



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 551 OF 2011

DANIEL GACHANJA GITHAIGA.....PLAINTIFF

VERSUS

CREDIT REFERENCE BUREAU AFRICA LTD1ST DEFENDANT

CFC STANBIC BANK LIMITED.....2ND DEFENDANT

JOSHUA NGWATHA NJENGA.....3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted the suit herein through a plaint dated 6th December 2011 and amended on 5th April 2012, seeking for judgement against the Defendants jointly and severally for:

- a. An order compelling the 1st Defendant to retract any statements or advice issued to all the banks injuring the Plaintiff's character.
- b. An injunction restraining the Defendants, their agents or servants from maligning and or in any way interfering with the Plaintiff's ventures and business activities pending hearing and determination of the suit.
- b(i) Motor vehicle registration No. KBL 905 be impounded and sold by public auction to offset any outstanding amounts owed to the 2nd Defendant if at all or as may be directed by the honourable court.
- c. General damages
- d. Costs of the suit plus interest on (c) and (d) at court rates.

2. The Plaintiff's avers that he runs a beer distribution agency business and that in the month of July 2011, he approached Equity Bank Ltd for a loan facility to expand his business and the bank was inclined to grant the same. However, the bank later retracted the offer.

3. Upon inquiry he learnt that, on or around mid-September 2011, the 1st Defendant had written to Equity Bank Limited and other banks without his knowledge or consent advising them that, he was not creditworthy, as he had unpaid loans with CFC Stanbic Bank Limited. He avers that, the information provided by the 1st Defendant was not only untrue but unfounded as he did not have a loan account with the 2nd Defendant. Further, the 1st Defendant did not verify the information before publishing it, but instead purported to have legal backing from statute to investigate loan defaulters; which if at all it had, it exercised it unlawfully.

4. That upon further investigations, he learnt that the 3rd Defendant had fraudulently and unlawfully acquired his personal data and documents and subsequently forged his signature on several documents to acquire a loan facility from the 2nd Defendant and purchased a motor vehicle registration number KBL 905M in his name without his knowledge and consent. That, the 2nd Defendant did not make the necessary enquires or investigations before advancing the monies.

5. The Plaintiff argues that, the Defendants' actions were reckless and negligent as the 1st and 2nd Defendants owed him a duty of care to establish and verify with him, the authenticity of the facts and the documents presented to them, before acting and/or relying on them to his

prejudice. Further, the Defendants failed to carry out due diligence before giving false and damning information about him to third parties.

6. That as a result of the aforesaid, he has suffered loss and damage by reason that, he was denied a loan facility, as a consequence whereof his business has stagnated. He is also deemed to be a defaulter thus damaging his long standing goodwill and character as an honest businessman of good repute. Thus he claims for compensation for the loss and an order compelling the 1st and 2nd Defendants to issue an apology and retract the unlawful advice it had issued to all the banks against him and remedy the situation.

7. That despite demand and notice to sue having been given the Defendants have adamantly refused to stop interference with his activities or remedy the situation thereby necessitating the filing of this suit.

8. However, the 1st Defendant filed a statement of defence dated 23rd May 2012 and denied the Plaintiffs' claim. It averred that, the amended plaint is fatally defective for non-compliance with the mandatory provisions of; Order 8 Rule 7(1) of the Civil Procedure Rules 2010.

9. That, the 1st Defendant was at all material times to this suit a Credit Reference Bureau duly licensed under Section 31(4) of the Banking Act (cap 488) Laws of Kenya; and by dint of sections 31(3) (b) and (c) of the Act and regulations (3)(1) of the Banking (Credit Reference Bureau) Regulations, 2008, it was a statutory and/or disclosed agent of; the Central Bank of Kenya and/or Institutions licensed under the Banking Act. Therefore, the amended plaint has no reasonable cause of action against it.

10. That, if it received any information in relation to the Plaintiff, which is denied, the same was received in the lawful performance of its duties/functions and the handling of that information was subject to qualified privilege under Regulation 14(1) and 28(6) of the Banking (Credit Reference Bureau) Regulations, 2008. Further, the Plaintiffs suit is statute barred under section 31(5) of the Banking Act.

11. The 1st Defendant, in the alternative and without prejudice, denied ever writing to Equity Bank Ltd or any other Bank or at all, advising them of the Plaintiff's credit worthiness or of the alleged un-serviced loan or any other loan with the 2nd Defendant or at all. That it did not and does not engage in the business of investigating credit defaulters and/or negligent as alleged.

12. Further and in the alternative and without prejudice, if at all any information was provided to the 2nd Defendant as alleged, and if such information was inaccurate and if the Plaintiff has suffered any damage and/or injuries therefrom, then the 2nd Defendant is fully liable to the Plaintiff and the 1st Defendant is entitled to indemnity from the 2nd Defendant.

13. That upon receipt of the demand letter, the Plaintiff's Advocates was advised on the recourse available to the Plaintiff under the Banking (Credit Reference Bureau) Regulations 2008 but the Plaintiff opted to ignore the advice and rushed to court to file the present suit. Therefore, the suit is thus pre-mature and the Plaintiff should follow the proper procedure. However, the Plaintiff filed a reply to the defence dated 31st May 2012 and argued that the suit is properly on record, and has disclosed a reasonable cause of action against the 1st Defendant.

14. The 2nd Defendant filed a statement of defence and denied knowledge of the alleged Plaintiff's dealings with Equity Bank Limited and/or allegation of the duty of care owed to the Plaintiff. He also denied the alleged particulars of negligence, loss and damage. However, the 2nd Defendant averred that, in the alternative and without any prejudice to each or any of the other averments in this defence, sometime in May 2010, two individual current accounts were opened at its Chiromo Branch in the name of the Plaintiff and the 3rd Defendant; each simultaneously electing to operate a joint account with the mandate of each party being a signatory to the other's account.

15. The account opening forms were jointly signed and each party became a signatory to and could operate the other's account.

Sometime in April 2010, an application was made in the name of the Plaintiff to the 2nd Defendant for an asset finance facility of KShs. 3, 832,320.00 for the purchase of; a Mitsubishi FH 215 Truck with all the requisite documentation for the loan being processed in the name of the Plaintiff. The facility was eventually approved by the 2nd Defendant and granted.

16. The loan proceeds were disbursed to the vendor of the Truck and the loan satisfactorily serviced until sometime in August 2011, when there was a default, whereupon the 2nd Defendant took lawful steps to protect its interests including attempting to repossess the truck to no avail.

17. That, if the 2nd Defendant shared any information concerning the loan default with the 1st Defendant, which is denied, then it was legally entitled to do so under the Banking Act, (Cap 488) of the Laws of Kenya and the Regulations made thereunder, particularly the Banking (Credit Reference Bureau) Regulations, 2008. The 2nd Defendant denied having been given any demand or notice of intention to sue.

18. The case proceeded to a full hearing. The Plaintiff's case was supported by his own evidence on 12th February 2019. He relied on his witness statement dated 10th October 2017 and an amended list of documents filed in court. He reiterated the averments in the plaint save to add, subsequently, after the institution of the suit, he made several efforts to negotiate for settlement of the matter out of court to no avail. He also requested the 2nd Defendants to dispose of the subject motor vehicle to repay the loan to enable him be cleared by the 1st Defendant to no avail. He later learnt that the 2nd Defendant had sold the motor vehicle without his knowledge.

19. In cross examination, he maintained that, he does not know the 3rd Defendant and that he met him for the first time in court. That he has never opened an account with the 3rd Defendant and although the particulars on the account opening forms are his, the signature thereon is not his. That, the entire process is a fraud. He also denied having ever seen the chattel instrument before it was filed in court nor signed it. Similarly, he denied ever having owned the subject motor Vehicle. That he has reported the matter to the police, although he does not have a document examiners report to verify the disputed signature.

20. He said that he did not know whether the 3rd Defendant was ever arrested, charged or imprisoned. He conceded that he has produced a document where the 3rd Defendant apologized for having used his statement without his approval but denied colluding with the 3rd Defendant to defraud the bank. In further cross examination by the 2nd Defendant, he confirmed the subject does not implicate the bank in the collusion. In re-examination, he maintained that the 3rd Defendant used his documents without his knowledge and that the signature thereon is not his.

21. The 2nd Plaintiff's witness was; Amos Wambugo Githaiga who relied on his witness statement dated 7th November 2017. He testified that he is an accountant by profession. That he prepared audited income accounts for the Plaintiff's business for the years 2011 to 2016, and produced the reports thereof in court. That he relied on bank statements and sales receipts to arrive at a conclusion that the profit made in the year 2010 was; Kshs 100,000.

22. In cross examination he conceded that he did not produce invoices, receipts and bank statement to back the findings in the reports. That he relied on information given by the client. In re-examination, he stated that the reports were for internal consumption and he did not require to produce raw data.

23. The 1st defendant's case was supported by the evidence of its legal officer Rosemary Mbugua, who relied on her witness statement filed on 8th November 2018 and a list of documents filed on 24th May 2012 and supplementary list of documents filed dated 16th October 2017. She reiterated the averments in the statement of defence and testified that she will rely on the notice of claim issued against the 2nd Defendant.

24. In cross examination she maintained that the Plaintiff had failed to utilize the dispute resolution mechanism as advised. She reiterated that the 1st Defendant merely relies on information received from institutions and denied that the 1st Defendant stopped criminal investigations in this matter by a letter dated 17th October 2013.

25. The 2nd Defendant's case was supported by the evidence of Hamilton Suba who relied on a witness statement dated 14th November 2017 and a list of documents dated 5th April 2017. In cross examination, he stated that the bank undertook to indemnify the 1st Defendant in case of any errors in the information forwarded to it. He stated that, the documents presented to the bank were not forged. In cross-examination by the Plaintiff he conceded that, he had not produced the accounts opening documents in respect of the Plaintiffs account and that he was not aware of any notice to produce the same. That the 3rd Defendant was not a signatory to the chattel transfer instrument but a referee. That although the Plaintiff opposed the sale of the motor vehicle, it was still sold. He conceded that on the information passed to the 1st Defendant that the Plaintiff was listed.

26. The 3rd Defendant did not defend the suit and consequently judgment in default was entered against him on 3rd May 2017.

27. The parties filed their final submissions after the close of the hearing of the case. The plaintiff's undated submissions were filed on 21st May 2019, and submitted that the 3rd Defendant having not defended the suit, it is deemed that he had admitted all the averments in the suit. As such the defences by the 1st and 2nd Defendants collapsed in the light of that admission.

28. That the Plaintiff was not served with a notice prior to the listing pursuant the provisions of clause 5.1 (c) of the agreement between the 1st and the 2nd Defendants. Further, the Plaintiff having denied opening an account with the 2nd Defendant, it was incumbent upon the 2nd Defendant to subject the impugned documents to a document examiner, to rebut the Plaintiff's allegation but that was not done. Finally, the 2nd Defendant not having filed a counter claim implies that upon the sale of the subject motor vehicle, the outstanding loan was cleared.

29. The 1st Defendant submitted that; the Plaintiff's claim in defamation is improperly pleaded for want of particulars of the alleged defamation pursuant to the provisions of Order 2 Rule 7 of the Civil Procedure Rules 2010. The 1st Defendant referred to the definition of defamation in the Halsbury's Laws of England 3rd Edition; Volume 24; as follows: "A defamatory statement (g) is a statement which, if published of and concerning a person, is calculated to lower him in the estimation of right-thinking men or cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule, or to convey an imputation on him disparaging or injurious to him in his office , profession, calling trade or business (h)"

30. That the definition above was adopted by Parke B in the case of; *Permitter v Coupland (1840) 151 ER 340* , and quoted in the case of Hon. *Nicholas Kipyator Kiprono Biwott v Hon. Paul Kibugi Muita & Baraza Limited HCCC No 1369 of 2003*, which states that, for a party to prove defamation successfully, the party needs to prove that the statement was defamatory, it referred to him; and the Defendant published it to a third party. The Defendant cited several authorities of the High Court to support the averments. The Plaintiff approached the court prematurely without following the Statutory Dispute Resolution mechanism. That Section 31(5) of the Banking Act; protects any institution from being sued for breach of duty by reasons of the disclosure in good faith of any information in the course of the performance of their duties.

31. That the Plaintiff has not proved bad faith on the part of the Defendants and/or its agents or employees nor pleaded malice or particulars thereof and relied on the case of; *Jamlick Gichuhi Mwangi v Kenya Commercial Bank Ltd & another (2016) eKLR*. The 1st Defendant relied on the defence of; qualified privilege and submitted that, it was under a duty to publish the information; and the recipient was under a corresponding duty to receive the statement; and the publication was limited to only the persons under a duty to receive the information. The definition of qualified privileges under Halsbury's Laws of England 3rd Definition vol. 24 and the case of; *E.L Hoare & Others v Eric Jessop [1965]E.A 227 and Longdon Griffiths v Smith and Others [1950]2ALL ER 662*, were referred to.

32. Further the Plaintiff has not proved the particulars of fraud as pleaded or required under Section 108 of the Evidence Act and as held in the case of; *Ratilal Gordhanbhai Patel v Lalji Makanji [1957] EA 314*. Similarly having therefore denied knowledge of the 3rd Defendant's

letter of apology or admission of unlawful use of his documents he cannot maintain a claim for fraud as against the Defendants.

33. That the statutory provisions applicable herein do not create a co-existing duty of care in tort and/or common law between the Credit Reference Bureau and the Bank customers. The case of; *Keith Smeaton v Equifax PLC [2013] EWCA Civ 108* was relied on. Therefore, the Plaintiffs claim is therefore not foreseeable. That the Banking Act and Regulations 2008 impose criminal liability and statutory fines on bureaus which fail to follow the laid down regulations and therefore it would be inappropriate to extend the law of negligence to this area.

34. The 1st Defendant further submitted that, the evidence led by the Plaintiff on its income statement does not meet the probative value to be attached to the same as provided for under Section 35 (3) of the Evidence Act which statement were prepared for purposes of aiding the Plaintiffs claims for loss of income as the same did not adhere to sound accounting principles.

35. The 1st Defendant further submitted that it is not a servant of the 2nd Defendant and therefore no vicarious liability can attach to it in relation to any tortious acts committed by the 2nd Defendant as distinguished in the Halsbury's Laws of England 3rd Edition Vol 1. The 1st Defendant is therefore an agent by estoppel as provided for under section 31(3) (b) and (c) of the Banking Act.

37. The 2nd Defendant submitted that, the Plaintiff did not prove the alleged forgery yet it is trite law that he who alleges must prove pursuant to sections 107-109 of the Evidence Act. Secondly the allegations of forgery and fraud must be pleaded and strictly proved as stated in the case of; *Vijay Morjaria v Narsingh Madhusingh Dabar & Another [2000] eKLR (civil appeal no 106 of 2000)* that; "it is well established that fraud must be specifically pleaded and that particulars of fraud alleged must be stated on the face of the pleadings.... and it is not allowable to leave fraud to be inferred from the fact"

37. Further the onus lies on the Plaintiff to prove that the bank did not act honestly and was actuated by malice and has not proved this. That the listing herein was not publicized to unauthorized persons and no proof of defamation was tendered. The bank only publicized the information to persons who are under a duty to receive the information under Regulations 15(2) the Banking Regulations 2008. Finally, it was submitted that, the Plaintiff is not entitled to the prayers sought as held in the case of; *Jamlick Gichuhi Mwangi v Kenya Commercial Bank Ltd & another [2016] e KLR* that a party denied credit only suffers a temporary inconvenience.

38. He is also not entitled to exemplary damages which are meant to hold the Defendant liable for acting out of improper motive as set out by the Court of Appeal in the case of; *Ken Odondi & 2 others v James Okoth Ombura T/A Okoth Ombura & Company advocates (2013) eKLR*.

39. I have analyzed the evidence adduced and the submissions and I find that the issues that have arisen for determination are whether:

- a. The suit is premature and/or statute barred
- b. The plaintiff opened an account with the 2nd Defendant and/or applied for any loan facility;
- c. Whether the 2nd Defendant forwarded information to the 1st Defendant for listing of the Plaintiff;
- d. If the answer to (b) is in the affirmative, whether it was lawfully and/or legally done;
- e. The 1st Defendant acted lawfully in publishing the information received;
- f. The Plaintiff is entitled to the prayers sought; and who will meet the costs of the suit;

40. I have analyzed the evidence and I note that the 2nd Defendant has produced account opening forms in the name of the Plaintiff and the 3rd Defendant. I further note that, each party applied to open a joint account separately, so that each account opening form was signed by each party individually. That fact is confirmed by the 2nd Defendant's witness who states that "two individual accounts were opened". The witness further states that, each account holder elected to operate a joint account with each party being a signatory to the others account. The account opening forms were jointly signed and each party became a signatory to and could operate the others account. The Plaintiff denies authorizing the impugned documents and the signature thereto.

41. I have looked at the forms and I note that the form allegedly filled and signed by the Plaintiff has his particulars which includes; his full names, identify number; 1894256, Post office box number; 90 (00209) Loitoktok, date of birth; 1952, occupation; businessman and telephone number; 0727556328. It is also bears his alleged signature alongside the signature of the 3rd Defendant.

42. I also note that, there is a separate form signed by the 3rd Defendant, however it is curious that his post office number is the same as that of the Plaintiff, 90 (00209) Loitoktok, and the occupation is also similar; businessmen. The forms were signed on the same date.

43. In the same vein, the documents used to apply for the loan, indicate the Plaintiff as the applicant. The particulars of; identity number, the postal address and telephone number are the same as those in account opening form. The form also shows that the Plaintiff, has an account with Equity Bank Limited.

44. The 3rd Defendant is named therein as a referee and described as the Plaintiff's associates; who has known the Plaintiff for over seven (7) years. Peter Njuguna a resident of Loitoktok is named as a second referee and a business associated of the Plaintiff, who has known the Plaintiff for over ten (10) years. The application form bears a signature of the Plaintiff certifying that, the details given therein are true and correct to the best of his knowledge. The plaintiff allegedly signed the letter approving the facility accepting the terms and conditions thereof.

45. In addition, there is a letter dated 15th April 2010, allegedly written and signed by the Plaintiff requesting for the adjustment of the price of the vehicle.

46. Finally, the 2nd Defendant has produced a Chattel Transfer Mortgage instrument which is alleged to have been signed by the Plaintiff on all pages. He is alleged to have signed the mortgage, in the presence of Tom Konduti, a resident of; Ngong. Apparently, Konduti swore an affidavit before a commissioner of oath by the name of; Kaburu Miriti on 18th June 2010, in which he states inter alia; that he is a salesman in Ngong and he witnessed the Plaintiff execute the Chattel Mortgage instrument.

47. Finally, the parties have produced a log book issued for motor vehicle KBL 905M, registered in joint names of the Plaintiff and 2nd Defendant. Notably, it is not signed by the registered owners.

48. I have taken time to analyze the documents relied on because several issues arise therefore. That is; whether the Plaintiff and the 3rd Defendant knew each other, as they are alleged to be business associates and even share the same box number. But even more importantly, if the Plaintiff did not go to the 2nd Defendant's premises to open an account, where did the bank get his personal particulars from? Are these particulars correct? Even more importantly, who signed these documents that the Plaintiff has denied signing? What about the second referee in the loan application form, does the Plaintiff know him and/or Tom Konduti who witnessed his signature on the Chattel Mortgage forms.

49. It is noteworthy that, despite the 2nd Defendant alleging that a joint account was opened, the said account has not been disclosed. All that the 2nd Defendant produced are account opening forms and space therein where the bank account number is supposed to have been indicated is blank. Similarly, there is no bank statement produced to show the account was not only opened and/or even received the loan amount and/or was operated by the account holder(s). The question that arises is; was any account opened?

50. In my considered opinion the key question herein is whether, the Plaintiff signed; the account opening forms, the loan application and the Chattel transfer. The general principle of law is that, he who alleges proves. Indeed; the provisions of section 107 to 109 of the Evidence Act (cap 80) of the Evidence Act speaks to that and states as follows:

107:(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

51. It is a fact that for a signature to be deemed and certified as forged, a document examiner's report must be produced. None has been produced by either the Plaintiff or the 2nd Defendant, each shifting the burden of proof to the other. However, it is the Plaintiff who is alleging his signature was forged. He holds the otherwise genuine signature. He bears the burden to prove the impugned signature is a forgery.

52. In that regard, it suffices to note that, the Plaintiff wrote a letter dated 8th July 2013, to the Director of Banking Fraud requesting them to investigate an account he alleged was opened with the 2nd Defendant, without his knowledge and a loan processed to buy a car Reg. No. KBL 905M. He states in the letter that he only got to know about the same when he tried to get a loan with Equity Bank which was denied.

53. It suffices to note that the Plaintiff wrote that letter a period of one year and 7 months, after the 3rd Defendant wrote him an apology letter confessing use of his documents to obtain a loan. That letter was followed up by the Plaintiff's Advocate's letter to the Director of Banking Fraud Investigation Department dated 24th September 2014, which was received by the department on 30th September 2014, a period of 14 months from the first letter requesting that it should speed up with their investigations.

54. The key question is; why wasn't the Plaintiff reporting the matter to the Directorate of Criminal Investigation especially after the 3rd Defendant allegedly confessed "unauthorized use of his documents?" The conduct of the Plaintiff in this matter is wanting. First and foremost, he does not deny the particulars and/or personal information attributed to him in the subject documents. Secondly, he does not deny knowledge of the 3rd Defendant and to fortify that position, the 3rd Defendant states in the apology letter that he will clear the Plaintiff's name within a month and pay him one hundred and twenty thousand (KShs 120,000.00) which the Plaintiff will deduct from "Crossline Hardware Account". Obviously, the Plaintiff and the 3rd Defendant were well known to each other and it seems the Plaintiff was not ready to assist nail the 3rd Defendant. This is even informed by the fact that, the Plaintiff wanted the matter settled amicably even after the suit was filed.

55. I therefore hold and find that in the absence of the document examiner's report, there is no evidence beyond reasonable doubt that the Plaintiff's signature was forged. The next question is whether the 1st Defendant is liable as claimed. I have considered the evidence adduced and I find that, the Plaintiff does not deny the fact that, the 1st Defendant advised him to follow the laid down procedure under Regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008. The said Regulation states as follows at: 20 (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"

56. In that regard I find that, the 1st Defendant's argument that the suit is premature is well founded in law. Indeed, a litigant who surpasses

any lawful procedure laid down in law for dispute resolution or any other process abuses the court process.

57. Be that as it were, the 1st Defendant is licenced under section 31(3) (b) and (c) and (4) of the Banking Act, to disseminate customers credit information. Further, the 1st Defendant has produced a Credit Reference Agreement dated 21st February 2012, executed by it and the 2nd Defendant, relating to the supply of information to the 1st Defendant by the 2nd Defendant on their customers. This is a clear indication that, the 1st Defendant had the right to receive and publish any information received from the 2nd Defendant. Further, the 1st Defendant is protected under section 31(5) of the Act from being sued for carrying out its mandate unless it does not act in good faith. The Plaintiff has not proved that the 1st Defendant did not act in good faith.

58. In fact, the Plaintiff's Advocates by a letter dated 27th September 2011, made a demand to the 1st Defendant in relation to an alleged loan account No 0100001237197, demanding the immediate clearance of the Plaintiff's name and apology to the Plaintiff on the basis that he has never held an account with the 2nd Defendant and information contained in their consumer credit report is fabricated.

59. The 1st Defendant advised the Plaintiff vide a letter dated 25th June 2013, written by Mohammed Madhani & Co. Advocates that, pursuant to Regulation 20 (5) of the Regulation, 2008, cited herein, he should notify the 1st Defendant of the information disputed and request the 2nd Defendant to inform the 1st Defendant to delete the adverse information held on him. He did not. Therefore, the Plaintiff cannot have expected the 1st Defendant, which is a mere agent of necessity to delete information, which it is incapable of verifying independent from the source and/or the author. I therefore find and hold that, the 1st Defendant acted within its statutory duty and the information published was received in the ordinary course of its business.

60. I further concur with the submission advanced that, the Plaintiff has not complied with the provisions of Order 2 Rule 7 of the Civil Procedure Rules, 2010, as he did not state in the pleadings the particular words published which amount to defamation and/or the particulars of that claim. How can the court arrive at a decision that, the words complained of are defamatory in nature, when it does not even know what those words are?

61. It is trite law that the words must not only be pleaded but must be set out verbatim in the statement of claim. The 1st Defendant has made reference to several cases in its submissions that speaks to this requirement and I entirely associate myself with the same. On the basis of the aforesaid, the Plaintiff having failed to prove the first ingredient of defamation that; the alleged statement was published and was defamatory, it does not call for the court to consider the other two ingredients for they stand on the foundation of the defamatory statement.

62. As regards the claim against the 2nd Defendant, I find that, although the Plaintiff has not proved that his signature was forged, the manner in which the 2nd Defendant opened and/or operated the alleged Plaintiff's account does not pass the test of a "reasonable prudent banker" acting with care and skill to protect its interest, that of its customers and/or third party against fraud. I arrive to that conclusion on the basis that; first and foremost, it is not a normal banking practice that a joint account is opened by individual two thereto separately, one being a signatory to the others account. Secondly as aforesaid, that account is unknown and the only time it is mentioned is by the Plaintiff is through correspondence.

63. Thirdly, there is no evidence; that the loan was disbursed, how much was paid and how much was in arrears by the time the 2nd Defendant caused the listing of the Plaintiff; as the bank loan account statement was not produced. There is also no evidence as to why the 2nd Defendant did not trace the motor vehicle which is the subject of the suit and disposed it off and/or realized or enforced its rights under the Chattel Transfer instrument. There is no evidence that, even a demand letter was ever served upon the Plaintiff before the listing. The 2nd Defendant in my considered opinion acted negligently in this matter and without due regard to procedure and/or banking practice. It is not surprising that, it has not even filed a counter claim against the Plaintiff. The question therefore remains as to whether there was default, at all, if any monies were advanced.

Be that as it were, there is no evidence of fraud against the 2nd Defendant. It was simply taken for a ride by the 3rd Defendant.

64. Finally, as regards the 3rd Defendant, I find that as already stated herein, there is a default judgment against him. The 2nd Defendant is alleged to have confessed to "using the Plaintiff's document without authority". In an alleged apology letter dated 3rd October 2011, the 3rd Defendant states therein as follows;

"I Joshua Ngwath Njenga do apologise to you for the following reasons; I used your statement as supporting document without your approval. I'm very sorry for that and I promise that if you forgive me, I will clear your name within a month and pay you one hundred and twenty thousand (Kshs 120,000/=) which you will deduct from Crossline hardware account and pay us the difference"

65. Based on that letter and the default judgment there is no defence by the 3rd Defendant against the Plaintiff's case. Therefore, confirm the judgment as final.

66. I shall now consider whether the Plaintiff is entitled to the prayers sought. In that regard, I find that, the prayer for an order compelling the 1st Defendant to retract any statements or advice issued to all the banks injuring the Plaintiff's character is justified in the light of the fact that, the 1st Defendant has not proved the Plaintiff owes it any money.

67. The prayer seeking for an injunction restraining the Defendants, their agents or servants from maligning and or in any way interfering with the Plaintiff's ventures and business activities pending hearing and determination of the suit, is spent. The prayer that, the Motor vehicle registration No. KBL 905, be impounded and sold by public auction to offset any outstanding amounts owed to the 2nd Defendant, if at all, or as may be directly by the Honourable court, is allowed, as the log book shows that the motor vehicle is registered in the joint names of the

Plaintiff and the 2nd Defendant and since the Plaintiff is not claiming ownership or propriety rights therein, it should be disposed of. It is the 2nd Defendant's security and it is their statutory duty and obligation to trace it and sell it off.

68 As the prayer for general damages I find that, there is no evidence to prove that the Plaintiff suffered loss. The Plaintiff has produced income statement prepared by; Wambugu Githaiga & Associates for period of 1st January to 31st December, 2011. He then alludes to profit made in the years 2010 2011, 2012 and 2013 as Kshs 113,347,081, Kshs. 71,533,516, Kshs 639,406 and Kshs 38,846, respectively. He avers that, the business made a loss in the years 2014, 2015 and 2016, in the sums of; Kshs. 304,877, Kshs. 171,916, and Kshs 118,786, respectively.

69. The figures above can only be used to support a claim for special damages. There is no such claim herein. General damages or non-pecuniary losses are those damages which cannot be mathematically assessed at the date of trial. The heads of general damages; include loss arising out of personal injury claims; pain, suffering and loss of amenity; loss of use; to compensate the claimant for the loss of use of items damaged; loss of prospects; a Plaintiff is entitled to recover damages under this head if they can show, that he has suffered loss inter alia; due to breach of contract.

70. The Plaintiff did not plead to the nature of loss suffered and having failed to prove defamation, no general damages can be awarded. The final prayer seeks for costs of the suit plus interest on prayers (c) and (d) at court rates. First and foremost, no monetary award has been allowed and therefore the issue of interest does not arise. Secondary, I have already held that, the Plaintiff did not prove its case against the 1st Defendant and I award the 1st Defendant costs of the suit. I have also held that, the Plaintiff shielded the main culprit. There is no report made to any Police Station to investigate him. The Plaintiff equally failed to prove his signature was forced and/or the alleged defamation. He who goes to Equity must go with clean hands. I shall not order for him to be paid costs. Neither is he entitled to pay the 2nd Defendant's costs. The Plaintiff and the 2nd Defendant shall each bear their own costs. However, the Plaintiff is entitled to costs from the 3rd Defendant.

71. Those then are the orders of the court.

Dated, delivered virtually and signed on this 9th day of September, 2020

GRACE L NZIOKA

JUDGE

In the presence of;

Mr. Eric Mose for the Plaintiff

Ms. Wanja holding brief for Mr. Kisinga for the 1st Defendant

No appearance for the 2nd Defendant

No appearance f

or the 3rd Defendant'

Robert-----Court Assistant