



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. 275 OF 2014**

**OBADHIA GITONGA MICHEU.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF (K)LTD.....DEFENDANT**

**JUDGMENT**

1. This judgment relates to a suit filed herein by the Plaintiff against the Defendant vide plaint dated 24<sup>th</sup> June 2014 seeking for judgment against the Defendant as here below reproduced:-

- a. A mandatory injunction to compel the Defendant and/or its agents and/or servants and/or employees to release the title documents in respect to Title Number Mwimbi/Chogoria/2092.
- b. A mandatory injunction to compel the Defendant and/or its agents and/or servants and/or employees to remove the adverse listing with the Credit Reference Bureau in respect to the plaintiff.
- c. Kshs. 215,880,000.00
- d. General, exemplary and punitive damages
- e. Costs of this suit.
- f. Interest on (a), (b) above at court rates
- g. Any other or further relief which this Honourable court deems fit and just to grant.

2. It is the Plaintiff's case that, the Defendant advanced a loan to Chogoria Junior School, where he is a director. That he guaranteed the loan which was secured by parcels of lands namely, Title Number Mwimbi/Chogoria/2091, registered in his name and Title Number Mwimbi/Chogoria/2092, in the name of one Jediel Micheu. A legal charge was duly registered over the properties accordingly.

3. Subsequently, on 12<sup>th</sup> May 2008, the Defendant served him with a statutory notice, to the effect that the outstanding balance on the loan account was Kshs 1,014,627.00. He then requested the Defendant to allow him dispose of the land Title Number Mwimbi/Chogoria/2091 by private treaty and repay the debt. The request was allowed. That the authority to sell land Title Number Mwimbi/Chogoria/2091, was granted on conditions that, the purchaser's lawyer would be a member of the Defendant's panel of lawyers, and would give his professional undertaking to utilize the proceeds of sale to clear the outstanding debt.

4. That, on 30<sup>th</sup> September 2008, he received another demand letter from the Defendant showing the outstanding balance on the loan account as Kshs.952,262.85 as at that date. He caused the sub-division of the subject property, and sold it and ensured that the entire debt of Kshs.952,262.85, was paid to the Defendant, vide Bankers cheque number 008272, from Equity Bank, through Kiautha Arithi Advocates, the purchaser's lawyer based on the professional undertaking given.

5. He avers that, the Defendant did not acknowledge the payment but fully discharged the charge on the subject property vide a duly executed discharge of charge dated, 17<sup>th</sup> November 2008. However, the Defendants have unlawfully refused to release and continue to withhold Title number Mwimbi/Chogoria/2092, to date.

6. The Plaintiff testified that neither the Principal Debtor nor him as the director of the School or as a Guarantor, were supplied with the bank statements in respect of the loan account, before and after clearing the outstanding debt, despite several demands from him, which is contrary to the provisions of the Banking Act.
7. He testified that subsequently, on 1<sup>st</sup> February, 2011, he established a Hotel known as Chogoria Heritage Hotel for outside catering which required a sum of Kshs 50,000.00 for upgrading. On or about 25<sup>th</sup> July 2012, he applied for a loan of the same amount from Kenya Commercial Bank, Chogoria Branch, but the loan application was rejected by Kenya Commercial Bank on account of being listed negatively with Credit Reference Bureau Africa limited t/a Trans-Union based on information from the Defendant. He argues that the listing and or referral to the Credit Reference Bureau Africa limited t/a Trans-Union, was illegal and malicious as the Defendant did not give any reason for listing him with the Credit Bureau, nor any adverse notice served on him before the listing and neither was he indebted to the Defendants.
8. That at the time of the application for the loan, he was earning a monthly income of Kshs 73,000.00 per month and with the upgrading; the same was expected to raise Kshs 90,000 per month. That as a result of the aforesaid negative listing and/or referral to Credit Reference Bureau and due to lack of finance to upgrade the business; he was forced to close down the Hotel business.
9. The plaintiff further testified that on 17<sup>th</sup> May 2010, he established and registered Chogoria Teachers College and on 3<sup>rd</sup> May 2012, he invited the officials from St. Paul's university to visit. They visited and inspected the College with a view to collaborate with him and establish a campus for the University upon inspection. He then received a report recommending the improvement and upgrading of the College facility, to meet the standards for running a campus. However, this required injection of money. As such on or about 3<sup>rd</sup> September 2013, he applied for a loan of Kshs 400,000.00, from Kenya Commercial Bank Limited to improve and upgrade the College but the loan application was rejected on account of the said Credit Reference Bureau listing by the Defendant, which cited indebtedness to the Defendant amounting to Kshs.952,262. 85, which amount he had paid and the loan fully discharged on 17<sup>th</sup> November 2008.
10. That, at the time of the proposed collaboration, the College was already running and was generating average annual income of Kshs 1,500,000.00 per annum and with the establishment of St Paul's University campus, the income was projected to rise to an average Kshs30,000,000.00 per annum.
11. He reiterated that the listing is illegal, unlawful and malicious, as he has never received any adverse notice from the Defendant as required under the provisions of Regulation 28 of Legal notice No. 97, the Banking (Credit Reference Bureau) Regulations, 2008 of Banking Act Cap 488. That pursuant to regulation 18(1) of the Banking (Credit Reference Bureau) Regulations, the listed information with the Bureau shall be retained for a period of 7 years after settlement of the debt.
12. That as a result of the aforesaid listing and being a village elder, a member of the Board of Chogoria Boys High School, Chairman of Chogoria Water Project and a member of Chogoria Forest Association, he has suffered loss of dignity and integrity among the members of the public and cannot access any loan from any banking institution for a period of 7 years. In the same vein, he was forced to resign from the directorship of Chogoria College and therefore lost income from the college. He argues that the Defendant's actions violated his constitutional right to earn a decent living.
13. However, the Defendant entered appearance and filed an amended statement of defence pursuant to the leave of the Honourable Court granted on 11<sup>th</sup> May 2015, denying each and every allegation of fact contained in the Plaint dated 24<sup>th</sup> June, 2014, save for the description of the parties.
14. The Defendant's case is that, it advanced various loan facilities to the School guaranteed by the Plaintiff. The loans were for a sum of Kshs 340,000 taken on 14<sup>th</sup> November 2005, Kshs 600,000 advanced on 10<sup>th</sup> June 2006, and Kshs 265,000 granted on 2<sup>nd</sup> August 2006 and were secured by the two properties as stated above.
15. That it was a term of the loan facility that interest shall be calculated daily and debited monthly; and further, it was agreed that if the loan account falls into arrears, a penalty of 0.5% per month shall be charged calculated on the daily amount in arrears and payable monthly until the account is fully regularized.
16. That subsequently, the Borrower defaulted on the loan repayments on several occasions and on or about 12<sup>th</sup> May 2008, the Defendant served the Plaintiff and the other Guarantor Jediel Micheu, with Statutory Notices of sale of the same date, with respect to charged properties, in accordance with Section 74 of the Registered Land Act. The Defendant averred on 12<sup>th</sup> May 2008, that the outstanding balance on the loan stood at Kshs. 1,014,627.00, which amount continued to accrue interest and penalties.
17. That, the Borrower through the Plaintiff, vide a letter dated 23<sup>rd</sup> July 2008, requested the Defendant to withhold foreclosure and allow for sale one of the charged properties, being Title Number Mwimbi/Chogoria/2091 and proceeds of the same to be applied towards servicing the outstanding loan. Similarly, the Borrower through the Plaintiff, sent a further letter, dated 18<sup>th</sup> August 2008, promising to pay a sum of Kshs 400,000.00 and further requested for release of Title Number Mwimbi/Chogoria/2091.
18. By a letter dated 30<sup>th</sup> September 2008, the Defendant notified the Borrower of its acquiescence to the request made in the letter dated 23<sup>rd</sup> July 2008 but on the conditions stated herein that, the release of the said title would be subject to a professional undertaking from the Borrower's lawyers, for the entire sale proceeds to be remitted to the Defendant; and the outstanding debt be fully settled from the sale proceeds of the property.
19. The Defendant conceded that indeed, it notified the Borrower that, as at, 30<sup>th</sup> September, 2008, the outstanding loan balance amounted to Kshs. 952,262.85, but insisted that the said amount continued to accrue interest and penalties, until paid in full. However, the Defendant

argued that, this amount is exclusive of the loan amount in the Borrower's account number 016C857313002, which stood at Kshs 133,333.10.00, and which was inadvertently not tabulated into the outstanding arrears.

20. That indeed the law firm of Kiautha Arithi & Company Advocates, gave a professional undertaking to pay to the Defendant an amount of Kshs, 952,262.85, for the original Title Deed to be released to it. Subsequently, the same was paid as aforesaid and the Advocates were released from their professional undertaking. The Defendant denied the averments by the Plaintiff that, the payment was never acknowledged and testified that the payment was acknowledged on 20<sup>th</sup> November, 2008.

21. The Defendant testified further that, although the sum of Kshs. 952,262.85 was sufficient to settle the debt secured by the property Title Number Mwimbi/Chogoria/2091, and the balance was utilized towards liquidating the debt secured by property Title Number Mwimbi/Chogoria/2092, but, that at the date of payment of the said amount on 20<sup>th</sup> November 2008, the debt had accrued additional interest and therefore the funds were not adequate to off-set the entire outstanding loan, a fact the Plaintiff was aware of and which was partly occasioned by the delay in forwarding the cheque.

22. The Defendant further averred that several meetings were held thereafter with the Plaintiff, where the Defendant pressed upon the Plaintiff to pay the outstanding amount to enable the Defendant release security being Title No. L.R. No. Mwimbi/Chogoria/2092. Therefore, at all material times the Plaintiff was aware of the outstanding amounts and was equally aware of the reasons why property title No. L.R. No. Mwimbi/Chogoria/2092 could not be released.

23. That as a result of the Plaintiff neglect and/or blatant refusal to make the payments, the Defendant was prompted to send the information to the Credit Reference Bureau ("CRB") in line with the Banking (Credit Reference Bureau) Regulations, 2008. The Defendants testified that, the information is found in the Credit Reference Bureau (CRB) Report of Africa Limited T/A Transunion records, was availed to the Plaintiff.

24. That, on a without prejudice to the foregoing, the Defendant vide a letter dated 19<sup>th</sup> August, 2010, notified the Plaintiff that his details had been forwarded to the Credit Reference Bureau. The Defendant therefore contents that in light of the above; any adverse effect suffered by the Plaintiff as a result of his negative listing with the Credit Reference Bureau is a direct result of his own failure to service the loan facility.

25. The Defendant thus vehemently denied each and every particular of malice, fraud, misrepresentation and defamation, and argued that the Plaintiff was not merely a Guarantor to Chogoria Junior School as alleged, but was at all material times relevant to this suit, the registered proprietor of the Chogoria Junior School. Further at the time of the alleged loan application to the Kenya Commercial Bank, the Plaintiff was not the proprietor of Chogoria College as alleged and therefore lacks the locus standi to claim damages and/or exemplary and punitive damages on behalf of Chogoria College or on account of any alleged dealings of Chogoria College.

26. The Defendant further averred that any demands for release of Title No. L.R. No. Mwimbi/Chogoria/2092 cannot be complied with until such times as the Plaintiff redeems the said security. Further, the said property land Title No. Mwimbi/Chogoria/2092 is registered in the name of one Jediel Mucheu, who is deceased and in the absence of a Power of Attorney in favour of the Plaintiff or any other lawful authority to demand the same on behalf of the deceased Jediel Mucheu; the Plaintiff is estopped from demanding release of the said title.

27. Finally, the Defendant stated that a customer requesting for its bank statement is required to meet the costs of any such statements through funds available to his credit with the Bank and in the absence of any funds, the Defendant will not be able to honour such a request.

28. At the hearing of the case, the Plaintiff testified and called three other witnesses. He reiterated the entire content of his pleadings as stated in the Plaintiff and summarized above, save to add that, the loan was guaranteed by two persons namely; himself and one Jediel Mucheu, the registered owner of Land Title Number Mwimbi/Chogoria/2092 and that despite the demand for the release of the original Title to land Title No. Mwimbi/Chogoria/2092 and a reminder dated 10th August, 2013, through the firm of Charles Kariuki and Company Advocates; the same has not been released. Similarly a demand through the firm of Muciimi Mbaka & Company Advocates urging the Defendant to remove his name from the negative listing has not been honoured. The evidence of the other witnesses is as per the record and will be referred to herein. The Defendant on its part called one John Chege, who also basically reiterated the averments in the amended Statement of Defence and which the evidence is on record and shall be referred to herein

29. At the close of the entire case, the Parties filed their respective submissions, which I have considered alongside the evidence adduced. The Plaintiff submitted and invited the Court to determine the following issues:-

- a. Did payment of Kshs 952,262.85/= to the defendant Bank offset the loan in view of the contents of the letter dated 30<sup>th</sup> September 2008?
- b. Was the Plaintiff informed by the Defendant of outstanding loan after payment of Kshs 952,262.85/=/? If so what was the mode of communication and date of such correspondence?
- c. Was the plaintiff herein the Borrower or the Guarantor?
- d. Was the information sent to the Credit Reference Bureau accurate?
- e. Was the defendant's holding on to the charge on Land Title *MWIMBI/CHOGORIA/2092 after payment of the loan amount legal?*  
*and*
- f. Did the defendant serve the plaintiff with Adverse Notice before referring him to the Credit Reference Bureau?

30. The Defendant on its part, invited the Court to determine the following issues:-

- a. Whether the Plaintiff has proved malice fraud misrepresentation and defamation;
- b. Whether the Plaintiff's credit information was erroneously submitted to CRB for listing by the Bank;
- c. Whether the Plaintiff has proved malice in submission of his credit information to CRB;
- d. *Whether the Defendant was obligated to issue the Adverse Action Notice;*
- e. The Defendant's role in credit referencing;
- f. The obligation of the Plaintiff and Defendant in the issue of Bank Statements;
- g. Whether Plaintiff's claim herein offends the redress mechanism provided in the CRB Regulations;
- h. Whether the Plaintiff is entitled to the reliefs sought in the Plaintiff; and
- i. Who should bear costs.

31. I have considered the issues raised by the Parties for determination and find the following consolidated issues require determination:-

- a. What is the nature of the relationship between the plaintiff and the defendant herein?
- b. Who was advance loan facility(s) in this matter?
- c. What security(s) if any, were provided to secure the said loan facility(s)?
- d. Were the facilities advanced, if any, fully repaid?
- e. If the facility(s) were fully repaid was the Defendant entitled to release the subject security property and/or title; and if not fully repaid, is the Defendant entitled to withhold the title to the subject suit property?
- f. Does the Plaintiff have the locus standi to seek for the release of the subject title deed?
- g. Was the Plaintiff notified of any outstanding balance after the sale of the sale of the property that was sold and remittance of funds to the Defendant?
- h. Did the Defendant maliciously list the Plaintiff with the CRB?
- i. Did the Defendant serve the Plaintiff with an adverse notice before the listing?
- j. Has the Plaintiff proved its case and is it entitled to the orders sought?

32. The first, second and third issues are straight forward. It is not in dispute that, the Defendant advanced several loan facilities to Chogoria Junior School. Hence the School is the Borrower. It is also not disputed that the Plaintiff is a Director of the School and that, the loan facilities were secured by inter alia, by a property known as Mwimbi/Chogoria/2091 registered in the name of the Plaintiff. Thus the Plaintiff is a Guarantor.

33. As well understood in law, a guaranty is a promise to a lender to perform the obligations of another party. A guarantor can assume responsibility for the debt of a Borrower in a number of transactions, including mortgages, leases, and business loans. Thus the guarantor's responsibility is to make loan payments if the borrower doesn't. Therefore the relationship of the parties is contractual based on the guarantee contract. The above analysis also answers issues two and three as to who was advanced the loan facility and the securities offered for the same.

34. The next issues are what loan facilities were advanced and whether the same have been fully repaid. The analysis of the evidence reveals that, the Defendant approved a loan facility of Kshs 600,000 in favour of Chogoria Junior School to finance construction. The Borrower had applied for a facility of Kshs 1,501,000.00 as per the letter dated 10<sup>th</sup> June 2006, from the Defendant to the Borrower. The interest thereon was stated to be at 6% above the Bank's prevailing base rate which stood at 14% and which was subject to change. It was also stated that a facility that fell in arrears would be charged a penalty of 5% provided as follows:

- a. Personal guarantee by the Plaintiff supported by a charge for Kshs 400,000.00 over L.R. No. Mwimbi/Chogoria /2091;
- b. Existing legal charge of Kshs 1,050,000 over L.R. No Mwimbi/Chogoria/2092 in the name of Jediel Micheu

Other charges levied included commissions as follows:

- a. 2.5% of Kshs 600,000 as the fees equivalent to Kshs 15,000.00;
- b. Application fees Kshs 4,000;
- c. Standing order commission of Kshs 250,000

35. It is evident from the pleading and evidence adduced and conceded to by the parties that, on 12<sup>th</sup> May 2008, the Defendant served the Plaintiff and Co-guarantor with a statutory notice, to the effect that the outstanding balance on the loan account was Kshs 1,014,627.00 and on 30<sup>th</sup> September 2008, the outstanding loan balance amounted to Kshs. 952,262.85.

36. The saving grace herein is that, upon default of repayment of the loan facilities by the Borrower, the Plaintiff/Guarantor assumed responsibility and approached the Defendant/Creditor to repay the loan facilities. It does occur up to that point; the amount outstanding was not in dispute. It is also not in dispute that as aforesaid, the said sum of money was subsequently, remitted to the Defendant. I note that, the cheque dated 18<sup>th</sup> October 2008 from Equity Bank Limited, for payment of the same has been produced by the Plaintiff. The letter forwarding the same from Kiautha Arithi & Co. Advocates is dated 17<sup>th</sup> November 2008.

37. The evidence reveals that, the charge in respect of land Title Number Mwimbi/Chogoria/2091, was fully discharged vide a duly executed discharge of charge dated, 17<sup>th</sup> November 2008. It suffices to note that, the Defendant testified that they acknowledged the payment on 20<sup>th</sup> November, 2008. It does therefore occur from the above that, any liability outstanding was generally discharged by the discharge of the charge.

38. However the key question that arises is whether; the payment received extinguished the entire debt outstanding as at the time, when it was received. The whole matter rests on that.

39. To answer this question, regard must be made to the date when the payment was made and the defence advanced. The Defendant argued that, the amount of Kshs. 952,262.85, was exclusive of the loan amount in the Borrower's account number 016C857313002, which stood at Kshs 133,333.10.00, and which was inadvertently not tabulated into the outstanding arrears. The Defendant further testified that, although the sum of Kshs, 952,262.85 was sufficient to settle the debt secured by the property Title Number Mwimbi/Chogoria/2091, the balance was utilized towards liquidating the debt secured by property Title Number Mwimbi/Chogoria/2092.

40. That, further at the date of payment of the said amount on 20<sup>th</sup> November 2008, the debt had accrued additional interest and therefore the funds were not adequate to off-set the entire outstanding loan, a fact the Plaintiff was aware of and which was partly occasioned by the delay in forwarding the cheque.

41. It is noteworthy that, the balance cleared was as at the 30<sup>th</sup> August 2008, and it was cleared on 17<sup>th</sup> November 2008, obviously, the account was running and these amounts cannot have remained outstanding at Kshs. 952,262.85.

42. The next issue to consider is whether the Plaintiff was made aware of any outstanding balance. According to the Defendant, it wrote to the Borrower on 2<sup>nd</sup> April 2009 and informed it of an outstanding amount of Kshs 198,700.95. However it is noteworthy that this was about 5 months after the last payment. I have seen the said letter which gives the details of the outstanding balances as follows:

<u>Account</u>	<u>Balance (Kshs)</u>
01129057313000	39,062.35
01627057313002	66,666.70
01698057313101	19,640.70
01627057313002	3,401.00
016C8057313002	66,666.40

43. There was no response to the letter. The Defendant averred that the parties held several meetings with the Plaintiff, after the payment of Kshs. 952,262.85, where the Defendant pressed upon the Plaintiff to pay the outstanding amount to enable the Defendant release security being Title No. L.R. No. Mwimbi/Chogoria/2092 but he refused therefore, at all material times the Plaintiff was aware of the outstanding amounts and was equally aware of the reasons why property title No. L.R. No. Mwimbi/Chogoria/2092 could not be released. That due to neglect to pay the Defendant by letter dated 19<sup>th</sup> August 2010 the matter was referred to Credit Reference Bureau.

44. The Plaintiff maintains that, he was not aware of the outstanding balance and only got to know of it when he got a loan facility from another bank. It suffices to note that the letter by the Borrower seeking for a statement of accounts in relation to the subject credit facility is dated 20<sup>th</sup> October 2013. This is well over five years from the date when the payment of Kshs 952,262.85 was forwarded to the Defendant's Bank.

45. The question is, was the Plaintiff aware or was he not aware? Analysis of the evidence reveals that, there is no document produced by the Defendant that the Plaintiff was notified of the outstanding balance Kshs 198,700.95. A document that the Court was referred to at page 21 of the Defendant's documents filed in Court, on 24<sup>th</sup> October 2014, reveals that it is an Inter-Branch/Department Memorandum from the

Manager Chuka to Head of Retail Recoveries. It makes reference to a self-explanatory letter from the customer in relation to the discharge of LR No. Mwimbi/Chogoria/2092 Base0573130 showing outstanding balance on the customer's accounts. This letter is dated 2<sup>nd</sup> April 2009. This was long after the customer had been notified of the outstanding balance of Kshs 952,262.85 as at 30<sup>th</sup> September 2008 and the same subsequently paid by 20<sup>th</sup> November 2008. It is notable from the said letter, the following words in handwriting "28<sup>th</sup> April 2009 Mobile 0725852955, not picked and landline busy". If this is the letter that the Defendants are relying on to have brought to the knowledge of the Plaintiff of the outstanding balance, then it does not pass the test. I therefore find that there is no evidence that the Plaintiff was notified of the outstanding balance of the accounts.

46. However, it is clear from the evidence that, the Plaintiff became aware of his negative listing as early as on or about 25<sup>th</sup> July 2012, when he applied for a loan from Kenya Commercial Bank Limited and was denied the same. It suffices to note that, despite the Plaintiff being denied the loan as far back as 25<sup>th</sup> July 2012, he apparently continued to seek for facilities from the Bank without dealing with the issue of negative listing. He testified that, on 3<sup>rd</sup> September 2013, he applied for a loan of Kshs 400,000.00, from Kenya Commercial Bank Limited to improve and upgrade the College but the loan application was rejected on account of the said Credit Reference Bureau listing by the Defendant.

47. The Defendant stated on a without prejudice that it notified the Plaintiff vide a letter dated 19<sup>th</sup> August, 2010, that his details had been forwarded to the Credit Reference Bureau. Although it does occur from the evidence the letter dated 19<sup>th</sup> August 2010 makes reference to Kenneth Muriithi Micheu and not the Plaintiff, however there is another letter to the even date addressed to the Plaintiff. There is a dispute as to whether the Plaintiff received this letter.

48. Be that as it were, the Plaintiff subsequently got to know of his negative listing. The question that arises is this, had he by then written to the Defendant to complain. It is noteworthy that, the first letter to the Bank in relation to the listing of the Plaintiff with Credit Reference Bureau (CRB), was written by Muami Mbaka & Co. Advocates on 30<sup>th</sup> September 2013, quite a long time after he had been denied a facility in the year 2012.

49. In the same vein, it suffices to note that the letter by the Borrower seeking for a statement of accounts is dated 20<sup>th</sup> October 2013. This is well over five years from the date when the payment of Kshs 952,262.85 was forwarded to the Defendant's Bank.

50. The other issue to consider is whether the Defendant maliciously listed the Plaintiff with the Credit Reference Bureau. To answer this question, the following issues already analyzed herein have to be considered, namely;

- a. Was there any outstanding balance that the Plaintiff was liable to pay?
- b. Was the Plaintiff given adverse notice of the listing?
- c. Is the answers to the questions are in the negative, did he suffer any loss?
- d. Is so, is he entitled to any of the prayers sought for?

51. I shall now address the prayers in the Plaintiff. The first prayer seeks for a mandatory injunction to compel the Defendant release the title deed Mwimbi/Chogoria/2092. The Analysis of the evidence above is clear that, the amount of Kshs 952,262.85 would not have discharged the Plaintiff fully from liability as there was interest that accrued from the date when that balance was given to the date of payment as already analyzed herein, between 30<sup>th</sup> September 2008 to 20<sup>th</sup> November 2008. It is also clear that, the Defendant advanced to the Principal borrower more than one loan facility as per the statement herein and on his own admission, the outstanding balance was not fully cleared, but the failure to do the same was informed by negligence which is admitted by the Defendants that they inadvertently failed to inform the Plaintiff of the outstanding balance of Kshs 198,700.95.

52. The fact that the Defendant did not inform the Plaintiff of this amount, negligently or otherwise, does not mean that the money is not repayable. The only way the Plaintiff can benefit from this negligence, is to order that the same be repaid without any interest thereon. This is informed by the fact that, had it been brought to the knowledge of the Plaintiff, he would have paid it as far back as at that time and the issue of interest would not arise. In the same vein, it is clear that even when the Plaintiff was notified of the balance, as and when he got to know, whether as at the time of listing or otherwise, he refused to pay it. I say so because, the Plaintiff testified that when he learnt of his negative listing in the year 2012, he established the reason was the alleged outstanding balance. Therefore, had he paid it, he would have had the title deed released.

53. Even then, a further argument has been raised in this matter as to whether the Plaintiff has the locus standi to seek for the release of the title deed. It is noteworthy that, the Plaintiff at paragraph 3 of the statement of defence dated 26<sup>th</sup> June 2013, states that, the title Mwimbi/chogoria.2092 belongs to his deceased father Jediel Micheu. The Defendant argued that the said property land Title No. Mwimbi/Chogoria/2092 being registered in the name of one Jediel Micheu, who is deceased and in the absence of a Power of Attorney in favour of the Plaintiff or any other lawful authority to demand the same on behalf of the deceased Jediel Micheu; the Plaintiff is estopped from demanding release of the said title.

54. Indeed there is no evidence that, the Plaintiff has the legal authority to seek for the release of the same and when the issue was raised the Plaintiff did not respond to it. Similarly, there seems to be quite a number of facilities offered by the Defendant to Chogoria Junior School, therefore, it is important to establish which particular facility was secured by the said property.

55. In conclusion on this issue, I order that the title deed in question be released on condition: firstly, the Plaintiff to pay any outstanding balance stated to be Kshs 198,700.95 and be at liberty to verify and which is payable without any interest, however the said balance should

be paid within a period of sixty (60) days from the date of this order, failure of which, it will attract interest at Court rates until payment in full; secondly, upon payment of the said outstanding balance, the title deed be released only to a person identified to be legally entitled to the same under the Law of Succession Act.

56. That leads me to the issue of a mandatory injunction sought to compel the Defendant to release the Plaintiff from the negative listing. In this regard, I order that, once the payment is made of the outstanding sum, the Defendant should forthwith and with immediate effect cause the removal of the Plaintiff's name from the Credit Reference Bureau.

57. As regards the claim of Kshs 215,880,000.00, sought for by the Plaintiff as particularized under paragraph 25 of the Plaintiff being Kshs 210,000.00 in school fees for Chogoria college campus and Kshs 5,880,000 for loss of income from Chogoria Heritage Hotel, it is clear that this is a claim for special damages and the law is now settled that special damages must be pleaded and specifically proved (insert case law).

58. The Plaintiff has given details of how he lost income from Chogoria Heritage Hotel based on documents he has produced in Court showing that he was "earning a monthly income of Kshs 73,000.00 per month and with the upgrading; the same was expected to raise Kshs 90,000 per month". I have looked at the documents in question and considered the same in the light of the evidence of PW4 Albert Wafula Juma and find that first and foremost, the witness who produced these documents testified that, the initial purpose of the documents he produced was for filing of returns of the Plaintiff's all businesses to Kenya Revenue Authority. That he did not prepare them for the purpose of this suit. He also confirmed that he was not the one who signed the document. It is therefore clear that this report cannot be relied on clearly to prove that the loss allegedly suffered by the Plaintiff, was meant for a different purpose altogether, and as rightfully observed by the Defendant, no evidence was produced to support the alleged income and/or projection thereof. It was not adequate for the Plaintiff to simply combine a booklet of accounts and leave them to the Court to sort them out which ones are relevant and which ones are not.

59. But even more, the claim in respect of Chogoria College arises from the failure to be advanced a loan facility by Kenya Commercial Bank Limited with a view of improving the college as required by St Paul's University with which it was going to enter into a partnership and/or collaboration. It suffices to note as already stated herein by his own evidence, the Plaintiff admits that by the time he was seeking for this facility, he was aware that he will not get it, the earlier facility applied for to improve the hotel having been rejected. This was more than a year from the time the first facility was rejected. Therefore the Plaintiff had an ample opportunity to seek redress from the Courts to redeem his credit standing before applying for this second loan. He had a duty to mitigate his losses too. In that regard, I find no basis for that claim, other than the fact that there is no evidence to specifically prove the loss in the sum of Kshs 215,880,000.

60. The next prayer is for general exemplary and punitive damages. The award of the same would be based on the finding that the Defendant acted maliciously and/or fraudulently in listing the Plaintiff with the Credit Reference Bureau. The parties herein have submitted on this issue with the Defendant drawing the Court's attention to the definition of the words "defamation, fraud and misrepresentation under the Black Law Dictionary, 9<sup>th</sup> Edition". It was submitted that for the Court to award this prayer, the Plaintiff must show that, the Defendant acted with malice and that the referral of the Plaintiff to the Credit Reference Bureau was not in accordance with statutory obligation placed upon the Defendant. It was further argued that the Credit Reference regulation, do not make a distinction between a borrower and a guarantor and requires that, credit information whether positive or negative of any individual with financial obligation to a financial institution should be shared. The Plaintiff relied on the case of; Rupa Cotton Mills (EPZ) Ltd & 2 Others vs Bank of Baroda (Kenya) Limited (2012) eKLR. Further reference was made to the case of; Jamlick Gichuhi Mwangi vs Kenya Commercial Bank Ltd & Another (2016) eKLR.

61. The Defendant therefore contends that in light of the above; any adverse effect suffered by the Plaintiff as a result of his negative listing with the Credit Reference Bureau is a direct result of his own failure to service the loan facility.

62. Finally the Defendant submitted that, Regulation 20 of the Credit Reference Bureau Regulations provides the procedure to be followed where the borrower believes that the information contained in the data base is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed. In that regard, the Plaintiff has approached the Court prematurely in this matter. The cases of; Amy Kagendo Mate -vs- Prime Bank Limited & Credit Reference Bureau Africa Limited in Nairobi HCCP No. 17 of 2013 and Nairobi HCCC No. 551 of 2011 Daniel Gachanja Githaiga -Vs- Credit Reference Bureau Africa Ltd & 2 Others were relied on.

63. The Plaintiff on his part submitted that, the principles upon which an award of exemplary and punitive damages is based was elaborated in the cases of; John vs MG Ltd (1996) 1 ALL E.R. 35 and Bank of Baroda(Kenya) Limited v Timwood Products Ltd Civil Appeal Number 132 of 2001. That in the instant matter, the Defendant's action was calculated to damage the reputation of the Plaintiff who was a guarantor and who had fully paid the loan, and therefore he is entitled to compensation in the award of special damages, future earnings, for loss of business, and general damages for loss of reputation and good standing with the financial institution.

64. In considering the rival submissions on this issue, I find that the relationship between the parties herein, was based on a contractual relationship founded on the Law of Guarantees. I have already noted herein the guarantor assumes the responsibility to pay a debt where the principal debtor fails to. I have also held that, though the Bank was negligent in not providing the accurate information as to the outstanding balance, on the loan facility on which the Plaintiff was liable, the Plaintiff was not released from liability to pay, and when it was brought to his knowledge, he still did not pay. The referral of any information to the CRB is a requirement of the law and the Defendant as a financial institution are entitled to do the same, and as a result of their negligence in notifying the Plaintiff of the outstanding balance, the Court has held that the Plaintiff will not pay any interest on the said sum. I do not find in the given circumstance, that the Defendants were malicious, but I find that they were more negligent. In the given circumstances, I find no basis for awarding the orders sought.

65. Finally on the issue of costs, I find that the trigger of this litigation is the negligence by the Defendant as stated herein, and as much as the Plaintiff may have subsequently failed to cooperate, the Defendants are primarily to blame. In that case I order that they pay the Plaintiff's costs of this suit.

66. Those are the orders of the Court.

**Dated, delivered and signed in an open court this 1<sup>st</sup> day of October 2018**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Mageto for the Plaintiff

Ms. Okimaru & Mr. Kilonzo for the Defendant

Dennis.....court assistant