC, [2013] EWCA CIV 108*.
34. According to the 2<sup>nd</sup> defendant, it acted strictly in accordance with the *Banking Regulations* of 2008 and did not therefore breach any statutory duty as alleged by the plaintiff. The 2<sup>nd</sup> defendant also invited the court to find that it was acting as a statutory or disclosed agent of the 1<sup>st</sup> defendant and that therefore, it cannot be held liable for the acts or omissions of the 1<sup>st</sup> defendant.
35. In his further submissions filed on 22<sup>nd</sup> January 2019, the plaintiff contended that since he had proved that the publication was actuated by malice, the defence of qualified privilege raised by the 2<sup>nd</sup> defendant automatically failed.
36. Regarding the defendant's contention that breach of statutory duty cannot be a basis for a claim in negligence, the plaintiff urged the court to be guided by the Supreme Court's decision in *Kenya Wildlife Service V Rift Valley Agricultural Contractors Ltd, [2018] eKLR* which upheld the Court of Appeal's finding that the absence of a provision granting a remedy for breach of statutory duty was no bar to a claim for damages under common law.

37. Having considered the pleadings, the evidence on record and the lengthy rival submissions made on behalf of the parties, I find that four main issues crystallize for my determination in this case. These are:

- i. Whether the plaintiff's suit is defective for being premature and/or statute barred;
- ii. Whether the plaintiff has proved his claim for defamation, negligence or breach of statutory duty to the standard required by the law;
- iii. Whether the plaintiff is entitled to the reliefs sought;
- iv. What orders should be made on costs.

38. Starting with the first issue, the 1<sup>st</sup> defendant challenged the validity of the plaintiff's suit arguing that it was defective as it was instituted before the plaintiff exhausted the dispute resolution mechanism set out under *Regulation 20 (5) to (14)* of the *Regulations*.

39. Under the above Regulations, a person who disputes the accuracy of information held by a credit reference bureau has an option of making a complaint to the bureau which was required to launch investigations into the complaint in consultation with the institution which had furnished it with the disputed information. Depending on the outcome of investigations, the bureau was mandated to either delete or correct the information where it was found to be erroneous or leave it unchanged where it was confirmed to be correct.

40. Though it is clear from the evidence that the plaintiff did not complain to the 2<sup>nd</sup> defendant about his erroneous listing and only directed his complaint to the 1<sup>st</sup> defendant, it is evident that the process envisaged by *Regulation 20* was initiated and completed by 28<sup>th</sup> March 2011 when the 2<sup>nd</sup> defendant corrected its records and notified the plaintiff and Equity Bank accordingly. This was long before the suit was filed. There is therefore no merit in the 1<sup>st</sup> defendant's submission that the plaintiff's suit was filed before exhausting the process stipulated under *Regulation 20 (5) to (14)*.

41. The above notwithstanding, it is important to note that the only remedy a customer aggrieved by erroneous listing can obtain from a credit reference bureau is deletion or correction of erroneous information. In this case, the plaintiff is seeking an award of damages for defamation, negligence and breach of statutory duty. I did not come across any provision in the *Banking Act* or in the *Regulations* which empower credit reference bureaus like the 2<sup>nd</sup> defendant to award damages. This is a jurisdiction reserved for courts of law. In the premises, I do not find any merit in the 1<sup>st</sup> defendant's objection to the competence of the plaintiff's suit and the same is hereby dismissed.

42. Turning to the 2<sup>nd</sup> defendant's claim that the suit was statute barred by virtue of *Section 31 (5)* of the Act, I think it is prudent to reproduce the provision in order to understand its true import. The section is expressed in the following terms:

***"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."***

43. In my view, this provision does not give banks or other financial institutions immunity from prosecution for unlawful disclosure of customer information. The section only provides that banks and other financial institutions will not be held liable for information disclosed in the course of normal banking business if such disclosure was made in good faith. Rather than being a bar to prosecution, the provision offers a shield which banks can use to defend themselves in actions instituted by their customers for breach of confidentiality. It is thus my finding that the suit is not statute barred as alleged by the 2<sup>nd</sup> defendant and is properly before this court.

44. Having dealt with the preliminary points raised by the defendants, I now wish to consider whether the plaintiff has established a case for defamation against both defendants. The law of defamation is concerned with the protection of reputation. A defamatory statement is defined in *Gatley on Libel and Slander 11<sup>th</sup> Edition* at page 38 as one which is to the ***"Claimant's discredit"; or which tends to lower him in the estimation of others or causes him to be shunned or avoided; or exposes him to hatred, contempt or ridicule ....."***

45. The Court of Appeal in *SMW V ZWM, [2015] eKLR* and in *Musikari Kombo V Royal Media Services Limited, [2018] eKLR* defined a defamatory statement as follows:

***"A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided."***

46. From the above definitions, it is clear that the test for determining whether or not a statement is defamatory is an objective one. It is based on the perception of an ordinary reasonable man and not on a person's opinion of himself or his character.

47. The Court of Appeal in *Wycliffe A. Swanya V Toyota East Africa & Another, [2009] eKLR* specified what a plaintiff needed to prove to succeed in an action for defamation. The plaintiff must prove the following:

*i. That the matter of which the plaintiff complains is defamatory in character.*

*ii. That the defamatory statement or utterance was published by the defendants. Publication in the form of defamation means that the defamatory statement was communicated to someone other than the person defamed.*

*iii. That it was published maliciously.*

48. In this case, it is not disputed that the consumer credit report submitted to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was published to Equity Bank after the plaintiff applied for a loan from Equity Bank. It is also not disputed that the information in the report which was in reference to the plaintiff was false or inaccurate as it depicted the plaintiff as a loan defaulter yet he did not have any loan facility with the 1<sup>st</sup> defendant. What is strongly disputed is the plaintiff's claim that the publication was defamatory.

49. According to the plaintiff, the publication was defamatory because it was false and maliciously published and had the effect of tarnishing his image and reputation in the eyes of the banking community, his family, peers and members of the society at large.

50. I have looked at the consumer credit report (Exhibit 4). It shows that though it was submitted in respect of *Nicasio Njiru Njagi*, it bore two sets of information which obviously referred to two different people. For instance, it had two different physical and postal addresses one in Embu and another one in Kitui. Two occupations were also attributed to the holder of the information, that is, a Clerical Officer with the Office of the President and a Teacher. The plaintiff in his evidence admitted that he was a Clerical Officer in the Office of the President and that the Embu address belonged to him. This clearly lends credence to the 1<sup>st</sup> defendant's evidence that there was a mix up of the information belonging to the plaintiff and its Kitui customer who had similar names.

51. The evidence taken as a whole establishes that on realizing its mistake, the 1<sup>st</sup> defendant moved swiftly and initiated the process of correcting the error which was done by 28<sup>th</sup> March 2011 less than two weeks after the plaintiff's initial complaint.

52. It is trite that malice in an action for defamation does not necessarily mean spite or ill will. It does not also need to be express. Malice can be inferred from the circumstances in which the publication was made including recklessness by the defendant or the language used in the publication if it was disproportionate to the facts. It can also be inferred from the relations between the parties or in the conduct of the defendant either before or after the publication or in the course of the proceedings.

53. Though there is a sense in which the 1<sup>st</sup> defendant can be said to have been reckless for not verifying the accuracy of the information retrieved from its system before sharing it with the 2<sup>nd</sup> defendant, its conduct after receiving the plaintiff's complaint negates any inference of malice on its part. As stated earlier, it moved swiftly to ensure the error was corrected expeditiously. Secondly, it is not contested that the information was not published to any unauthorized person or entity. It was only published to Equity Bank which had a right to receive such information being one of the 2<sup>nd</sup> defendant's subscribers.

Given the foregoing, I find that the plaintiff has failed to prove that either of the defendants published the information maliciously.

54. Regarding the plaintiff's claim that the publication injured his reputation in the eyes of, *inter alia*, his family members, peers, professional colleagues and other members of the society, it is noteworthy that as stated earlier, the information was only published to Equity Bank. It was not published to members of the public or to persons falling under any of the categories specified in the plaintiff's pleadings.

55. It is a cardinal principle of the law of evidence that he who alleges must prove. The plaintiff had the burden of proving on a balance of probabilities all the allegations made against the defendants including the claim that as a result of the publication, his reputation was damaged in the eyes of the banking community, his family, his peers and other members of the society. He did not adduce any evidence to that effect.

56. As held by the Court of Appeal in *Selina Patani & Another V Dhiranji V. Patani [2019] eKLR*, a person's own view about his or her reputation is immaterial in a claim for defamation. As the publication complained of was not in the public domain, it was incumbent upon the plaintiff to avail evidence from a 3<sup>rd</sup> party to prove that his standing and reputation had been damaged as a result of the publication which he failed to do.

57. Having failed to prove that the publication was published maliciously and that it injured his reputation in the eyes of right thinking members of the society, I am satisfied that the plaintiff has not proved his claim for defamation against both defendants on a balance of probabilities.

58. Turning to the claim for negligence and or breach of statutory duty, I agree with the plaintiff's submissions that in appropriate cases, breach of statutory duty can form a basis for a claim in negligence. This was the holding of the Supreme Court in *Kenya Wildlife Service V Rift Valley Agricultural Contractors Ltd, [supra]*. In that case, the Supreme Court highlighted the key elements that must be proved in an action for negligence which are: a duty of care, breach of that duty, causation and damage. The court stated that:

***“A defendant must owe a duty of care to the person bringing the claim, in the sense that they fall within a class of interests which the law considers should be protected. .... There is breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law.”***

59. The court also cited with approval *Halsbury's Laws of England 3<sup>d</sup> Edition paragraph 689* where proof of the essentials of a cause of action for breach of statutory duty were laid down thus:

***“In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection and must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage.”***

60. In this case, the plaintiff claimed that the 1<sup>st</sup> defendant breached the statutory duty imposed on it by *Regulation 28 (1)* which required banks to notify its customers within 30 days of the name and address of the bureau to which their information had been submitted for listing. The plaintiff also claimed that the 1<sup>st</sup> defendant breached the duty imposed under *Regulation 28 (3)* of providing accurate customer information to credit reference bureaus. The 2<sup>nd</sup> defendant was accused of having shared and published information about the plaintiff in a manner that was contrary to the Regulations.

61. A reading of the Regulations reveal that the duties allegedly breached by the defendants in this case were owed to customers of banks and other financial institutions. This means that in order to succeed in his claim for negligence based on the 1<sup>st</sup> defendant’s alleged breach of statutory duty, the plaintiff had to establish that a banker-customer relationship existed between him and the 1<sup>st</sup> defendant. Instead of doing so, the plaintiff vehemently denied the existence of such a relationship. He expressly pleaded in paragraph 14 of his plaint that he was not and has never been the 1<sup>st</sup> defendant’s customer. He maintained this claim throughout his evidence. Having denied that he was at any time the 1<sup>st</sup> defendant’s customer, it logically follows that he was not in the class of persons to who the 1<sup>st</sup> defendant would have owed a duty of care either under common law or under statute.

62. The fact that the 1<sup>st</sup> defendant claimed that the plaintiff was one of its customers and that is why his information was in its data base is immaterial to the plaintiff’s claim for breach of statutory duty or negligence for two reasons. First, the 1<sup>st</sup> defendant did not prove its claim by documentary evidence in the form of account opening forms and, secondly and most importantly, the burden of proof lay squarely on the plaintiff to establish his claim against the defendants to the standard required by the law. The defendants were not under any duty to help the plaintiff to prove his case.

63. As far as the claims against the 2<sup>nd</sup> defendant are concerned, the plaintiff did not provide an iota of evidence to prove his allegations that the 2<sup>nd</sup> defendant published the information received from the 1<sup>st</sup> defendant in a manner that was inconsistent with the duties imposed upon it by the Regulations.

64. In view of all the foregoing, I am persuaded to find that the plaintiff’s claim against both defendants for breach of statutory duty or negligence has not been proved to the standard required by the law.

65. Having found that the plaintiff has failed to prove all his claims against the defendants, I have come to the firm conclusion that he is not entitled to any of the reliefs sought.

66. Consequently, it is my finding that the plaintiff’s suit lacks merit and it is hereby dismissed with costs to both defendants.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>th</sup> day of May 2020.**

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

Ms Akonga holding brief Mr. Kimani for the 1<sup>st</sup> defendant

Ms Mungai for the 2<sup>nd</sup> defendant

Mr. Thige for the plaintiff

Ms Carol: Court Assistant