



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL 126 OF 2016**

**BOTTO SOLAR LIMITED.....PLAINTIFF**

**VERSUS**

**DIAMOND TRUST BANK KENYA LIMITED.....DEFENDANT**

**RULING**

1. Before me is the Notice of Motion dated 28<sup>th</sup> May 2019 brought under **Section 3A, 1 and IB of the Civil Procedure Act and Order 50 rule 1 of the Civil Procedure**. It seeks orders;

**1. The application be certified as very urgent due to the reasons given in the certificate of urgency.**

**2. This Honourable Court be pleased to order the respondent to remove the applicants name in the CRB pending the hearing and determination of the appeal.**

**3. Costs of the application.**

It is supported by the Grounds on the face of the application and the Affidavit of Edith Wathuti Muchiri, one of directors of the applicant sworn on 7<sup>th</sup> March 2019.

2. The gist of the application is that on 21<sup>st</sup> September 2016 a judgment was entered for the respondent against the appellant at Kshs. 899,778/75/= plus interest at court rates from date of filing the suit to the date of payment.

3. The appellant was aggrieved and filed this appeal. A condition for stay of execution was the deposit of the total decretal sum plus interest into an interest earning account in the names of both counsel. That was done, as evidenced by the annexures ENM proof of deposit of the amount in Barclays Bank Nakuru East Branch on 21<sup>st</sup> July 2018.

4. The applicant's complaint is that despite that compliance, the respondents continue to retain the applicant's name in the Credit Reference Bureau (CRB), and has refused to remove the same despite pleas by the applicant's counsel, causing the applicant untold financial woes.

5. The application is opposed vide the Replying Affidavit of Amaan Kassam, a Debt Recovery Officer with the respondent sworn on 3<sup>rd</sup> October, 2019. The main ground of opposition is that the appellant is still indebted to the respondent, that removing the appellant's name from the CRB, would amount to overturning the judgment. Secondly, that the bank's only obligation is to remit credit information to the CRB does not have any control of the CRB's data base or what CRB does with that information.

6. Counsel agreed to dispose of the application by way of written submissions.

7. For the applicant it is argued that since the original suit was not based on borrowed money/loan, the respondent had no business remitting the name of the applicant to CRB. Secondly that the applicant had deposited the entire decretal sum in a joint interest earning account where the money sits to date; thirdly that having the applicant's name at CRB has grounded its operations, as it cannot access financial facilities. That in any event the whole suit arose out of the respondent's professional misconduct.

8. For the respondent, two issues are set out for determination.

**a) Whether the Appellant is indebted to the Respondent; and;**

**b) Whether the Appellant has exhausted the dispute mechanisms provided in the Credit Reference Bureau Regulations, 2013.**

9. It is argued that by virtue of **Section 44 of Evidence Act Cap 80**, the applicant is duly indebted to the respondent. That the respondent as a financial institution within the meaning of **Banking Act Cap 488** maintains credit information on its customers which information is shared with CRB in accordance with **Section 31 (3) (b) of the Act**, and **Regulations 50 of the CRB Regulations 2013**.

10. That the said CRB regulations provide a dispute resolution mechanism at **Regulation 35** which the applicant ought to have utilized before coming to court.

11. The respondent relies on the Court of Appeal case of **Geoffrey Muthinja & another vs Samuel Muguna Henry & 1756 others [2015] eKLR** where it was stated that;

*“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for a last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution.”*

12. That the applicant has a recourse under the **Regulation 18** of the **CRB regulations 2013**.

13. I have considered the affidavits, annexures and submissions and authorities cited. Does the application have merit? Can the orders sought issue?

14. The applicant invokes the court’s inherent jurisdiction to do justice, the applicant also relies on **Sections 1A and 1B of the Civil Procedure Act**, the overriding objective of the Act, to facilitate the just, expeditious, proportionate and affordable resolution of disputes, while also making efficient use of available judicial administrative resources.

15. The CRB regulations define credit information as **“credit information” means any positive or negative information bearing on an individual’s or entity’s credit worthiness, credit standing, credit capacity, to the history or profile of an individual or entity with regard to credit, assets, and any financial obligations;** This is what the respondent supplied to the CRB. I have looked at **Regulation 35 of the CRB regulations of 2013**. The provision clearly gives an answer to the applicant’s issue. It provides that a customer is entitled to a free copy of his credit report.

At rule 35(5) it says;

**“35 (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.”**

Hence where the customer is of the view that the information in the data base is inaccurate, erroneous, outdated, the customer may raise a dispute. In this case the applicant is of the view that the fact of its listing with the CRB is disputable, the respondent’s rival position is that there is no wrong doing on its part as it is obligated to supply credit information to the CRB and that is all it has done. Clearly there lies the dispute.

At **Sub Regulations (6) to 13**, the Regulations provide a procedure for the resolution of the dispute, which includes, the deleting of that information.

*(6) Within five working days of being informed that the information in a customer’s credit report is disputed, the Bureau shall –*

*(a) attach a note to the credit information report, warning that the disputed information is under investigation, which notice shall remain on the file until resolution of the dispute; and*

*(b) give the institution or credit information provider that supplied the information a notice of dispute requesting confirmation from the institution or credit information provider as to the accuracy of the information.*

*(7) The Bureau shall, within fourteen days, conduct investigation, based on the relevant information provided by the customer, and may contact any person who has furnished information.*

*(8) Where an institution or credit information provider receives a notice of dispute from the Bureau it shall, within fourteen days of receiving the notice, complete all necessary investigations into the disputed information and give the Bureau a notice of resolution, advising whether the disputed information is to be deleted, corrected, or remain unchanged.*

*(9) Where the investigation reveals an error, the Bureau shall remedy the error and inform all persons who may be affected by the information including the customer.*

*(10) If the Bureau does not complete its investigation within twenty-one days, it shall delete the disputed information as requested by the customer.*

*(11) If the Bureau later completes its investigation, it may reinsert or revise the disputed information based on the results of such investigation and shall inform the customer of the action taken.*

*(12) Upon receipt of a notice of resolution or an amendment notice from an institution the Bureau shall, within five working days of such receipt, send a notice of change to any subscriber that has in the previous twelve months obtained a credit information report from the Bureau containing the incorrect information.*

*(13) Where the customer disagrees with the resolution of the disputed information, the customer may request the Bureau to attach a statement of not more than one hundred words to the customer's credit report, setting out the customer's claim that the information is not accurate and the Bureau shall take reasonable steps to comply with the customer's request.*

It appears to me that the applicant has a dispute resolution mechanism right here, which ought to have been utilized before this application was filed.

16. The mechanism is provided for the CRB against whom this against whom this court is expected to direct orders while they are not parties hereto. Hence, I am of the view that the applicant ought to have sought recourse from the CRB 1<sup>st</sup> before filing this application as the procedure is clear and gives the applicant the requisite relief.

The applicant has not indicated it went before the CRB and was not heard. The applicant had a duty under **Section 1B of the Civil Procedure Rules** to utilize that procedure before coming before this court. Although the applicant's application may have merit, in this first instance, it is before wrong forum. Going by the holding in **Geoffrey Muthinja** above, the applicant ought to have first, pursued the dispute resolution mechanism provided for before invoking the jurisdiction of this court. That is the expectation of the provisions of the CPA cited by the applicant, and article 159 of the Constitution.

17. I am therefore in agreement with the submissions by counsel for the respondent that the applicant ought to have sought relief from the CRB. The application is struck out with no orders as to costs.

**Dated at Nakuru this 22<sup>nd</sup> day of June, 2020.**

**Delivered and signed at Nakuru this 13<sup>th</sup> July 2020**

**Mumbua T. Matheka**

**Judge**

In the presence of: VIA ZOOM

Ms. Lang'at for Kimatta & Company Advocates for applicant

Mohammed Madhani & Co. Advocates for respondent N/A