



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT CHUKA**  
**CIVIL APPEAL CASE NO. 24 OF 2016**

**GERALD KAURA MUTHAMIA.....APPELLANT**

**VERSUS**

**THE CO-OPERATIVE BANK OF KENYA LTD.....RESPONDENT**

**JUDGEMENT**

1. **GERALD KAURA MUTHAMIA**, the appellant herein had sued Co-operative Bank (the respondent herein) vide **Chuka Senior Principal Magistrate's Court Civil Suit No. 41 of 2013** for defamation, loss of business arising out of his customer bank relationship with the respondent. In summary, his claim before the lower court was that while the appellant operated **Account Number [Particulars withheld]** at **Chuka Branch** with the respondent, the respondent without his knowledge opened another **Account No. [Particulars withheld]** in **Meru Branch** in the appellant's name and advanced a credit facility of **Kshs.200,000/=** and **Kshs.832,633/=** respectively to person(s) unknown to the appellant. He further accused the respondent for preventing the himt from accessing his **Kshs.118,113/=** in his account and referring him to **Credit Reference Bureau (CRB)** unfairly as in his view he had paid all his debts. It was this reference to **Credit Reference Bureau (CRB)** that the appellant termed defamatory alleging that he had suffered financial loss as a result pointing out that Equity Bank on the basis of the reference declined to advance his **Kshs.300,000/=** which he had qualified to be given.

2. On the other hand, the respondent pleaded that the appellant operated more than one account with them and that **Account No.[Particulars withheld]** was ostensibly opened by the appellant to manage loan arrears from **Account No.[Particulars withheld]**. The defendant further pleaded that the appellant had fraudulently misled banks valuers by taking them to value a different property form the one (**KARINGANI/NDAGANI/3609**) he had offered as security and that when they realized that they had been duped, they took action against the valuers (**NJOKA KARIUKI SERVICES**) as a result of which they were indemnified of the professional negligence by **PAN AFRICAN INSURANCE COMPANY LIMITED** who paid **Kshs.450,000/=**.

3. The trial court below heard both parties and upon assessing the evidence tendered found that the respondent was justified to list the appellant with (**Credit Reference Bureau )CRB** and dismissed the appellant's contention that the listing was due to an account in Meru finding that the claim was fallacious as the liability tendered by the respondent showed that both accounts belonged to the appellant and were in arrears at the material time. The trial court further found that under Baking regulations (Regulations 13 (1) the bank was under obligation to share customer information with (**Credit Reference Bureau**) CRB and that black listing the appellant was done in compliance with the rules therefore the issue of malice or defamation could not arise. The sum total of the learned trial magistrate's decision is that the appellant had not proved his case on a balance of probabilities and dismissed it with costs.

4. The appellant felt aggrieved and preferred this appeal listing four grounds the following four grounds

namely;

*(i) That the learned Senior Resident Magistrate erred in fact and law in relying on a non disputed account and overlooked the account in question which was Account NO. [Particulars withheld] at Meru Branch which in his view formed the basis of his case.*

*(ii) That the learned magistrate erred in fact and law in failing to heed the breach of duty of care by the defendant to ensure it maintains current authentic reliable accurate and truthful information reflecting the appellant's accounts' position.*

*(iii) That the learned trial magistrate erred in fact and law in failing to appreciate the glaring violations of regulations 14, 20 and 40 of Banking Credit Reference Bureau (CRB) Regulations by failure to issue credit report and to correction of wrong or inaccurate information pursuant to Co-operative Bank Meru Branch Account No.[Particulars withheld] purportedly owned by the appellant herein.*

*(iv) That the learned magistrate erred in fact and law by overlooking the plaintiff's evidence on damages and loss of business.*

*(v) That the judgment was against the weight of the evidence tendered and the submissions by both parties.*

5. The parties in this appeal chose to canvass the appeal through written submissions and I will begin by considering the written and oral submission made by the appellant through his learned counsel M/S Otieno & Co. Advocates. It was Mr Otieno's contention that the learned magistrate simply erred because he based his judgment on an account that in his view did not exist. His contention was that Account No. [Particulars withheld] at Meru Branch did not exist and faulted the trial court for holding that numerous accounts can be opened to manage and monitor customers loan facilities. In his view there was no basis for the respondent to open an account in Meru County using a collateral in parcel No. **Ntumu/Igoki/4876** held by one J. N. Njuri and maintained that that account did not belong to him and that it was wrong for the bank (respondent) to use the said account as a basis of referring him to the **Credit Reference Bureau (CRB)**. The appellant has further submitted that the learned trial magistrate never asked why the appellant was not informed by the respondent about the status and activities of the said account in Meru.

6. The appellant has also faulted the learned trial magistrate for ignoring evidence tendered by the appellant (PEX 1) which he contends showed that the appellant's credit balance in his account was Kshs.118,313.60/= after offsetting a debit balance of Kshs.330,561/= which he claims he did by depositing a cheque of Kshs.450,000/=. He faulted the respondent for not allowing him full access to his statements and cited the case of **CONCORD INSURANCE COMPANY LTD –VS- NIC BANK LTD** to support his assertion that discovery of documents is essential to a fair trial. He has submitted that important information was withheld by the respondent deliberately in order to direct the trial court's attention on the fact that the appellant had fully repaid his loan. The appellant reiterates that the trial court should and ought to have considered that the respondent's action of hiding one loan behind another loan by a stranger had caused him loss of business and negative publicity due to defamatory actions of blacklisting him in the CRB. He has urged this court to re evaluate evidence tendered and set aside the decision of the lower court and find that he is entitled to general damages from the respondents for the reasons cited above.

7. The respondent on its part has opposed this appeal and supported the judgment of the lower court. The respondent through its learned counsel **M/S Mithika & Kariuki Advocates** made both written and oral submissions in summary faulted the appellant's case at the trial for being unsustainable in law. In its view, the appellant simply failed to prove his claim that he had been wrongly referred to **Credit Reference Bureau (CRB)**. The respondent pointed out that the appellant at the trial was challenged to show that the account he had disowned did not belong to him but had no response and that on the contrary the bank provided or tendered documents detailing the loans that the appellant had taken and failed to repay. The respondent contended that the appellant took a loan of **Kshs.150,000/=** a fact that the

respondent contends was admitted by the appellant and the amount was not repaid and that it was justified to list the appellant as a defaulter because he had defaulted and had also presented a questionable collateral as security.

8. The appellant has submitted that the security provided by the appellant namely **KARINGANI/NDAGANI/3609** was later discovered to have been a misrepresentation because the appellant allegedly directed the valuers (**M/S Njoka Kariuki Services**) to a different property which was not a true reflection of the actual value of the property offered as collateral. The respondent contends that the said valuers letter conceded to a claim by the respondent for the professional negligence and that its insurers M/S Pan African Insurance Company Ltd indemnified them by paying Kshs.450,000/= which amount was paid into the appellant's account to indemnify the respondent from the loss. The respondent has explained that at the time of the indemnity, the appellant account had a debit balance of Kshs.330,561/= and that the amount outstanding in that account was offset in full and that the credit balance of **Kshs.118,313.60/=** was transferred to offset the appellant current account which at the time was also in arrears and that after the credit a debit balance of **Kshs.174,863.30** remained which it argues remains unpaid to date besides another debit balance of **Kshs.43,675.65** which also remains unpaid.

9. The respondent has also faulted the appellant for the civil action in court contending that the appellant should have in the first instance followed a procedure under regulation 20(5) –(4) of Banking Regulations to settle the dispute instead of coming to court. It is contended that the appellant action was incompetent and should fail.

10. It is further contended that the appellant's action failed for want of proof. The respondent has cited the decision in **FIBI MUNENE –VS – NATION NEWSPAPERS & 2 others [2007] eKLR** in its contention that the appellant failed at trial to establish the necessary ingredients showing that he had been defamed through the respondent's action. The necessary ingredients cited are;

- (i) That the statement is defamatory
- (ii) That it refers to him
- (iii) Publication to a 3<sup>rd</sup> party
- (iv) That the statement is false

The respondent has pointed out that the statement referred to **Credit Reference Bureau (CRB)** was true because the appellant had a non performing loan and that the respondent was exercising its legal duty which in their view was free from malice.

11. The respondent has also faulted the appellant's suit at the lower court particularly on the claim on defamation stating that the plaint did not comply with the mandatory provisions of **order 2 rule 7 of the Civil Procedure Rules** in that the appellant failed to disclose the particulars of facts/matters upon which the claim on defamation rested. The decision in the case of **Christopher Orina Kanyariri –vs- Barclays Bank of Kenya Ltd & Anor** has been cited by the respondent in urging this court to find that failure to cite the particulars of malice where a defendant has pleaded justification was fatal to the appellant's claim.

12. I have considered this appeal and submissions made by both counsels in this appeal. The main issue in this appeal is whether or not the respondent was justified in referring the appellant to CRB for blacklisting. The other issues raised are secondary to the main issue will consider all of them in my judgment noting that the work of a 1<sup>st</sup> appellate court is to re-evaluate or re-assess the evidence tendered at the trial and come up with own conclusion.

13. Before I dwelve into the main issue perhaps it is prudent to consider the secondary issues and one of those issues is the issue raised by the respondent that the appellant's suit at the lower court was incompetent and should have been entertained in the first place because the appellant had another avenue

provided under Regulations 20(5) – (14) of the Banking (Credit Reference Bureau) Regulations 2008. It is true that Regulation 20(5) of the Banking (CRB) Regulations 2008 provides an avenue to bank customers who have reasons to believe that the information forwarded to **Credit Reference Bureau (CRB)** is inaccurate, erroneous or outdated to launch a complaint with the bureau. The regulations further provides how such complaints should be addressed and resolved. The evidence tendered at the trial clearly shows that that avenue was not explored by the appellant. Be that as it may, the position of this court is that the issue now is water under the bridge because really the respondent should have taken the issue out at a preliminary stage before trial commenced. The matter having been entertained before the trial court and a decision rendered I find it belated for the respondent to say that the appellant should have referred his complaint to the CRB as provided. In any event, the operating word in the cited regulations is “may” meaning that it is not really mandatory for an aggrieved party to follow the route provided though he should have an explanation why the route provided by gazetted regulations has not been exhausted. I have looked at the authority cited by the respondent in the case of **George Morara Manyara –vs- Hon. Maina Kamanda & 3 others [2014] eKLR** but, the decision therein is slightly different from the situation obtaining in the present case. In Manyara’s case the respondent took out a preliminary objection to the petitions suit pointing out that CDF Act clearly provided a dispute resolution mechanism under section 49 which inter alia clearly stated that before a Civil matter is taken to court it must be subjected to dispute resolution which included arbitration. That the court on the basis of that declined to entertain the matter and referred it back to dispute resolution mechanism expressly provided by statute. In the instant case, regulations gazetted by the minister concern (not an act of parliament) provided avenues to address complaints by customers such as the appellant and so I find that really should have been canvassed before trial rather than at this appellate stage.

14. Turning to the issue of defamation is that I agree with the respondent’s contention that the party pleading defamation of character must clearly specify the particulars of defamation as provided under **Order 2 Rule 7 Civil Procedure Rules**. This is an important legal point because failure to comply with the said rule renders the claim legally incompetent. Therefore even before I look at the merits of the claim itself the same was incompetent *ab initio* going by the pleadings filed by the appellant under paragraph 9 of the plaint. The appellant only provided the particulars of the tort of negligence and fraud for which he was seeking damages. He however omitted the particulars of defamation and that was fatal to his claim. In that respect I am in agreement with the decision cited by the respondent in the case of **Christopher Orina Kanyariri –vs- Barclays Bank Ltd & Anor [2012] eKLR**.

15. The respondent pleaded justification in their defence in the action in the action they took by referring the appellant to the **Credit Reference Bureau (CRB)**. The appellant therefore had the burden to prove to the required standard in law (balance of probabilities) that the statement presented to the **Credit Reference Bureau (CRB)** was false. This brings me to the main issue in this appeal which is whether or not the respondent’s action in blacklisting the appellant was justified. The main complaint the appellant presented at the trial was that he had repaid all his loans and that the bank wrongly misapplied his credit balance at his account to pay a loan which he was not party to. I have painstakingly gone through the pleadings filed by both parties at the trial and the evidence tendered. The appellant in his own evidence under cross examination conceded that he had first borrowed **Kshs.70,000/=** initially from the respondent and later added another **80,000/=** making it a total of **Kshs.150,000/=**. The respondent clearly pleaded this in its amended defence. The appellant conceded that he did not repay the amount borrowed on the time as agreed and that further to the indebtedness he further requested for another overdraft facility from the respondent on 23<sup>rd</sup> September, 1997. I have noted from the evidence rendered that the appellant offered his property known as **Land Parcel No.KARINGANI/NDAGANI/3609** as security. Challenged to show whether he had repaid the loan, he had no answer or evidence to the contrary. So because he failed to pay as undertaken, any prudent financial institution would resort to the collateral deposited to realize their expectations and this is what the respondent herein tried to do only to realize that they had been misled.

16. I have gone through the evidence tendered by the respondent and I am satisfied that the trial court evaluated the same correctly and arrived at the right decision. The basis for this is clear. The appellant appears to have clearly but fraudulently misled the valuers sent by the appellant to assess the value of the security offered by the appellant. The valuers (**M/s Njoka & Kariuki Services**) later conceded to professional negligence by being misled by appellant into the wrong property when carrying out the

assessment. Obviously the appellant's intention was to misrepresent the facts before the respondent in order to get a higher loan than what his security could cater for. That is the undeniable underlying fact. The bank was paid by the insurers (**Pan Africa Insurance Company Ltd**) to the tune of **Kshs.450,000/=** as indemnity suffered as a result of the professional negligence by the valuers.

17. The evidence tendered by the respondent showing that the appellant's **Account No.[Particulars withheld]** was overdrawn by **Kshs.330,561/=** due to a non-performing loan was conceded by the appellant. The evidence that the bank did open two accounts for the appellant monitor the performance of each account was also not seriously challenged. The trial court found that one such accounts opened for that purpose was **Account No.[Particulars withheld]** and apart from claiming that the account was in Meru (which he could not establish) the appellant again failed to fault the respondent for action taken. The amount of **Kshs.450,000/=** received by the respondent from Pan African Insurance was used to offset the loan arrears that had accrued from Appellant's various accounts. The lower court in its judgement properly assessed the evidence tendered by the respondent on this score and I do not find any malice in the respondent's action in referring the appellant to **Credit Reference Bureau (CRB)**.

18. I further find the appellant's claim that he was denied access to his credit balance of **Kshs.118,313/=** to be preposterous at best. He never deposited **Kshs.450,000/=** and perhaps had no idea on where the money had come from. He may have only realized from his statement that an amount of **Kshs.450,000/=** from an insurance company had somehow been credited to his account and in a twist reminiscent of the biblical times of mana dropping from the heavens, he entertained some wild and fertile imagination that the money was his for the taking and started crafting machinations with a view of arm twisting the bank to pay him. This is clearly demonstrated by his claim at the trial that the bank had offered him **Kshs.1 million** to settle the matter out of court amicably. The claim in my view was either a fallacious impression that he had managed to corner the bank or a classic example of the extent to which some people go at times in an attempt to reap where they have not sown. Either way I am not convinced that the appellant had a sustainable claim against the appellant from the beginning. His claim that he was unable to prove his case because the respondent failed to supply him with documents flies in the face of the law (see the provisions of **Section 69** of the **Evidence Act**.) The appellant did not file the requisite notice to produce documents that could have been in possession of the respondent.

19. In the end, I find that the learned trial magistrate was correct to find that the plaintiff's claim had not been proved to the required standard in law. The pleadings filed as well the evidence tendered as I observed above fell far short of the requirements of the law. The upshot of this is that I find no merit in this appeal and the same is dismissed with costs.

**Dated, delivered at Chuka this 15<sup>th</sup> day of June, 2017.**

**R.K. LIMO,**

**JUDGE**

**15/6/2017**

Judgment signed, dated and delivered in open court in the presence of Murithi holding brief for Kariuki for Respondent and in the absence of the appellant.

**R.K. LIMO**

**JUDGE**

**15/6/2017**