



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**CIVIL CASE NO 358 OF 2012**

**ANTHONY MAINA MUTAHL.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA.....1<sup>ST</sup> DEFENDANT**

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

**RULING**

**INTRODUCTION**

1. The 1<sup>st</sup> Defendant's Notice of Motion application dated and filed on 15<sup>th</sup> May 2018 was brought pursuant to the provisions of Order 2 Rule 15(d) of the Civil Procedure Rules 2010, Regulation 20 of the Banking (Credit Reference Bureau Regulations) 2008 and any other enabling provisions of the Law. It sought the following orders:-

**1. THAT this Honourable court be pleased to strike out the suit.**

**2. THAT costs of this application and the suit be awarded to the 1<sup>st</sup> Defendant.**

2. The 2<sup>nd</sup> Defendant filed a Notice of Preliminary Objection dated 17<sup>th</sup> May 2018 on 18<sup>th</sup> May 2018 stating that the Plaintiff's suit was statute barred under Section 4 (2) of the Limitations and Actions Act Cap 22 (Laws of Kenya) as read with Section 20 of the Defamation Act Cap 36 (Laws of Kenya).

3. On 16<sup>th</sup> May 2018 this court directed that both the 1<sup>st</sup> Defendant's Notice of Motion application and the 2<sup>nd</sup> Defendant's Preliminary Objection would be heard together.

4. The 2<sup>nd</sup> Defendant's Written Submissions were dated 15<sup>th</sup> May 2018 and filed on 26<sup>th</sup> June 2018 while those of the 1<sup>st</sup> Defendant's were dated 12<sup>th</sup> June 2018 and filed on 13<sup>th</sup> June 2018. The Plaintiff's Written Submissions were dated 27<sup>th</sup> June 2018 and filed on 28<sup>th</sup> June 2018.

5. When the matter came up on 4<sup>th</sup> October 2018, the parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**LEGAL ANALYSIS**

6. Having perused the parties' respective pleadings and Written Submissions, it was clear that the issues that had been placed before it for determination were:-

**1. Whether or not the Plaintiff's suit herein was premature; and**

**2. Whether or not the Plaintiff's suit was statute barred.**

7. The court deemed it prudent to address the aforesaid issues under the distinct and separate headings shown herein below.

## I. WHETHER OR NOT THE PLAINTIFF'S SUIT WAS PREMATURE AND AN ABUSE OF COURT PROCESS

8. The 2<sup>nd</sup> Defendant contended that the Plaintiff's suit was premature as he had not exhausted the dispute resolution mechanism under Regulation 20 of the Banking (Credit Reference Bureau) Regulations 2008.

9. It relied on the cases of Kennedy Odhiambo Nyagudi vs Central Bank of Kenya Ltd [2013] eKLR, Amy Kagendo Mate vs Prime Bank Limited Credit Reference Bureau & Another [2013] eKLR and Daniel Gachanja Githaiga vs Credit Reference Bureau Africa Ltd & 2 Others [2013] eKLR where the common thread was that any person who was aggrieved with a bank sharing information with a credit reference bureau ought to exhaust the procedure under Regulation 20 of the said Regulations.

10. The 1<sup>st</sup> Respondent also fully associated itself with the views of the 2<sup>nd</sup> Defendant and relied on several cases, amongst them Bernard Murage vs Fineserve Africa Ltd & 3 Others [2015] eKLR, where the common thread was that where the statute has prescribed a remedy to a party, then the court had to exercise restraint and first give an opportunity to that organ to resolve the dispute.

11. It was emphatic that the Plaintiff was attempting to have this court usurp the powers of the 2<sup>nd</sup> Defendant as provided in the statute. It urged the court to allow the application because if not allowed, litigants would avoid exhausting the statutory mechanisms for resolving the disputes.

12. On his part, the Plaintiff was emphatic that there was no law barring a party from instituting a claim for recovery of damages as a result of the Defendants' negligent acts. He argued that whereas the jurisdiction of the court could be ousted by statute, those ouster clauses would be applicable in the clearest of the cases.

13. He referred this court to the case of Habre International Co Ltd vs Kassam & Others [1999] EA where the Supreme Court of Uganda held that:-

**"...it would be better to uphold jurisdiction than to turn away a litigant away from the seat of justice without being heard..."**

14. He also placed reliance on the case of Mtenga vs University of Dar es Salaam HCCC No 39 of 1971 where Biron J stated as follows:-

**"It is trite to observe that a court is, and to has to be for the protection of the public, jealous of its jurisdiction, and will not lightly find its jurisdiction ousted. The legislature may, and often does, far too often, oust the jurisdiction of the court in certain matters, but for the court to find that the Legislature has ousted its jurisdiction, the Legislature must so state in no uncertain and in most unequivocal terms.**

15. He was categorical that it was never the intention of the Parliament to oust the jurisdiction of the court while coming up with Regulation 20 Banking (Credit Reference Bureau) Regulations and that if it was its intention, then nothing would have been easier than the legislators having said so.

16. He argued that the mere fact that the Defendants filed their Memorandum of Appearance meant that they had submitted themselves to the jurisdiction of this court. They placed reliance on the cases of Barakat Exploration Inc vs Taipan Resources Inc [2014] eKLR and Kanti & Co Ltd vs South British Insurance Co Ltd [1981] KLR where it was held that once a defendant had entered an unconditional memorandum of appearance, the court became seized of the matter.

17. Section 5 of the Civil Procedure Act is clear that courts have jurisdiction to try all suits excepting those that are expressly barred. The said Section provides as follows:-

**"Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred".**

18. Regulation 20 of the Banking (Credit Reference Bureau) Regulations provides a mechanism of resolving a dispute. It does not bar a party seeking relief from court for a claim that is based on tort. If that was the intention of Parliament, then nothing would have been easier than for the said Regulations to have expressly stated so. Appreciably, a statute and the Constitution has more force than a regulation or rule.

19. This court therefore took the view that whereas it could stay proceedings before it to enable parties go to a proper forum for the determination of their dispute, it could not strike out a suit merely because that party had come to it seeking reliefs. It would be best not to pore over affidavit evidence and dismiss a suit at an interlocutory stage and more fair and in the interest of justice to hear the same on merit and dismiss it at the appropriate time if it was determined that determination at the conclusion of the case that it was unmeritorious.

20. Indeed, it is trite law that courts must exercise restraint when asked to strike out pleadings. Such discretion must be exercised as a last resort. In this regard, this court associated itself fully with the holding of Musinga J (as he then was) in Geminia Insurance Company Limited vs Kennedy Otieno Onyango [2005] eKLR when he stated that striking out of pleadings out to be done only in the clearest of the cases. The case herein was not one of such clear case.

21. In addition, having heard due regard to all the cases that were relied on upon the parties herein, this court was more persuaded by the Plaintiff's Submissions that once the Defendants entered an unconditional appearance and defence admitting the jurisdiction of the court, this court became seized of this matter herein. The Defendants could now not turn around and aver that the court had no jurisdiction to hear and determine the dispute between them. Indeed, this court had jurisdiction under Article 50 of the Constitution of Kenya, 2010 to hear and

determine the dispute herein.

22. This court was therefore not persuaded that it should strike out the Plaintiff suit *in limine* as that was too draconian.

## **II. WHETHER CLAIM IS STATUTE BARRED OR NOT**

23. This court was not persuaded by the Defendants' submissions that the Plaintiff's claim on defamation was statute barred as it was not brought within twelve (12) months from the date of listing. This was an issue that ought to be interrogated during a full trial as he was emphatic that as at 31<sup>st</sup> October 2011, he was still being listed and as result, his suit that was filed on 17<sup>th</sup> July 2012 was not statute barred. Further, he had also sought general damages for embarrassment and malicious listing. These claims could not be within the jurisdiction of the 2<sup>nd</sup> Defendant herein.

24. It was the view of this court that the Plaintiff had raised triable issues as to whether or not his suit was statute barred. Whether he could prove a case for malicious listing and embarrassment was another matter altogether. It was a matter of evidence. It was only fair and in the interests of justice that he be given an opportunity to have his day in court and prove his case.

## **DISPOSITION**

25. For the foregoing reasons, the upshot of this court's decision was that the 1<sup>st</sup> Defendant's Notice of Motion application dated and filed on 15<sup>th</sup> May 2018 was not merited and the same is hereby dismissed. Costs of this application shall be in the cause. The 2<sup>nd</sup> Defendant's Preliminary Objection dated 17<sup>th</sup> May 2018 filed on 18<sup>th</sup> May 2018 was also not merited and the same is hereby dismissed.

26. It is so ordered.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of December 2018**

**J. KAMAU**

**JUDGE**