REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 311 OF 2012

JAMLICK GICHUHI MWANGI...PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD...............................1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD............2ND DEFENDANT

JUDGMENT

OUTLINE

- ***main issue: whether the listing of a bank customer with Credit Reference Bureau for defaulting to pay loan instalment is defamatory***
- ***background***
- ***pleadings for plaintiff***
- ***pleadings for defendants***
- ***testimonies on oath***
- ***submissions***
- ***issues for determination***
- ***analysis, findings, decision and reasons thereof***
- ***conclusion***

A. **Background:** B**rief general description of the parties**

1. The 1st Defendant **KENYA COMMERCIAL BANK LTD** is a banking institution while the 2nd Defendant **CREDIT REFERENCE BUREAU AFRICA LTD** is an Incorporated Limited Liability Company to whom commercial banks and microfinance banking institutions submit credit history (both positive and negative) of their customers/clients which information the 2nd Defendant circulates to other commercial banks and microfinance banks for consideration when providing credit facilities. The 2nd

Defendant is also charged with the responsibility of listing any loan defaulters whose name is submitted to it by such banks and or micro financing institutions.

B. **Pleadings by the plaintiff**

2. The Plaintiff herein **JAMLICK GICHUHI MWANGI** filed this suit against the Defendants jointly and severally seeking general damages for defamation, aggravated damages and general damages for negligence together with costs of the suit and interest. He alleged that the defendants negligently, maliciously and falsely listed him as a loan defaulter thereby tarnishing his name. He also claimed that the defendants owed him a statutory duty of care which they breached by listing him as a loan defaulter before verifying the facts to ensure that those facts they relied on in listing him were accurate and or correct.

C. **Defence pleadings**

3. The defendants entered appearance and filed separate defences denying the plaintiff's claim in toto and urging the court to dismiss the plaintiff's suit with costs. The 2nd defendant also filed notice of claim against the 1st defendant seeking for indemnity. The 1st defendant maintained that the plaintiff had defaulted in repaying the loan advanced to him hence the listing with the 2nd defendant. The 2nd defendant on the other hand stated that it lawfully received information from the 1st defendant in relation to the plaintiff and it proceeded to list him subject to a qualified privilege under regulations 14(1) and 28(6) of the regulations and further that the plaintiff's claim was statute barred under section 31(5) of the Banking Act. As against the 1st defendant, the 2nd defendant claimed that it was the 1st defendant's duty to provide the 2nd defendant with accurate information concerning the customer's credit and to give an amendment notice instructions to the 2nd defendant for deletion of any inaccurate information and replace it with accurate information whenever the 1st defendant was made aware of any inaccurate information previously submitted to the 2nd defendant.

D. **The Plaintiff’s case and testimony**

4. The plaintiff Mr. Jamlick Gichuhi Mwangi testified as PW1that he was an accountant by profession employed by Kenya Airports Packing Services Ltd (KAPS). The plaintiff also adopted his witness statement filed on 22nd June 2012 and further produced the documents in his List of Authorities filed on the 22nd June 2012 as "**P Exh 1 to 13"** respectively in the Order they appear on that list. The plaintiff stated that he was the Corporate Affairs Manager but at the material time he was the Chief Operations Officer). He stated that at the time the 1st Defendant was the banker to KAPS Limited and that he also held an account with both the 1st Defendant and Barclays Bank of Kenya Limited. The plaintiff further stated that sometime in the year 2008, the 1st Defendant approached KAPS Limited offering unsecured personal loans as set out in the letter dated 10th January 2008 marked as “**P Exh 2”** and that as the *Chief Operations Officer)* he was involved in negotiating the terms of the agreement and after it materialized, he was a beneficiary of the said agreement. In the said agreement, it was agreed that payment for plaintiff's employer KAPS Ltd would repay the loan instalment on behalf of the loanees by deducting them from their salaries and paying as a lump sum payment at the end of each month. The Plaintiff further confirmed that as the Chief Operations Officer. The plaintiff was also in-charge of ensuring that the payments were made on time. The plaintiff further testified that in October 2011 he approached Barclays Bank of Kenya for a loan for his private business which application was denied and he was informed that it was because he was a loan defaulter and was thus directed to get a Credit Report from a Credit Reference Bureau which he did and that is when he found out that he was listed as a defaulter by the 1st Defendant. The said listing was done on the 10th December 2010 in respect of a default that occurred on the 13th September 2010. The plaintiff denied having defaulted on his loan repayments. Following this discovery of being listed as a loan defaulter, the plaintiff visited the 1st Defendant’s Moi Avenue Branch where he spoke to the Manager about the listing and the Manager, one Mr. Joseph Gitau via a letter dated 27th October 2011 marked as **“P Exh 4”** informed the Plaintiff that he had no outstanding arrears and that they had updated his CRB status. The Plaintiff further testified that contrary

to the said letter his information was retained in the database until April 2012 when the 1st Defendant directed that the same be deleted. He further testified that he did not know why his name was referred to a Credit Reference Bureau and on being questioned by the court he stated that he was never notified of any default by the Bank and further the 2nd Defendant Credit Reference Bureau did not make inquiries with him before listing the information. The plaintiff alleged that as a result of the listing he could not undertake his planned business activity of establishing a Tour firm. The Plaintiff’s further testimony was that as a result of the listing he suffered damage, ridicule and was shunned and avoided by his bankers, peers, staff and fellow business men, and right thinking members of the public alike. He also stated that he had been denied loans as a result of the listing from various banks.

5. On being cross examined by Mr Amoko counsel for the 1st defendant, the Plaintiff stated that he had obtained advances from the 1st defendant. That when he applied for the loan from the 1st defendant he was given some documents containing terms and conditions for obtaining the said loan and that recovery thereof was to be in monthly instalments of Kshs 61,861. The plaintiff confirmed that the mode of repayment of the loan was by way of check off system from pay point. When shown document No.13 for May, 2010, from his employer, the plaintiff confirmed that the same had not been approved. Further, that his employer's accountant certified it as a correct copy of the one send to the bank and that it had the plaintiff's writings for June 4th, 2010. Further, the plaintiff confirmed that payments for May 2010 were remitted on 4th June; 2010.He also stated that he did not give the bank authority to disclose any information concerning him to other persons to his disadvantage.

6. When cross examined by Mr Kisinga counsel for the 2nd defendant, the plaintiff responded that he operated two accounts one with Kenya Commercial Bank and the other with Barclays Bank and that he also had a loan with KCB. When shown documents relating to the loan, he confirmed that he did authorise the bank to release information concerning him to the CRB but that only accurate information was authorised to be released. The plaintiff also admitted that he had applied for a loan from Barclays Bank but he had not produced any letter of offer from the Bank which he did not find necessary and neither did he have any letter from the CRB. The plaintiff confirmed that he had obtained credit facilities from the bank before and that there were conditions that banks give and which must be fulfilled. He denied that he had defaulted in loan repayment as shown by the CRB listing of 1.1.2011 for sh 2,014,249. He confirmed applying for the loan in October, 2011 and stated that he did not expect a Bank gave him a letter to the effect that KCB had given his name for listing with CRB. He stated that the information given by Barclays Bank that he was a defaulter was inaccurate and that the Bank later gave an apology. That when he approached KCB and Barclays Bank for the loan thy declined citing the listing. He stated that the default information is normally given to all banks in Kenya but denied that his peers, family members and workmates received the listing. He also stated that he lodged a complaint with CRB concerning the listing and as against KCB by email. He maintained that CRB released information concerning him.

7. In re-examination by Mr Muga, the plaintiff stated that the repayment was made within the duration given hence there was no default in repayment. He also confirmed that deductions were given at the payroll and a list for staff and schedule for individual amounts deducted and a cheque issued to the bank at the end of the month. According to the plaintiff, the remittance of 4th June, 2010 was payment for May 2010 and made in time without default and that at no point in time did the bank raise any questions on repayment and remittances. He further stated that listing of 29th November 2010 showed only one delinquency and the listing institution was KCB while the listing date was 21st December, 2010 by which time there was no outstanding payment. He also confirmed that Barclays Bank had written to CRB which had removed his name from the erroneous listing. He also confirmed that his advocates wrote to CRB on 10th May, 2012 complaining of the wrong listing but that the 2nd defendants responded thereto justifying the listing. He also maintained that he did not authorise the erroneous listing as was done by the 2nd defendant who owed him a duty to correct information but unfortunately, they gave inaccurate information. He also stated that he had a long-term loan with KCB and not advances which are short term. He stated that he exchanged correspondence with the defendants wherein the KCB indicated that his name could only be removed from the listing after 7 years.

8. Questioned by the court, the plaintiff stated that he was still servicing the loan with the 1st defendant and that the 1st defendant never ever informed the plaintiff that he had defaulted in repayment hence he

did not know why he was listed as a defaulter.

E. **1st defendant's case**

9. The 1st Defendant Kenya Commercial Bank called one witness **"DW1" Mr. Vincent Andambi Maniagi** who testified that he was the Assistant Manager Credit Administration with the 1st Defendant. **"DW1"** thereafter adopted his witness statement filed on the 12th August 2013 as his testimony-in-chief and produced the documents in the List of Documents filed on the 12th August 2013 as **"1st DExh 1 – 8"** respectively as they appear in the List of Documents. DW 1 testified that on the 24th April 2010 the 1st Defendant granted the Plaintiff a top-up loan of Kshs. 1,692,543/ additional to an earlier loan bringing the total loan amount to Kshs. 2,565,000 which was to be paid in instalments of Kshs. 61,861/- per month up from the previous instalments of Kshs. 29,244/- per month. This was set out in the letter of offer dated 23rd April 2010 produced as **"1st DExh 1."** That shortly after disbursement, the Plaintiff failed to remit the scheduled instalment payment for the month of May 2010 as indicated in the Loan Repayment schedule on page 11 of the List of Documents produced as **"1st D Exh 6"** and the Plaintiff's Loan Account Statements and Liquidation Account Statements produced as **"1st D Exh 7 &"1st D Exh 8** respectively. That there was no payment entry made for the month of May 2010. He also produced the check-off repayments from KAPS Ltd as **"1st D Exh 6"**(pg. 13 of 1st Defendant's List of Documents)which the plaintiff was in-charge of effecting as the Chief Operating Officer and which indicated that there was no payment for the month of May 2010. That payments commenced in June 2010. That the said account was thereafter in default for a period of three (3) months which lapsed in September 2010 prompting the 1st Defendant to downgrade the account to asset class 30 and thereafter refer the plaintiff's account to the 2nd Defendant in December 2010. That the bank also notified the Plaintiff of his default via their letter dated 3rd January 2011 produced as **"1st D Exh 2."** The Defence witness maintained that the account was in default and therefore validly listed with the CRB. He further stated that contrary to the plaintiff's assertion that he was never served with any letter notifying him of his default he was issued with a letter dated 3rd January 2011 produced as **"1st D Exh 2"** notifying the plaintiff that he ought to clear outstanding arrears of **Kshs. 47,497.14/-.** DW1 further testified that the Bank subsequently waived the arrears in January 2011 as was their policy where a check-off account subsequently becomes performing and the information in the database was updated to 'performing status' on 19th October 2011 as per their Manager's letter produced as **"1st D Exh 4."** He further stated that following negotiations between the Plaintiffs, the 1st Defendant, out of good faith and in consideration of their continued business relationship opted to issue the Amendment Notice pursuant to Regulation 28(5) of the Regulations 2008 which was the only way to delete adverse credit information.

10. In cross-examination, **"DW1"** reiterated that it was the Plaintiff's duty to ensure that payments were made as scheduled even if his employer failed to make remittances. That this could be seen under the terms of the letter of offer dated 23rd April 2010 **"1st DExh. 1"** paragraph 3 titled **"Repayment Mode.**" He further reiterated that the payment for the month of May 2010 was skipped and the bank out of its own discretion and good faith opted to waive about Kshs. 40,000/-being accrued arrears. In relation to the 2nd Defendant, **"DW1"** confirmed that the plaintiff's customer information was supplied with the prior approval of the Plaintiff and further that the 1st Defendant is under the 2008 Regulations obligated to forward accurate information to the 2nd Defendant and further by a Credit Referencing Agreement produced as **"2nd DExh. 5"** the 1st Defendant had further warranted under para. 5.1 of the Credit Reference Agreement that the 1st Defendant had obtained prior consent of the Plaintiff and further that it was accurate. "DW" further confirmed that the Bank only send the particular details of the customer being name, employer and nature of default and did not forward the actual account statements to the Credit Reference Bureau. The witness maintained that the information was accurate at the time it was forwarded and it was only deleted in good faith and considering the business relationship with the plaintiff. He also stated that the accuracy of the information was only within the knowledge of the bank which agreed to indemnify the CRB as per paragraph 6:5 *"against all claims, actions, proceedings...suffered or arising out of or incurred relating to claims for defamation, inducing breach of contract, breach of confidentiality etcetera*." Further, that during the signing of the letter of offer the bank had obtained

written consent from the plaintiff and that they only send accurate information to CRB and that once that information was send, they did not know how CRB deleted it except that the bank usually initiated such deletion by updating the customer's account. The witness denied that the plaintiff made any formal complaint to the bank concerning the reference.

11. In re-examination by Mr Amoko advocate, the witness maintained that there was a default by the customer in May 2010 and hence the reference made to the CRB. Further, that the Bank's obligation to indemnify CRB was conditional and that no such notice of indemnity had been received in accordance with the Agreement and that there had been no negotiation or arbitration between the two defendants.

F. **2nd Defendant's case**

12. On its part the 2nd Defendant called one witness **"DW2" Ms. Olive Muasya** a legal officer in the 2nd Defendant's Legal and Compliance Department who testified that the 2nd Defendant is a Credit Reference Bureau which receives information from financial institutions of and concerning their customers. The witness relied on her Supplementary witness statement filed on the 28th October 2014 which was adopted as her testimony-in-chief and produced the documents in the List of Documents filed on the 10th August 2012 as ***"2nd DExh 1 – 5"*** respectively as they appeared in the List of Documents. She further testified that Credit Reference Bureau Africa Ltd maintained both positive and negative information on performing and non-performing loans forwarded by banks, microfinance institutions and other subscribers; she estimated that the numbers of entries that are forwarded to the CRB database are in millions per month. She confirmed that CRB does not retain the books of accounts of all the banks and financial institutions that forward information as this would be impossible and further that the regulations provide that institutions forwarding credit information are entirely responsible for the accuracy of the said information. Regarding the claim by the Plaintiff against the 2nd defendant, DW2 stated that whenever a customer disputed credit information under the regulations he ought to serve the 2nd Defendant with a formal dispute in writing or file an individual dispute filing form to initiate a dispute under *Regulation 20(5)* of the *Regulations 2008.* She clarified that in this case the Plaintiff never filed any complaint. She further stated that on the *25th April 2012* the 2nd Defendant received an amendment notice from the 1st Defendant directing the CRB-Africa Ltd to delete the customer information relating to the Plaintiff which they promptly deleted on the same day and issued a Notice of Change to Barclays Bank of Kenya Limited pursuant to *Regulation 20(12) of the Regulations 2008*. She further clarified that the information was only published to the banks indicated in the Recent Inquiries Section and not to everyone as stated by the plaintiff. She denied that the information submitted to the 2nd defendant was published maliciously and she denied that the 2nd Defendant breached any statutory duty and/or acted negligently.

13. In cross-examination by the plaintiff's and 1st defendant's counsels, DW2 confirmed that her duties included ensuring that the Bureau complied with CRB regulations, dealing with complaints and answering any queries from customers. She denied that the CRB notified KCB of the claim of indemnity contrary to clause 6:6 of the Agreement. She also stated that the listing information could only be accessed by subscribing institutions which had the necessary authorization.

14. In re examination by Mr Kisinga, the witness stated that they received over 20 claims and that they were notified of the claim when suit was filed. She denied ever receiving a reply to the Notice under clause VI (b).

15. At the close of the parties' respective cases they agreed and filed their written submissions for consideration by the court, while setting out their respective issues for determination.

G. **The issues for determination** by **the plaintiff**

16. The plaintiff settled on the following framed issues for determination and submitted on the same:-

i. ***Whether the plaintiff defaulted in repaying monies borrowed from the 1st defendant.***

17. On this issue the plaintiff submitted that he faithfully, through his employer remitted all the loan repayment instalments to the 1st defendant and that he had adduced such evidence of monthly remittances without any default and that his assertion that there was no default was never rebutted by the defendants. He further submitted that albeit the 1st defendant maintained that the default giving rise to the listing was for May, 2010, nonetheless, that the date of delinquency was different as published by the 2nd defendant which delinquency date was 13th September, 2010 and the listing done on 21st December, 2010. It was further submitted that the remittance for October and September 2010 was at the end of those respective months hence there was no default for those months for the plaintiff to be listed as a loan defaulter.

ii. ***whether the words in the publication are in their ordinary meaning and context defamatory of the plaintiff in his character, professional and financial integrity:-***

18. The plaintiff's counsel submitted that the manner in which the word "***delinquency"*** was used in the ordinary language was understood to mean a bad or criminal behaviour and that in banking terminology it meant failure to pay an outstanding debt by a person who was not in a position to meet his financial obligations; who is not creditworthy and lacked integrity and financial probity. That from the definition of Credit Information and Delinquency, which were in the negative, they meant that the plaintiff was a defaulter in meeting his financial obligations, uncreditworthy; dishonest and lacked integrity and as such should be shunned by the right thinking members of the society especially banks and financial institutions**..**

C. whether the publication was false and actuated by malice:-

19. The plaintiff submitted that the publication which listed him as a loan defaulter was false since he had not defaulted at any time in repaying his loans to the 1st defendant. In addition, it was submitted that the loan advanced to him was subject to an agreement between the first defendant and the plaintiff's employer whereby the latter would make deductions from the plaintiff's salary and remit it to the 1st defendant bank. Further, it was submitted that the 1st defendant's witness in his evidence admitted that the bank did not raise any question with the plaintiff's employer concerning any case of default to deduct and remit the plaintiff's loan repayments and that the 1st defendant submitted in writing that the listing was in error.

20. The plaintiff further contended that the defendants acted maliciously because they did not inform him of his default before listing him as a defaulter in making his loan repayments for the month of May 2010 or September, 2010. That his employer was also not informed that there was a default in making loan deductions from the plaintiff's salary and remitting it to the 1st defendant. It was further submitted that the 1st defendant having acknowledged that the credit information about the plaintiff was inaccurate took too long about seven months later to correct the anomaly by causing the 2nd defendant to delete the said information in respect of the plaintiff’s alleged default.

21. The plaintiff further submitted that the 1st defendant's action of failing to notify the plaintiff that it had submitted his credit information to the 2nd defendant confirms the malice. On the part of malice by the 2nd defendant it was submitted by the plaintiff that it did not seek the plaintiff's version on the nature of the information it received from the 1st defendant to verify its accuracy before publishing it. Further, the 2nd defendant was accused of failing to remove the plaintiff's name from the listing as a loan defaulter even after ascertaining that the plaintiff was not a loan defaulter and that it did maintain that it could only remove his name at the instance of the 1st defendant which was construed by the plaintiff as being malicious.

D. whether ***the 1st defendant and or the 2nd defendant owed the plaintiff any statutory duties under the Banking Act and /or the Banking Act (Credit Reference Bureau Regulations, 2008).***

22. The plaintiff submitted that under **Regulation 28(1)(a)** the 1st defendant was required to notify the plaintiff of the name and address of the 2nd defendant to which information had been submitted within 30 days of the listings which notice was never issued to the plaintiff. That **Regulation 28(3)** required the 1st defendant to be responsible for providing accurate information to the 2nd respondent. That **Regulation 28(4)** imposed a duty on the 1st defendant to be entirely responsible and under an obligation to submit

and update all customer information to the 2nd defendant.

23. It was further submitted that Regulation 28(5) imposes a duty on the 1st defendant to issue an amendment notice within 5 working days of learning that the information submitted to the 2nd defendant was inaccurate in order to enable the 2nd defendant delete the inaccurate information and replace it with correct information. According to the plaintiff, the evidence adduced was clear that the 1st defendant was first alerted by the plaintiff that the information it had submitted to the 2nd defendant was inaccurate on or about the 30th October 2011 as evidenced by the 1st defendant's letter dated 27th October, 2011. However, that it was not until 25th April 2012 that the 1st defendant issued a notice of amendment to the 2nd defendant to delete the inaccurate information in respect of the plaintiff.

24. It was further submitted that Regulation 17(a) imposed a duty to the 2nd defendant to implement strict quality control procedures in order to ensure the possible accuracy of its database and the continuity of its services. Further, that Regulation 17(c) which was couched in mandatory terms required the 2nd defendant to take all such steps as are reasonably necessary to ensure that customer information maintained by it is current, authentic, legitimate, reliable accurate, truthful and it reflects the existing situation of the subject at any given time and if information is found to be illicit, inaccurate or no longer valid, the Bureau must promptly take corrective measures to remedy the deficiency.

25. According to the plaintiff, the evidence on record and from the 2nd defendant's pleadings showed that the 2nd defendant grossly breached the statutory obligations since it maintained that once the credit information about the plaintiff was received by it, it had the duty to publish it without reference to the plaintiff and that it could only vary it at the instance of the 1st defendant. That failure to correct the inaccurate information on the part of the 2nd defendant made it liable for breach of statutory duty.

E. whether the 1st and /or the 2nd defendant acted negligently to the detriment of the plaintiff

26. The plaintiff submitted that both defendants acted negligently and to the detriment of the plaintiff. He relied on USA case of **Byrant v Trw Inc** where the USA Court of Appeal Sixth Circuit called attention to the language of the law makers who were debating a law similar to the regulatory provision as discussed herein.

F. whether the plaintiff was injured in his credit reputation as a result of the publication:-

27. The plaintiff maintained that he was injured in his character and credit as a result of the publication of the information since he only learnt of his alleged default and listing when he applied for a loan with Barclays Bank of Kenya which requested for information from the 2nd defendant and Barclays bank advised him that he could not be advanced the loan applied for because he had been listed as a defaulter and hence he was injured by such information that he was not creditworthy and unable to meet his financial obligations and that the fact that the defendants took too long (7 months) to correct the inaccurate information injured him even more. He relied on the case of **Nicholas Ombija v Kenya Commercial Bank Limited (2009) eKLR** where the court held that the plaintiff's credit and reputation was injured when his credit card transaction was declined allegedly for insufficient funds while there was sufficient funds in his account. Comparing the Ombija case to his case, the plaintiff submitted that his credit was injured when his name was listed as defaulter as consequence of which he was unable to get a loan from Barclays Bank because he was listed as a loan defaulter by the 2nd defendant at the instance of the 1st defendant.

G. whether the plaintiff suffered damages as a result of the publication:-

28. The plaintiff submitted that he suffered defamation in the hands of the defendants by the inaccurate credit information which was published deliberately or recklessly and as a result of the said publication, he was considered not creditworthy and therefore humiliated and had to explain his predicament to his employer in order to access records to prove that he had been paying his monthly loan repayments. That he also had to explain to the staff and employees of the 1st defendant to try and counter the inaccurate information submitted to the 2nd defendant. That he also had to explain his predicament to the various

staff of Barclays Bank of Kenya and that he could not even get the loan he needed to run his business. He therefore prayed for assessment of damages since libel was on the higher side as it touched very closely to his integrity, professional reputation, honour, courage, loyalty and the core attributes of his personality.

29. The plaintiff also urged the court to consider the extent of the publication which was to all the institutions that subscribed to the 2nd defendant' services and to many individuals who handled the case and was for prolonged period of time hence General damages in the sum of Kshs 15,000000 and Kshs 2500000 aggravated damages and Kshs 2500000 in default of an apology would suffice. He annexed a list of authorities relied on albeit there was no specific decision mentioned as to its applicability to this case.

H. on whether the plaintiff is entitled to the reliefs sought in the plaint:-

30. The plaintiff submitted that the defendants acted in breach of statutory duty, maliciously, recklessly and negligently to his detriment as a result of which the plaintiff suffered injury to his reputation. He relied on **C.Mehta&Co.Ltd v Standard Bank Limited [2014] eKLR** wherein the court held that injury to credit can be compensated by allowing reasonable compensation without proof of special damages.

i. ***whether the 2nd defendant was a disclosed agent of the 1st defendant and or Central Bank***:-

31. It was submitted by the plaintiff's counsel that that is a matter that was not relevant to the determination of this suit as the case is related to liability for breach of statutory duty and or negligence in the performance of its obligations.

J. ***whether the information supplied by the 1st defendant to the 2nd defendant concerning the plaintiff was the subject of qualified privilege:-***

32. It was submitted that the defence of qualified privilege pleaded by the 2nd defendant was not available to it since it used the privileged occasion for an improper purpose and that it published inaccurate information concerning the plaintiff without reference to the plaintiff. Further, that it acted maliciously as seen by its conduct after the publication and in the proceedings in that it maintained that it had the right to publish the information supplied to it by the 1st defendant and that even where a complaint was raised that such information as supplied by the 1st defendant was inaccurate, the 2nd defendant was allegedly adamant that it could only make amends at the instance of the 1st defendant. Reliance was placed on the case of **Dorcas Florence Kombo v Royal Media Services [2014] eKLR**. The plaintiff further contended that it was outside the ambit of section 31(5) of the Banking Act which must be read together with section 31(2) dealing with the question of immunity and good faith. That in this case which is based on defamation, the publication contravened section 31(3) of the Credit Reference Bureau Regulations, 2008 made under section 31(3) and (4) and section 55(1) of the Banking Act.

k. Whether the 2nd defendant was entitled to indemnity as against the 1st defendant:-

33. It was submitted by the plaintiff that he was not a party to the agreement between the 1st and 2nd defendants hence he would rather not say a thing and leave that battle between the two defendants to address the court on the same.

- **on Costs**

34. It was submitted that under section 27 of the Civil Procedure Act, costs follow the event. The plaintiff therefore prayed for judgment to be entered in his favour together with costs of the suit and interest.

The 1st defendant's submissions.

The first defendant framed the following issues for determination

a. ***Whether the Plaintiff defaulted in repaying monies borrowed from the 1st Defendant.***

b. ***Whether the 1st Defendant had a right to forward the Plaintiff's details to the 2nd Defendant.***

c. ***Whether the publication was false and actuated by malice as alleged by the Plaintiff***

d. ***Whether the suit is statute-barred by the provisions of section 31 (5) of the Banking Act.***

e. ***Whether Barclays Bank of Kenya Limited refused to grant the Plaintiff a loan as a result of the listing by the 1st Defendant.***

f. ***Whether the Plaintiff is entitled to the reliefs sought.***

g. ***Whether the 2nd Defendant is entitled to indemnity as against the 1st Defendant***

35. The 1st defendant addressed each discrete issue in turn while acknowledging that some overlap was inevitable.

a. ***On whether the Plaintiff defaulted in repaying monies owed to the 1st Defendant***

36. The 1st defendant's counsel submitted that the evidence before the Court established conclusively that there was no payment made during the month of May, 2010. That it was clear from the plaintiff's statement of his loan account, a statement whose accuracy was allegedly not disputed that the last activity in the plaintiff's loan account for the relevant period was on 29th April 2010, followed by a transfer 9th June 2010. Therefore that there was a tacit admission by the Plaintiff as in its submissions. That despite the Plaintiff's protestations in its submissions, this cannot be or credibly denied that indeed no repayment was made for the month of May 2010. Further, that as this default persisted; the sum was still outstanding as at 13th September, 2010 for the Plaintiff had not regularized the position. That he was therefore delinquent as at that date when the report was made for the simple reason that he was not up to date with his repayment schedule, having missed out on one month. It was with the greatest respect that the Plaintiff, paragraph 19 of its submissions was wholly inaccurate. That there was no evidence that (a) KAPs deducted the sum of Kshs 61,861 and remitted for the month of May 2010. That from the Plaintiff's own documents there was undated and unsigned loan remittance list apparently for the month of May, 2010 but which was paid by a check dated 4th June, 2010. That the next payment was made in July, 2010 and the next August, 2010. There was no payment in May, 2010. That the critical issue is not the date given on the face of the list or the cheque but the date of actual payments which is as reflected in the statement of account. It was submitted that the Plaintiff had not contended, let alone proved, that he made any payments in May, 2010 which were not reflected in the Statement.

37. According to the 1st defendant, the plaintiff at most had proved that internally, KAPS prepared payment for May 2010, but that was not made until June, 2010 hence there was default. That the agreement was clear as to what was to happen in those circumstances ***"in the event that check-off arrangements are not finalized as anticipated for whatever reason, your obligation to repay the loan will remain and you will be expected to make direct payments into your loan account as they fall due, until your employer effects the check-off or until the loan is repaid in full, whichever will come earlier."***

38. The 1st defendant submitted that the Plaintiff failed to make these payments towards servicing his loan account, as expressly required and in the absence of his employer deducting the amount from his salary and remitting it directly to the 1st Defendant, account, he was in default for failing to make good these arrears for 3 consecutive months despite receiving regular Statements of Account from the 1st Defendant detailing all activities with respect to the loan account.

b. ***On whether the 1st Defendant had a right to forward the Plaintiff's details to the 2nd Defendant:-***

39. It was submitted that as the Plaintiff, an educated man learned in financial matters and ways of the

world accepted in cross-examination, it was a term in the loan agreement, which he understood and executed, that the Bank may disclose its personal data including data and information relating to any transaction documents or the assets, business or affairs of the borrower outside the Banks group, inter alia, 'to licensed credit reference bureaus or any other creditor.' That the said agreement also provided that:

> ***"The Borrower acknowledges and agrees that, notwithstanding the terms of any other agreement between the Borrower and the Bank, a disclosure of information by the Bank in the circumstances contemplated by this paragraph does not violate any duty owed to the Borrower either in common law or pursuant to any agreement between the Bank and the Borrower or in ordinary course of banking business and the customs, usage and practice related thereto and further authority from the Borrower and without inquiry from the Bank as to the justification for or validity of such disclosure."***

40. The 1st defendant also submitted that at common law, it is an implied term of the contract between a banker and its customer that the banker will not divulge to third parties, without the consent of the customer, either the state of the customer's account, or any of his transactions with the bank or any information relating to the customer acquired through the keeping of his account. That in this case, the 1st Defendant had the Plaintiff's express consent. That Bankes LJ in Tournier v. National Provincial and Union Bank of England [1924] 1 KB 461, stated that this duty is not absolute but qualified, being subject to certain reasonable exceptions provided below:

> ***"In my opinion, it is necessary in a case like the present to direct the jury what are the limits and what are the qualifications of the contractual duty of secrecy implied in the relation of banker and customer. There appears to be no authority on the point. On principle I think the qualifications can be qualified under four heads:***
>
> *a.* ***Where disclosure is under compulsion by law;***
>
> *b.* ***Where there is a duty to the public to disclose;***
>
> *c.* ***Where the interests of the bank require disclosure;***
>
> *d.* ***Where the disclosure is made by the express or implied consent of the customer."***

This was reiterated in the Court of Appeal case, **Standard Chartered Bank Kenya Ltd v. Intercom Services Ltd & 4 Others**, where the above-mentioned case was applied.

41. The 1st Defendant submitted that its action of submitting the Plaintiff's information to the 2nd Defendant was covered by the first, third and forth ground, that is, where disclosure is under compulsion by law, and where the interests of the bank require disclosure as well as the Plaintiff's express consent. That Information as to the credit status of those seeking loans from financial intermediaries such as banks to enable conduct meaningful credit assessments is a key component of the integrity of the financial system. It was further submitted that Section 31 (4) of the Banking Act provides that Credit Reference Bureaus may be established for the purpose of collecting prescribed credit information on clients of institutions licensed under the Act, and disseminating the same amongst such institutions for use in the ordinary course of business, subject to prescribed conditions or limitations.

42. That the nature of information to be shared is provided in regulation 14 of the Banking (Credit Reference Bureau) Regulations; and that customer information concerning a customer's non-performing or performing loans may be exchanged.

43. Further, that upon the Plaintiff's loan account falling into arrears for 3 consecutive months, it became necessary for the said account to be downgraded to asset class 30, prompting the 1st Defendant to submit this information to the 2nd Defendant. It was therefore contended that the listing of the Plaintiff by the 1st

Defendant was done in fulfilment of its legal obligation, and with the express consent of the Plaintiff, purely as a consequence of the Plaintiff's default.

c. ***On whether the publication was false and actuated by malice***

44. It was submitted that it was clear from the foregoing discussion that the publication of the Plaintiff's details was neither false nor malicious. That the circumstances under which the Plaintiff defaulted in repayment of his loan compelling the 1st Defendant to forward his account details to the 2nd Respondent as a matter of right and/or obligation have already been elucidated. To emphasize this point, the 1st defendant contended that the Plaintiff's loan account became a non-performing account, and was therefore eligible to be listed by the 2nd Defendant as defaulter.

d. ***On whether the suit is statute-barred under section 31 (5) of the Banking Act***

45. The 1st defendant relied on Section 31 (5) of the Banking Act which provides that:

> ***"No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to:***
>
> ***(a) The Central Bank or to another institution; or***
>
> ***(b) A credit reference bureau established under subsection (4),***
>
> ***In the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure."***

46. It was submitted that the above provision expressly prohibits the Plaintiff's very action of instituting the suit herein, as no breach has been occasioned by the 1st Defendant in disclosing the Plaintiff's information in utmost good faith to the 2nd Defendant, in the course of performing its duties. Further, that by this section, the suit herein is incompetent *ab initio* and ought to be dismissed.

e. ***On whether Barclays Bank of Kenya Limited refused to grant the Plaintiff a loan as a result of the listing by the 1st Defendant***

47. The 1st defendant submitted that a lynchpin of the Plaintiff's claim for relief are the allegations that his loan application was rejected by Barclays Bank of Kenya as a direct consequence of the listing of the Plaintiff by the 1st Defendant in the 2nd Defendant's system and injury to his reputation as he cannot show his face among his peers as "*a morally upright, financially sound and right thinking member of the society and has suffered mental anguish and damage."* According to the 1st defendant, each element of this alleged injury and/or damage is false the 1st defendant submitted that the Plaintiff in his cross-examination admitted that there was no official communication by Barclays Bank of Kenya, notifying him that their refusal to grant his loan was as a result of his listing in the Credit Reference Bureau by the 1st Defendant; and that that piece of evidence, which the Plaintiff had not volunteered showed that BBK had also listed the Plaintiff with the 2nd Defendant as a delinquent. That the Plaintiff had a prior loan account with BBK, on which fact he conveniently testified in Court that he did not deem it necessary to bring up as it was not relevant to this case hence he could not claim to be a morally upright man yet seeking to conceal material information from the Court. It was further submitted that from the evidence on record, it could be seen that Barclays Bank of Kenya had, as a matter of fact, themselves listed the Plaintiff with the 2nd Defendant as a defaulter, stating that the delinquency date was 1st January 2011. Seeing as the Plaintiff again applied for a loan from BBK on 30th October 2011, after being listed by the same bank, on a balance of probabilities, it was submitted that more likely than not, their refusal had to do with the Plaintiff's previous default with respect to his loan account with them. That it was therefore the Plaintiff's burden of proof to show that but for the 1st Defendant's listing he would have obtained the loan from Barclays Bank of Kenya.

48. The 1st defendant also submitted that the information that was listed with the 2nd Defendant was available only to its subscribers. That the Plaintiff had not shown that that information went beyond those authorized to receive it. That in cross examination he could not tell which relatives or colleagues received this information and or that he had lost whatever high regard they had of him. It was therefore contended that there was no evidence, but that in submissions the Plaintiff improperly sought to lead such evidence i.e. that he had to explain to his employer why he needed evidence for this case and was humiliated by doing so, which was improper as there was no pleasing to that effect nor was any evidence led. The 1st defendant further submitted that in any event, as the records allegedly showed that he was not in default, how could it lead to his humiliation; unless of course the evidence showed that he defaulted and thus no injury.

49. Finally, it was submitted by the 1st defendant that a man with a history of two reports of defaults in servicing loans had no reputation of *a morally upright, financially sound and right thinking member of the society* to be damaged. that there was no proof of a vast conspiracy by two of our more established banks to mistakenly as wrongly list the plaintiff as a defaulter so as to damage his reputation and that when the Plaintiff's talks of damage to his personal integrity, professional reputation, honour, courage, loyalty, and the core attributes of his personality, it is hard to resist a sarcastic laugh.

f. **on whether the Plaintiff is entitled to damages for defamation**

50. The 1st defendant submitted that the Plaintiff sought the ever so modest sum of Kshs 20 million as damages. That the basis of this award was assertions. That it is well settled law that defamation is concerned with statements which are defamatory and untrue and the core damage compensable is that to reputation. The 1st Defendant contended that the information regarding the Plaintiff, forwarded by it and published by the 2nd Defendant was true in substance and in fact and that the fact that the Plaintiff defaulted in remitting payments to the 1st Defendant towards the servicing of his loan account in the May 2010 was proved by the evidence on record, which shows that no payments were made by the Plaintiff in the said month.

51. The 1st Defendant also maintained that it was not driven by malice in listing the Plaintiff with the 2nd Defendant. On the converse, that it was carrying out a right backed by statute, to protect its own interests. Reliance was placed on the case of **Williamson Diamonds Ltd and Another v. Brown [1770] EA 1** in the Court of Appeal at Dar-es-Salaam that:

> ***"In considering the question of malice, the court should enquire whether the publication was done in the reasonable and necessary protection of the defendant; any defamatory statement, made by a person whose character or conduct has been attacked, will be privileged provided they are published bona fide and are fairly relevant to the accusation made; the defendant will be protected even though his language should be violent or excessively strong, if, having regard to all the circumstances of the case, he might have honest and reasonable grounds for believing that what he published was true and necessary for the purpose of his indication though in fact it was not so."***

It was further held that:

> ***"The onus is on the plaintiff to establish malice; in this case, the respondent had failed to establish that the appellants had not acted honestly for the purpose of protecting themselves; therefore, the finding of malice could not be sustained."***

52. The 1st defendant further submitted that in order to sustain a claim for defamation, the imputation must tend to lower the Plaintiff in the estimation of right-thinking members of the society in general as was explained by Greer LJ in **Tolley v. Fry [1930] 1 KB 467 CA** in the following dictum:

> ***"Words are not defamatory, however much they may damage a man in the eyes of a section of the community, unless they also amount to disparagement of his reputation in the eyes of right-***

thinking men generally. To write or say of a man something that will disparage him in the eyes of a particular section of the community but will not affect his reputation in the eyes of the average right-thinking man is not actionable within the law of defamation."

53. Further, that Regulation 15 (2) of the Banking (Credit Reference Bureau) Regulations provides that a Bureau shall only release customer information to a subscriber:

> ***"(a) that requires customer information to evaluate a customer's application for credit or other customer-initiated business transaction;***
>
> ***(b) that has certified to the Bureau that it will use the customer information for the purpose of making a permitted eligibility decision and for no other purpose; and***
>
> ***(c) That has agreed to properly dispose of customer information so that it cannot reasonably be read or reconstructed."***

54. According to the 1st defendant, from the evidence tendered by the its witness and allegedly acknowledged by the Plaintiff, it was clear that the only subscribers that accessed the Plaintiff's information were the 1st Defendant and Barclays Bank of Kenya, which could be classed as a section of society specializing in the business of banking. Further, that this being qualified privilege, the claim for defamation is defeated seeing as the Plaintiff's information was not accessed by 'right-thinking members of the community generally.'

55. The 1st defendant maintained that the Plaintiff was not entitled to the reliefs sought in terms of general damages for defamation and negligence, aggravated damages for defamation, or at all. The 1st defendant also accuses the Plaintiff's reliance on a rather notorious decision which has been stayed by the Court of Appeal pending the hearing and determination of an appeal against it. The 1st defendant cited the case of Mulwa J in **Machira v. Mwangi [2001] 1 EA 110** where it was stated as follows:

> ***"Depending on the conduct of the defendant, the court may award aggravated damages in addition to the general damages. These aggravated damages are meant to compensate the Plaintiff for the additional injury going beyond that which would have flowed from the words complained of but for the presence of the aggravated circumstances… Aggravated damages will be ordered against a Defendant who acts out of improper motive, for example, where it is actuated by malice; insistence on a flimsy defence of justification or failure to apologise."***

56. Guided by the above case, the 1st defendant submitted that a claim for aggravated damages, let alone exemplary damages for defamation, cannot be sustained as the 1st Defendant sent out the Plaintiff's information regarding the true status of his account to the 2nd Defendant in good faith, and in pursuance of a legal right; and that upon the arrears being waived by the 1st Defendant, it forwarded the information of the new status of the Plaintiff's account, which was now performing, to the 2nd Defendant who updated it accordingly. Further, that in good faith, and for the purpose of fostering a good customer relationship, the 2nd Defendant, in consultation with the 1st Defendant, deleted the Plaintiff's adverse information.

g. on whether the 2nd Defendant is entitled to indemnity as against the 1st Defendant, no submissions were made by the 1st defendant.

- **The 2nd defendant's issues for determination**

57. The second defendant identified the following issues for determination:

> *i.* ***Whether the publication by the Defendants were defamatory in nature;***
>
> *ii.* ***Whether the said publications were subject to Qualified Privilege;***

iii. ***Whether the 2nd Defendant herein owes the Plaintiff a duty of care in tort hence liable in negligence;***

iv. ***Whether the Defendants breached any statutory duty imposed by the Banking Regulations 2008;***

v. ***Whether the Plaintiff's suit is statute barred under Section 31(5) of the Banking Act CAP 488 Laws of Kenya;***

vi. ***Whether the Plaintiff is entitled to General damages and exemplary damages and if so the quantum of damages;***

a. ***On Whether the publication by the Defendants were defamatory in nature;***

58. The 2nd defendant's counsel commenced his lengthy submissions by defining what Defamation is and referred to defamation as was defined by the learned authors of the **Halsbury's Laws of England 3rd Edition Vol. 24 pg 6** 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).*

59. Further definition of Defamation was as defined by the learned authors ***Gatley on Libel & Slander 11th Edition*** as follows: -

> *"A publication without justification or lawful excuse which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule...' Even without executing such strong feeling as hatred, contempt or ridicule, a statement may amount to defamation if it tends to lower a person in the estimation of right thinking people generally or tends to make them shun or avoid him..."*

60. The 2nd defendant submitted that for the Plaintiff to successfully prove defamation he must therefore satisfy the Honourable court that:

i. ***the statement was defamatory;***

ii. ***it referred to him; and***

ii. ***The Defendant published it to a third party.***

Accordingly, it was submitted that the Plaintiff's claim in Defamation against the defendants was baseless and could not be sustained as against the 2nd Defendant for the following reasons: -

1. ***The Defence of Justification: -***

a. ***that the Plaintiff had defaulted in payments: -***

61. The 2nd defendant maintained that a party confronted with a claim for defamation could in opposition to the said claim plead truth which if proved, would constitute an insurmountable defence of justification. The 2nd defendant relied on the case of ***Reynolds v Times Newspapers Ltd and others[1999] 4 All ER 609 where*** the House of Lords considered the defence of justification and *Lord Nicholls Of Birkenhead* had this to say in relation thereto: -

> ***"...But, as Littledale J said in M'Pherson v Daniels (1829) 10 B & C 263 at 272, 109 ER 448 at***

451: <u>'…the law will not permit a man to recover damages in respect of an injury to a character which he either does not, or ought not, to possess.' Truth is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.</u> With the minor exception of proceedings to which the Rehabilitation of Offenders Act 1974 applies, this defence is of universal application in civil proceedings. It avails a defendant even if he was acting spitefully."

62. In respect to this case the 2nd defendant submitted that the 1st Defendant Bank in its Defence filed on the 31st July 2013 under paragraph 7 of the said Defence asserted that it had indeed forwarded the negative customer information about the plaintiff and further that at the time of forwarding the information the Plaintiff had indeed defaulted on his loan repayments for the month of May 2010. The 2nd defendant therefore contended that the 1st Defendant at the hearing duly established that the Plaintiff had indeed defaulted in payment for the month of May 2010. Specifically, that it was "DW1's" testimony that by a letter of Offer dated 23rd April 2010 produced as "1st D Exh 1" the 1st Defendant extended a top-up loan of Kshs. 1,692,543/- to the Plaintiff which was to be repaid in instalments of Kshs. 61,861/-.

63. Further, it was submitted that immediately the said facility was disbursed the Plaintiff failed to remit the instalment payment for the month of May 2010 which led to arrears as shown by the Plaintiff's Loan account statement and Liquidation Account Statements as **"1st D Exh 7 & 8"** respectively which revealed that the Loan Account Statements (pg 19 List of Documents) showed that the Loan top-up was debited into the Plaintiff's loan account on the 24th April 2010 and further it is clear that no instalment payment was made for the month of May 2010 hence there was default as alleged by the 1st Defendant. Further, it was contended that the Loan liquidation account(pg 11 of the List of Documents) clearly demonstrates that no instalment payment was made for the month of May 2010 further corroborating the Loan account statement hence there is no doubt that the Plaintiff defaulted payment of the May 2010 instalment.

64. The 2nd defendant further submitted that the above are Banker's books as set out in Section 176 of the Evidence Act CAP 80 of the Laws of Kenya which provides that -

"Subject to this Chapter a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry, and of the matters, transaction and accounts therein recorded."

65. It was therefore submitted that the Plaintiff ought to have challenged the same, which he did not, hence the account statements ought to be considered as prima facie evidence proving the Plaintiff's default in servicing his loan as and when required. Further, it was contended that the Loan Remittance List adduced as **"1st D Exh 6"** (pg 13 – 18 List of Documents) further confirmed the above position that the repayment for the month of May 2010 was indicated as having been paid in June 2010 confirming the status of the accounts. It was further contended that the Plaintiff under cross-examination conceded that there was failure to remit the May 2010 instalment and instead blamed it on his employer for failing to make the payment. It was therefore submitted that the Plaintiff who was the Chief Operating Officer at the time was directly in-charge of ensuring that payments were made on time and he could therefore seek to plead ignorance of the failure to remit the instalment payments and thus was being less than candid to this Honourable court.

66. The 2nd defendants further submitted that the 1st Defendant need only prove that the statement was true in substance and not completely true. In this contention they relied on the case of ***<u>E. L. Hoare & Others ~vs~ Eric Jessop [1965] E. A 227</u>*** where *Crabbe JA.* Held as follows: -

"On the plea of justification <u>it is not necessary to prove that the statement is literally true; it is sufficient if, as in this case, it is true in substance, and there is no attempt at gross exaggeration. The Plaintiff himself admitted that he overstated the costs of his shares by above twenty-five per cent.</u>" (Emphasis ours).

67. In the circumstances it was submitted that the Plaintiff having defaulted cannot recover damages in

respect of an injury to a character which he does not, or ought not to possess.

b. ***that the Plaintiff had a prior default with Barclays Bank of Kenya Limited***

68. The 2nd defendant submitted further in contention that the Plaintiff failed to establish that it was the information forwarded by the 1st Defendant that caused Barclays Bank of Kenya Limited to deny his alleged loan application. they relied on *Regulation 28(1)(b)*of the *Banking (Credit Reference Bureau) Regulations 2008* *(hereinafter the Regulations 2008)* where it is provided that an institution shall: -

> *"(b)issue an adverse action notice to a customer against whom a decision has been taken or determination made, in whole or in part, that is adverse to the interests of the customer based on information obtained from a Bureau;*
>
> *(c) The adverse action notice shall be provided at the time the adverse decision or determination is communicated to the customer and shall notify the customer —*
>
> *(i) That customer information played a role in the decision;*
>
> *(ii) The name, address and telephone number of the Bureau that provided the customer information;*
>
> *(iii) The customer's right to a free copy of the information provided by the Bureau, and*
>
> *(iv) The customer's right to dispute such information with thebureau and, if erroneous or outdated, have it corrected.*

69. In this particular case it was contended that the Plaintiff failed to adduce any evidence to prove that he had applied for a loan with Barclays Bank of Kenya Ltd and that further under cross-examination he severally stated that he was never issued with a letter or notice from BBK Ltd indicating that the customer information forwarded by the 1st Defendant had caused him to be denied credit.

70. Further, that the Plaintiff was not notified by BBK Ltd from which of the two principal Credit Reference Bureaus in Kenya being *Credit Reference Bureau Africa Limited* and *Metropol Credit Reference Bureau Limited* that it obtained the customer information it relied on pursuant to *Regulation 28(1)(c)(ii) of the Regulations 2008.*

71. In connection with the above it was submitted that the first time that BBK Ltd accessed the credit report was in November 2011 while the Plaintiff alleged to have been denied the loan in October 2011. It was therefore the 2nd defendant's contention that the plaintiff failed to prove that BBK Ltd relied on the customer information from the 2nd Defendant to his disadvantage. Instead it was stated that Barclays Bank (K) Ltd relied on its own internal information about the Plaintiff's default on the loan advanced by them and listed in the Credit Report dated 26th April 2012 produced as "P Exh 10"&"2nd D Exh 3." And that as could be seen from the said credit report BBK Ltd listed the plaintiff on the 22nd March 2012 in respect of a default that occurred on the 1st January 2011. It was therefore the 2nd defendant's submission that in order for the plaintiff's claim to succeed as against the 2nd Defendant he ought to demonstrate that they relied on information supplied by the 2nd Defendant and not prior internal credit report from BBK Ltd itself. In the above contention the 2nd defendant relied on the case of ***Terry Cousin v. Trans Union Corporation, 246 F.3d 359 (5thCir. 2001)***where ***DeMoss J*** held that:

> ***"The thrust of the evidence indicated that GMAC was the credit grantor and that it denied Cousin's application based on an internal credit report and a report from Equifax, not Trans Union. As the denial of credit was due to something other than Trans Union's consumer report on Cousin, we cannot justify the $50,000 compensatory damages award to include damages arising from that credit denial."***

72. In this case, it was contended that BBK Ltd did not rely on the customer information forwarded by the 1st Defendant but had purely relied on their internal credit history of the plaintiff hence didn't issue the mandatory adverse action notice as provided for in *Regulation 28(1)(b) of the Regulations 2008*.

73. The 2nd defendant contended that one cannot defame a man in the eyes of a man who already holds him in such low esteem. In this case it was contended that at the time of applying for the Loan in October 2011 BBK Ltd already regarded the Plaintiff as a defaulter who had defaulted in the loan advanced by BBK Ltd themselves and therefore the Plaintiff could not have been defamed before

b) On whether the said publications were subject to Qualified Privilege;

74. The 2nd defendant submitted that the Plaintiff's claim for defamation is unmerited as the *said customer information* forwarded to the 2nd Defendant was published in an occasion of qualified privilege. They relied on the learned authors of the ***Halsbury's Laws of England 3rd Edition Vol. 24 pg. 54-55*** who provided the justification for *qualified privilege* as follows:

> ***"On grounds of public policy or the general welfare of society (k), the law affords protection on certain occasions (l) to persons who, acting in good faith and without any indirect or improper motive, make statements about another which are in fact untrue or defamatory (m). Such occasions are called occasions of qualified privilege (o)."***

75. It was further submitted that the importance of *qualified privilege* was further emphasised by the *House of Lords* in the case ***Reynolds ~vs~ Times Newspapers Ltd and Others [1999] 4 All ER 609*** where *Nicholls LJ.* observed that:

> ***"But there are circumstances, in the famous words of Parke B in Toogood v Spyring (1834) 1 Cr M & R 181 at 193, [1824–34] All ER Rep 735 at 738 when the 'common convenience and welfare of society' call for frank communication on questions of fact. In Davies v Snead (1870) LR 5 QB 608 at 611 Blackburn J spoke of circumstances where a person is so situated that it 'becomes right in the interests of society' that he should tell certain facts to another. There are occasions when the person to whom a statement is made has a special interest in learning the honestly held views of another person, even if those views are defamatory of someone else and cannot be proved to be true. When the interest is of sufficient importance to outweigh the need to protect reputation, the occasion is regarded as privileged."***

76. Therefore, the 2nd defendant posed a question that given the importance of qualified privilege under which circumstances does a privileged occasion arise? To answer that question they relied on the dictum of **Lord Atkinson** cited with approval by ***Nicholls LJ.*** *In the* **Reynolds v Times Newspapers Ltd case (supra)**as follows: -

> ***"Lord Atkinson's dictum, in Adam v Ward [1917] AC 309 at 334, [1916–17] All ER Rep 157 at 170, is much quoted:***
>
> ***'… a privileged occasion is … an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.'***

77. It was further submitted that an additional requirement for a privileged occasion to arise was observed by the court in the ***Reynolds case (supra)***at *pg 616* as:

> ***"Frequently a privileged occasion encompasses publication to one person only or to a limited group of people. Publication more widely, to persons who lack the requisite interest in receiving the information, is not privileged."***

78. From the above decision it was submitted that for a party to claim that a publication was made in

circumstances of qualified privilege they must demonstrate the following:

> *a. That the person publishing a statement was under a duty to publish it;*
>
> *b. That the person receiving the statement was under a corresponding duty to receive the statement;*
>
> *c. Publication was limited to only the persons under a duty to receive the information; (Unless in special circumstances not material to this suit.) and*
>
> *d. That the publication was made pursuant to a special and/or public interest that necessitated the communication;*

79. In the instant case it was contended that the sharing of customer information by Credit Reference Bureaus and their subscribers meets the above requirements and is thus subject to qualified privilege. In the above contention they relied on the case of ***Gatt ~vs~ Barclays Bank Plc & Anor [2013] EWHC 2 (QB)pg 13*** where *Moloney J.* considering a situation that falls on all fours relating to information published by Credit Reference Bureaus stated as follows:

> ***"So, in this case, Barclays as a subscriber to the system put the information now complained of into the pool; and when the Gatts through their brokers applied to BoS for a mortgage, BoS (also a subscriber, also a contributor to the pool) was able to access the information from Barclays through the medium of the CRAs. Because the data originated from Barclays' own client records, it was inherently likely to be accurate and reliable, though of course error in a particular case cannot be excluded. In the particular circumstances of this special and well-regulated system (which may well be very different from other classes of credit reference business):***
>
> ***a. the elements of mutuality, reciprocity, and self-protection emphasised in LAPT are clearly present;***
>
> ***b. and the elements of profit, narrow self-interest, and inherently unreliable sources emphasised in Macintosh are clearly absent."*** The Learned Judge proceeded to further state that: -
>
> ***"In the modern world, it is plainly in the public interest that such authoritative credit information can be obtained and relied on by banks and other financial institutions, provided it is done in a lawful and duly-regulated manner which respects the rights of the general public and the individuals affected. On the evidence provided by Mr Hill, the passing of the present information by Barclays into the CRA pool, and its onward transmission by the CRAs to BoS and/or any other subscribers who may have accessed it for the purpose of deciding whether or not to accept an application from the Gatts for finance, plainly took place on occasions of common-law qualified privilege. This occasion protects the publications equally whether complaint is made by MG and/or CG, subject to the question of express malice considered next."***

iii. Whether there existed a legal, statutory and/or moral duty on the Defendants to share and receive customer credit

80. The 2nd defendant submitted that it is a Credit Reference Bureau established under *Regulation 3(1)* of the *Banking Regulations 2008* and is therefore under a statutory duty under *Regulation 13(1) of the Banking Regulations 2008* to collect and disseminate credit information. The said Regulation provides: -

> *"A Bureau licensed under these Regulations may engage in the following activities-*
>
> *(a) Obtain and receive customer information;*
>
> *(b) Store, manage, evaluate, update and disseminate the customer information to subscribers in*

accordance with these Regulations;

(c) Compile and maintain database and generate reports from customer information database;

(d) Assess the creditworthiness of a customer;

(e) Sell to institutions specialized literature and other informational material related to its activities;

(f) Carry out market and statistical research relating to matters set out under these Regulations; and

(g) Carry out any other activity as may be approved by the Central Bank from time to time in accordance with the Act."

81. From the above it is was submitted that Credit Reference Bureaus are under a statutory duty to receive and disseminate customer information as defined in *Regulation 14(1) of the Banking Regulations 2008.*

82. Further, that subscribing institutions are under a duty to submit customer information under the *Banking Regulations 2008* specifically under *Regulation 28(4)& (6) of the Banking Regulations 2008 which* provide as follows:

"(4) *Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations…*

"(6) Institutions shall ensure that the customer information furnished pursuant to regulation 14(3) is provided to all licensed Bureaus.

83. From the above Regulations it was submitted that criteria (a) *the person publishing a statement was under a duty to publish it* had been satisfied as the 1st Defendant was under a statutory/legal duty to supply the 2nd Defendant with the customer credit information of the Plaintiff. Further, those criteria *(b) that the person receiving the statement was under a corresponding duty to receive the statement* had been met.

c) Whether the Publication was limited to only the persons

84. That as relates criteria *(c)* that *publication is limited to only the persons under a duty to receive the information it was submitted that Regulation 15(2) of the Banking Regulations 2008 provides: -*

"A Bureau shall only release customer information in accordance with sub-regulation (1) (a) (iii) to a subscriber-

(a) That requires customer information to evaluate a customer's application for credit or other customer-initiated business transaction;

(b) that has certified to the Bureau that it will use the customer information for the purpose of making a permitted eligibility decision and for no other purpose; and

(c) That has agreed to properly dispose of customer information so that it cannot reasonably be read or reconstructed."

85. It was submitted that ***"DW2" Olive Muasya's*** testimony was to the effect that the Plaintiff's customer information was supplied to only two financial institutions that he sought loans from being:

i. Barclay's Bank of Kenya Ltd; and

ii. Kenya Commercial Bank Ltd (the 1st Defendant herein).

86. The 2nd defendant contended that the Plaintiff under cross-examination conceded that contrary to the contents of paragraph 15 of the Plaint the customer information was only published to the above Banks and not to all the Banks, members of his family, his employer KAPS LTD, the general public and his business associates. It was the 2nd defendant's contention that the 1st & 2nd Defendants' published the said customer information only to persons under a duty to receive the information under *Regulation 15(2)* of the *Banking Regulations 2008.*

d) Whether the publication was made pursuant to a special and/or public interest that necessitated the communication: -

87. It was further submitted that publications made pursuant to the *Banking Regulations 2008* are communications subject to *qualified privilege* as it is in the public interest that Banks have sufficient customer information about customers with whom they intend to deal with. Reliance was placed on ***Halsbury's Laws of England 3rd Edition Vol. 24 pg 59*** regarding occasions of qualified privilege where it was stated that:

> ***"... Inquiries, reports and references made with regard to the commercial credit of a person with whom a trader proposes to transact business may be entitled to qualified privilege(r)..."***

88. The second defendant submitted that it was thus imperative that Banks intending to deal with customers have sufficient credit information about their customers to enable them to make prudent lending decisions. Further, that this is particularly important in Kenya given the history of Banking in Kenya where in the 1980's and 1990's there was a lot of information asymmetry in the sense that banks were lending to customers whom they didn't have information on therefore leading to a high default rate by customers characterized as 'serial defaulters, which high default rate adversely affected the economy with many banks collapsing and interest rates soaring to unprecedented levels. That the aim of the *Banking (Credit Reference Bureau) Regulation 2008* was to enable institutions to share credit information relating to would be customers hence minimizing the risk of default which wards off economic turmoil. Reliance was placed on the ***Gatt case (supra)*** that given the history of banking in Kenya the sharing of customer information is imperative and in the public interest hence is covered by qualified privilege. In the circumstances, it was submitted that the customer information was published on an occasion of qualified privilege and the Plaintiff's claim for defamation should be dismissed on this ground.

vi) On Whether the Plaintiff proved that the 1st and 2nd Defendants had acted with express malice: -

i. ***On the part of the 1st Defendant's servants and/or agents: -***

889. It is was submitted that in order to surmount the Defence of *qualified privilege* the Plaintiff must prove '*express malice'* on the part of the 1st and 2nd Defendants which they had failed to prove in this matter. the 2nd defendant submitted that malice has been defined in the case of ***Horrocks v Lowe [1974] 1 All ER 662*** *at 669* cited with approval by ***Nicholls LJ.*** in the ***Reynolds case*** (supra) as follows:

> *"The classic exposition of malice in this context is that of Lord Diplock in* **Horrocks v Lowe [1974] 1 All ER 662 at 669, [1975] AC 135 at 149.** *If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not. Lord Diplock emphasised that indifference to truth is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true:* The Learned Lord Justice continued to state that:

"In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", i.e., a positive belief that the conclusions they have reached are true. The law demands no more.'

90. It was further submitted that the above position was cited with approval by *Maloney J.* in the case of ***Gatt v Barclay Bank PLC & Another (supra)*** where he stated:

*"Qualified privilege is defeated if the Claimant can prove that the Defendant was actuated by express malice in publishing the words complained of. In this context, what must be shown is a dominant and improper motive, i.e. other than the purpose for which the privilege was given; and generally this is proved by showing that the Defendant knew that his words were untrue, or at least di**d not believe them to be true(see Horrocks v. Lowe [1975] AC 135).** Negligence is not enough, unless it rises to the point of reckless indifference to truth. Where the Defendant is a corporation, it must also be shown that a particular employee or agent both participated in the publication and had the required malicious **state of mind; Broadway Approvals v. Odhams [1965] 1 WLR 805.** Here, the only such person would have to be Mr Williams."*

91. According to the 2nd defendant the above holding is also the position in the United States of America where DeMoss J in the case of ***Terry Cousin v. Trans Union Corporation, (supra)*** held as follows: -

*"Under § 1681h(e), consumer reporting agencies are generally qualifiedly immune from state law claims for defamation unless they involve malice or wilful intent to injure. Both Trans Union and Cousin agree that courts have determined that malice under this statutory scheme is congruent with the common law standard. See **Thornton v. Equifax**, 619 F.2d 700, 703 (8th Cir. 1980). Thus, to establish defamation with malice in the present case, one must establish that the defendant when he published the words--(1) either knew they were false, or (2) published them in reckless disregard of whether they were true or not. See **Gulf Publishing Co. v. Lee**, 434 So. 2d 687, 695 (Miss. 1983) (citing **Reaves v. Foster**, 200 So. 2d 453, 458-59 (Miss. 1967))."*

92. According to the 2nd defendant, there was no malice exhibited by the 1st Defendant's employees and agents in forwarding the name of the plaintiff to the 2nd defendant for listing as a defaulter.

93. In this instant case it was submitted that ***"DW1" Mr. Vincent Andambi Maniagi's*** gave evidence that the Listing of the Plaintiff was accurate as there was default in the payment for the month of May 2010 which was never repaid and therefore at the time of listing the Bank maintained that the Plaintiff was in default.

94. It was further submitted that according to ***"DW1"*** testimony which remained unchallenged in cross-examination, the arrears were waived by the 1st Defendant at their discretion as was the procedure where check-off loans that were not performing started receiving the full complement of the deduction and the account was updated to performing status as set out in the letter dated 27th October 2011 produced as ***"1st Def Exh 4".***

95. The 2nd defendant maintained that the Plaintiff seemed to have mistaken the above letter as produced in evidence to mean that his information would be deleted but the true position was that information of a default is maintained in the database for 5 years even after the account has been regularized and that it was only after negotiations that the 1st Defendant Bank opted to waive the arrears of around *Kshs. 40,000/-*and after further negotiations the Bank agreed to delete the customer information out of good faith and in consideration of the business relationship. The Bank thereafter issued the Amendment notice to have the information deleted. He stated this was discretionary on their part. Further, that the Regulations only contemplate the removal of Customer information via an amendment notice under

Regulation 28(5) of the Banking Regulations 2008 where there is an error in the customer information submitted. That the 1st Defendant's in order to continue their good business relationship with the Plaintiff were willing to misdirect the 2nd Defendant to have the information deleted which actions did not display any malice on the part of the 1st Defendant and on the contrary displayed honest attempts to aid the plaintiff who was their client avoid the negative effects of being listed with Credit reference Bureaus.

96. On the above contention the 2nd defendant relied on the case of ***Gatt ~vs~ Barclays Bank case (supra) pg 10*** where the judge considering a similar letter stating that the listing was erroneous held:

> *"7.5 The Gatts place great reliance on Mr Williams's letter of 29 April 2008 to Mr Elmes (and on a later letter of 4 August 2010 to their MP in which the Bank's customer relations department sought to defend that letter). They rely on it as, in effect, an admission that the overdraft was in fact authorised. Even if it had said so, I do not think an admission written at that time and in those circumstances would prevail over the clear evidence of what the actual position was. But, as stated at 6.3 above, the letter refers to an "agreed overall facility" not an "authorised overdraft", and was probably a rather disingenuous reference to the proposed consolidated loan rather than an admission as to the authorised overdraft limit in place. It was, I have to conclude, a misleading document, over-favourable to the Gatts, but written at their request with the intention of helping them out of their difficulties. It would be wholly unfair to the Bank now to interpret it in the manner for which the Gatts contend."*

The Learned Judge proceeded to hold as follows in page 14: -

> *"9.9 Again, his letter to Mr Elmes is relied on, to show that he knew or believed that the words complained of were false; if with that state of knowledge he had caused them to be published, there would be strong evidence of malice. But, for the reasons set out at 7.5 above, my interpretation of that letter is different. It appears to me to show that Mr Williams was shocked at the credit report and its possible effects, and that he was prepared to go to the outer limit of truthfulness in order to undo it and help the Gatts to get their loan. If he was a malicious person who wanted to falsify the Gatts' credit record to their detriment (and no reason has ever been suggested why he should want that) then he would certainly not have written such a letter."*

97. Parallels were drawn to the effect that the letter produced as ***"1st Def Exh 4"*** and the *Amendment Notice* produced as ***"2nd Def Exh 2"*** all demonstrated the good faith of the 1st Defendants agents who were prepared to go to the *"...outer limit of truthfulness"* to aid the Plaintiff to be removed from the CRB database and it is unconscionable for the Plaintiff to now feign ignorance of the circumstances that informed the issuance of the said documents namely the waiver of defaulted sum and negotiations to be removed from the database in good faith.

98. Further, that it was clear that the said admissions could not prevail over the clear evidence of the Plaintiff's default in servicing the loan particularly in the month of May 2010.

99. Further to the above, the 2nd defendant maintained that the plaintiff in his testimony in court did not lead any evidence to demonstrate express malice such as ill-will, corruption or any other improper motive by the 1st Defendant's agents and/or employees and that they in fact stated that they tried their utmost to aid him.

100. In the circumstances, the 2nd defendant submitted that the Plaintiff had failed to prove express malice on the part of the 1st Defendants servants and/or agents.

ii. ***On the part of the 2nd Defendant's servants and/or agents: -***

101. As relates the 2nd Defendant's conduct being governed by the Banking Regulations 2008, the 2nd defendant submitted that malice can only be expressly proved by their conduct and adherence to the Regulations. In this case it was submitted that the plaintiff did not file a formal dispute in the form of an

individual Dispute form under Regulation 20(5) of the Banking Regulations 2008 notifying the Bureau of the erroneous information and therefore there is no evidence of malice on the 2nd Defendant's servants' and/or agents' part.

102. It was submitted that having failed to utilize the dispute resolution mechanism as set out in *Regulation 20* then the Plaintiff could not allege bad faith or any form of express malice as the Plaintiff was yet to formally engage the servants and/or agents of the 2nd Defendant and any allegation of malice was therefore pure speculation.

103. It was further contended that the 2nd Defendant adhered strictly to the statutory timelines as set out in *Regulation 20 (5) to (13) of the Banking Regulations 2008.* Specifically, when they received the amendment notice on the *25th April 2012 in that* they immediately deleted the allegedly erroneous information and proceeded to issue a Notice of Change produced as ***"2nd Def Exh 4"*** on the *27th April 2012*, which act was done within the *five (5) days* period provided under *Regulation 20(12) of the Regulations 2008.*

104. It was therefore the 2nd defendant's submission that the 2nd Defendant's servants and/or agents did not act in complete disregard of the truth and therefore there was a stark paucity of evidence of malice on their part. In this contention reliance was placed on the case of ***Terry Cousin v. Trans Union Corporation (supra) pg 31*** where the Learned Judges held as follows:

> ***"Trans Union's subsequent actions do not suggest a reckless disregard for the truth. It promptly corrected any errors and fully disclosed its reports to Cousin. Therefore, we find that there was legally insufficient evidence to support Cousin's defamation with malice claim."***

105. In this case it was submitted that no malice could be inferred as the Plaintiff was unknown to the 2nd Defendant's servants and/or agents and further they did not act in reckless disregard for the truth when they became aware that the information was allegedly erroneous.

106. The 2nd defendant therefore invited this Honourable court to find that the Plaintiff has failed to prove express malice on the part of the 2nd Defendant and dismiss the claim for defamation on this ground.

On The Existence of Independent instances of Qualified privilege: -

107. The 2nd defendant submitted that in the unlikely event that the 1st Defendant' servants and/or agents are found to have express malice it was contended that their malicious actions did not deprive the 2nd Defendant of the protection of qualified privilege as there existed a separate instance of qualified privilege which could not be impeached by the existence of malice on the part of the 1st Defendant.

108. In this contention reliance was placed on the case of ***E. L. Hoare & Others ~vs~ Eric Jessop (supra) pg 225 where*** *Crabbe JA.* Held as follows: -

> ***"Before leaving this question of the inference of malice from proved facts, I wish to advert to what I consider an unsatisfactory feature of the trial. It is clear that throughout his judgment the learned judge regarded the three defendants as joint-tortfeasors, and imputed the malice of one defendant to another. In some instances the malice of Edwards, who was not even a party at the trial, was imputed to the three defendants. In view of certain dicta found in some of the authorities no blame whatsoever could be attached to the learned trial judge in treating the three defendants who signed the "the libel letter" as joint-tortfeasors. It has since been held in Egger v. Viscount Chelmsford & Others (9) that in an action for damages for a joint libel, in which the defendants rely upon qualified privilege, proof that one or more of them were actuated by express malice, will not render liable the defendants against whom such malice was not proved. (see also Longdon Griffiths v. Smith (10); Meekins v. Henson (11)."***

109. Further, the 2nd defendant relied on the case of ***Longdon-Griffiths ~vs~ Smith and Others [1950] 2 All ER 662*** where *Slade J.* held that:

> *"the protection afforded by the qualified privilege of the three trustees not actuated by malice was not destroyed by the malice of the fourth because each acted under an independent duty to make the communication to the general committee of the society and so had an independent privilege of his own and not one derived from that of the fourth trustee. Moreover, a person who published a defamatory statement on an occasion which the law clothed with the protection of qualified privilege was not a tortfeasor and could not, therefore, be a joint tortfeasor."*

110. In the above case the learned *Slade J.* further observed that: -

> ***"In the present case I have ruled that each one of these four defendants not only had a duty to publish the report complained of to the members of the general committee of the society, who had a duty to receive it, but that the report contained matters involving a common or corresponding interest between each of the trustees and the members of the general committee to whom the report was published. In other words, if Cooper had been malicious—and, indeed, if the other three defendants had known that Cooper was malicious—it would still have been their duty to publish the document which they did publish. Malice has nothing to do with the creation of privilege. It has to do only with its destruction. Rightly or wrongly, I have ruled that each of these four had a separate duty independent of the others to make the publication which they made or caused to be made."***

111. In this instance it was submitted that the 2nd Defendant had an independent *duty–interest* relationship with other subscribing institutions to provide them with customer information supplied to it by the 1st Defendant which was independent of the 1st Defendant's duty to supply it with the said information under *Regulation 13(1)(b)*of the *Banking Regulations 2008* which provides:

> ***"...A Bureau licensed under these Regulations may engage in the following activities-***
>
> ***(b) Store, manage, evaluate, update and disseminate the customer information to subscribers in accordance with these Regulations;..."***

112. From the above provision it was submitted that it was clear that the 2nd Defendant had a separate duty from that of the 1st Defendant to supply information to other subscribing institutions and therefore had an independent privilege not derived from the 1st Defendant and could not therefore be a joint tortfeasor where the 1st Defendant's agents were actuated by malice while the 2nd Defendant's agents act in good faith. In the circumstances, it was contended that even if the 1st Defendant was found to have been actuated by malice then the suit against the 2nd Defendant should be dismissed with costs.

On the Plaintiff's Claim in Negligence & Breach of Statutory Duty: -

1. ***Claim for general damages under tort and/or common law negligence: -***

113. The 2nd defendant submitted that the Plaintiff's claim for general damages for the tort of negligence was entirely misplaced as the *Banking (Credit Reference Bureau) Regulations 2008* only create a Statutory duty and cannot without express provisions to that effect create a co-extensive duty of care in tort giving rise to a claim for general damages in common law negligence. Further, that the existence of a statutory duty does not create a co-existing duty of care in tort and/or common law between Credit Reference Bureaus and Bank customers. They relied on the English Court of Appeal case of ***Keith Smeaton –vs- Equifax PLC [2013] EWCA Civ 108*** where *Tomlinson L. J.* considered this issue under similar provisions in the *UK Data Protection Act and Consumer Credit Act 1974 and the Consumer Credit (Credit Reference Agencies) Regulations 2000,* which constitute the statutory regime in England. The Learned Judge held as follows:

“With respect to the judge, this reasoning falls into the error identified by Lord Hoffmann in Customs and Excise Commissioners v Barclays Bank [2007] 181 at 200:-The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057. The statute either creates a statutory duty or it does not (that is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same was as the same conduct undertaken voluntarily). <u>But you cannot derive a common law duty of care directly from a statutory duty</u>.”

114. The 2nd defendant drew this court's attention to the *Banking (Credit Reference Bureau) Regulations 2008* for noting that the said Regulations only impose a statutory duty to retain customer information and do not impose a duty of care in tort or common law negligence. The Learned Lord Justice in the above case of ***<u>Keith Smeaton –vs- Equifax PLC</u>*** further held as follows: -

“I also consider that the judge was in error in concluding that a CRA assumes a responsibility to every member of the public simply by choosing to operate this type of business. As Lord Mance put it in the Barclays case at 217, such an approach “is to assign to the concept of voluntary assumption of responsibility so wide a meaning as to deprive it of effective utility”. Thus the judge was in my view wrong to identify a duty of care in tort co-extensive with that which he had found to be imposed by the statute.”

115. The 2nd defendant urged the court to be persuaded by the above said authority and find that the regulations impose an involuntary statutory duty and does not create a corresponding duty of care in tort to the general public hence exposing Credit Reference Bureaus to indeterminate and unlimited claims in tort as this was not the intention of the drafter of the said Regulations.

116. On the plaintiff's reliance on the case of ***<u>Bryant ~vs~ TRW INC</u>*** which is an American case it was submitted that that case had no application whatsoever in the Kenyan context for reasons that the ***<u>Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681</u>*** has specific provisions providing for civil liability for negligent non-compliance unlike the Kenyan Regulations which do not and in fact mirror the UK Regulations. That specifically, ***<u>Section 617. Of the FCRA</u>*** titled ***<u>Civil liability for negligent noncompliance</u>*** *<u>[15 U.S.C. § 1681o]</u>* provides as follows: -

“(a) In general. Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper.”

117. It was submitted that the position in Kenya was akin to the position in the United Kingdom where the Learned judges in the case of ***<u>Smeaton vs Equifax case (Supra)</u>*** further considered the issue of causation, specifically, whether there existed a causal link between Mr. Smeaton’s alleged loss and the listing by a Credit Reference Bureau. Tomlinson L. J. in respect to the above held as follows:

“Approaching the matter on the basis of the traditional three-fold test of foreseeability, proximity and whether it is fair, just and reasonable to impose a duty, Mr Handyside supplied four compelling reasons which, to my mind, demonstrate conclusively why it is inappropriate here to

superimpose on whatever is the statutory duty a co-extensive duty of care in tort. Thus:-

"(1) It is doubtful whether it was reasonably foreseeable that the recording of incorrect data on Mr Smeaton's credit reference would cause him any loss, having regard to the practices operated by the credit industry set out in the Guide to Credit Scoring 2000. A person whose credit application was rejected because of adverse CRA data would be told of that fact and would be entitled to take steps to correct (or dispute) that data and to require the lender to reconsider the application for credit having regard to further, correcting information provided by the applicant.

(2) It would also not be fair, just or reasonable to impose a duty. In particular, imposing a duty owed to members of the public generally would potentially give rise to an indeterminate liability to an indeterminate class.

(3) It would also be otiose given that the DPA provides a detailed code for determining the civil liability of CRAs and other data controllers arising out of the improper processing of data.

(4) Apart from the DPA, Parliament has also enacted detailed legislation governing the licensing and operation of CRAs and the correction of inaccurate information contained in a credit file in the CCA 1974. This provides for the possibility of criminal sanctions, but does not create any right to civil damages. In such circumstances it would not be appropriate to extend the law of negligence to cover this territory."

118. That if the information was erroneous then they had an opportunity to correct the same and seek further financial assistance from the bank. That the learned Judge in the ***Smeaton –vs- Equifax case (Supra)*** rightly noted that any inconvenience is only likely to be temporary in nature. He observed: -

"I agree with Mr Handyside that in most cases of applications for credit failed on account of incorrect data the harm likely to be suffered is temporary inconvenience. It is possible that the judge overlooked this as a result of his flawed conclusion that it was inaccurate data, or more precisely the alleged breach of duty which gave rise thereto, which prevented Mr Smeaton / Ability Records from obtaining credit in and after July 2006."

119. In relation to the right to correction it was submitted that the courts in Kenya have rightfully found that where a party fails to pursue the statutory reliefs provided under R*egulation 20 of the Banking Regulations 2008* then they cannot bring a suit to claim damages and that this suit was brought prematurely having by-passed the statutory provisions. In this contention reliance was placed on the case of ***Nairobi HCCP No. 17 of 2013 – Amy Kagendo Mate –vs- Prime Bank Limited & Credit Reference Bureau Africa Limited*** where *Ngugi J.* held as follows:

"In the present case, the petitioner complains and seeks a declaration, inter alia, that the 2nd respondent has violated her rights under the Constitution by maintaining in its database and disseminating 'inaccurate, outdated and untruthful credit information regarding thePetitioner and without due notice to her of the same…'

The petitioner has not pleaded that she invoked the provisions of Regulation 20, and what the outcome thereof was. On the pleadings before me, it appears that the petitioner sought the assistance of this court after by-passing the statutory remedy which is intended to address her grievances with respect to the information held by the 2nd respondent. I would therefore agree with the 2nd respondent that this petition is improperly before me on this point."

120. Further that in the case of ***Nairobi HCCC No. 551 of 2011 Daniel Gachanja Githaiga –Vs- Credit Reference Bureau Africa Ltd & 2 Others*** *Ogola J.* held as follows: -

"Finally, in my view, the application is premature as the procedure for correction and/or deletion of a customer's information shared with the 1st Defendant is clearly and intricately provided for under Regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008,

which procedure inter-a-alia requires a customer to notify the 1st Defendant in writing that he disputes the reference, after which the 1st Defendant carries out investigations and decides whether to delete or retain the reference. The Plaintiff has not invoked and/or exhausted the aforesaid procedure, and therefore this application is premature."

121. That it is clear that a party denied credit only suffers a temporary inconvenience and has a statutory recourse which the plaintiff failed to pursue by his own admission in court and hence cannot maintain a claim in negligence and or any claim which are clearly premature and amount to an abuse of the court process. Further it was submitted that it would not be fair, just or reasonable to impose such a duty on Credit Reference Bureaus to the general public as they are merely carrying out a statutory duty and it would lead to unlimited liability to an indeterminate class. That the Regulations also have detailed provisions on the resolution of any dispute under *Regulation 20 of the Banking Regulations 2008* which are adequate and similarly to the *UK Data Protection Act and Consumer Credit Act 1974 and the Consumer Credit (Credit Reference Agencies) Regulations 2000, the Banking Act and the Regulations 2008* impose criminal liability and statutory fines on Bureaus which fail to follow the regulations hence it would be otiose to impose civil Liability specifically: -

> i. Sharing of credit information without the consent of the customer is a criminal offence as set out in *Section 31 of the Banking Act* as read together with *Section 49 of the said Act*;
>
> ii. Further where a Bureau violates the regulations there are statutory fines imposed under *Regulation 13(3)* where a Bureau engages in unauthorized activity it can be fined *Kshs. 500,000/-*;
>
> iii. under *Regulation 15(5)* where a Bureau flouts the restriction on the use of customer information a similar fine can be imposed; and
>
> iv. Under *Regulation 30* the Central bank of Kenya has powers to impose fines and even to revoke a Bureau's license.

122. Accordingly, it was contended that there are criminal sanctions and therefore it would be inappropriate to extend the law of negligence to this area and that the *Banking Regulations 2008* do not impose civil liability for common law negligence hence this court should dismiss the Plaintiff's claim for general damages for negligence.

1. ***On the claim for breach of Statutory duty- it was submitted that: -***

a. ***The 2nd Defendant adhered to the Regulations strictly: -***

123. It was submitted that the 2nd Defendant did not breach any statutory duty and that it at all times acted in accordance with the Banking Regulations 2008. it was submitted that while the plaintiff maintained that the information was forwarded without his written consent under cross-examination he conceded that he had expressly in writing authorized the 1st Defendant to disclose his credit information to Credit Reference Bureaus under paragraph 1.3(b) of the Letter of Offer produced as ***"P Exh 3"*** which provides as follows:

> *"1.3 The Borrower further agrees that the Bank may disclose its personal data and/or information relating to the borrower including data and information relating to any transaction documents or the assets, business or affairs of the Borrower outside the Bank's group whether such personal data and/or information is obtained after the Borrower ceases to be Bank's customer or during the continuance of the Banker-customer relationship or before such relationship was in contemplation:*
>
> *(b) To licensed credit reference bureaus or any other creditors…"*

124. Further, that contrary to the contents of paragraph *16(c)* of the Plaint the 2nd Defendant herein only shared information as set out in *Regulation 14 of the Banking Regulations* which details are displayed in

the Credit Reports produced as ***"P Exh 10", 1st Def Exh 3" & 2nd Def Exh 3"*** hence the Defendant's didn't share any information outside of the regulations. That the Plaintiff also failed to prove that there was misuse and/or misapplication of the credit information and did not lead any evidence to this effect.

125. That the Plaintiff also alleged that the information was published to the financial community in general, his family, his employer, peers, professional colleagues and right thinking members of the society which ,if true, would be a grievous breach of *Regulation 15(1)(a) of the Banking Regulations 2008, but that u*nder cross-examination the Plaintiff duly acknowledged that the information was only released to the two Banks that he had applied for loans from and had given his written consent thus he failed to prove that there was a breach of this Regulation.

126. It was further contended by the 2nd defendant that contrary to the Plaintiff's claim that the 2nd Defendant failed to correct or delete untrue or misleading information, the 2nd Defendant deleted the credit information on the *25th April 2012* the same day that it received an amendment notice and further issued a Notice of Change to all institutions that had accessed the customer credit information on the *27th April 2012* merely 2 days after receiving the amendment notice. Accordingly, that the 2nd Defendant adhered to the statutory timelines set out in *Regulations 20(12) of the Banking Regulations 2008*.

b. ***On the duty to ensure accuracy of information retained in the database: -***

127. The 2nd defendant submitted that the Plaintiff in his written submissions had alleged that the 2nd Defendant specifically failed to adhere to Regulation 17(a) & (c) of the Regulations 2008 which deal with ensuring the accuracy of the information contained in its database. *Regulation 17(a) of the Regulations 2008* provides as follows: -

> *"Implement strict quality control procedures in order to ensure the maximum possible accuracy of its database and the continuity of its services;"*

128. Further, that *Regulation 17(c) of the Regulations 2008* provides as follows: -

> *"take all such steps as are reasonably necessary to ensure that customer information maintained by it is current, authentic, legitimate, reliable, accurate, truthful and that it reflects the existing situation of the subject at any given time and if the information is found to be illicit, inaccurate or no longer valid, the bureau shall promptly take the corrective measures necessary to remedy the deficiencies."*

129. In relation to this it was submitted that the Regulations impose a duty on the 2nd Defendant to take reasonable steps to ensure the accuracy of the data maintained in its database which steps the 2nd Defendant duly undertook. It was submitted that the Plaintiff on his part seemed to be under a misconception that the duty to ensure the accuracy of the information contained in the database is absolute and when the data becomes inaccurate and remains accessible then there is an automatic breach of this regulation. That this was not accurate as was found in the case of ***Keith Smeaton –vs- Equifax PLC (Supra) pg 15*** where the court held that -

> ***"The judge was also in my view wrong to regard the mere fact that the data had become inaccurate and remained accessible in its inaccurate form for a number of years as amounting to a "clearly established breach of the fourth principle"judgment paragraph 106. Paragraph 7 of Part II provides that the fourth principle is not, in circumstances where the data accurately records [erroneous] information obtained by the data controller from the data subject or a third party, to be regarded as contravened if the data controller has, putting it broadly, taken reasonable steps to ensure the accuracy of the data. A conclusion as to contravention cannot in such a case be reached without first considering whether reasonable steps have been taken.***

130. The 2nd defendant further stated that the court in the ***Smeaton case (supra) pg 31*** continued to find that the duty imposed is not absolute and stated thus: -

"The principles of the DPA relevant to this case do not impose an absolute and unqualified obligation on CRAs to ensure the entire accuracy of the data they maintain. Questions of reasonableness arise in the application of the fourth principle, as paragraph 7 of Part II of Schedule I spells out."

131. From the above it was submitted that it was clear that the existence of inaccurate data in the database doesn't automatically give rise to a breach of *Regulation 17(a) & (c) of the Regulations 2008* if the 2nd Defendant *(data controller)*accurately records the information as received from the 1st Defendant *(third party data supplier).* The 2nd defendant referring to the Smeaton case stated that the English Court of Appeal then proceeded to establish the principles that ought to guide the court in trying to determine whether reasonable steps were indeed taken to ensure the data was accurate. The court delivered itself thus:

"Equifax did take steps to ensure that its bankruptcy data was accurate. It obtained the data from a reliable and authoritative source in the form of the Gazette, it transferred the data accurately onto its data bases from that source and it amended its data immediately upon being made aware that it was inaccurate. Equifax monitored the Gazette. When the electronic data supply was first made available in 2008, Equifax implemented it immediately in order to ensure, as best it could, the continuing accuracy of its data. In my judgment the judge was wrong to conclude that Equifax had failed to take reasonable steps to ensure the accuracy of its data."

132. It was contended that for a court to establish whether reasonable steps were taken to ensure the accuracy of the data it must consider the following: -

iv. Whether the Credit Reference Bureau obtained the data from a reliable source;

v. Whether the Credit Reference Bureau accurately transferred the data onto its database;

vi. Whether the Credit Reference Bureau regularly updated its database; and

vii. Whether the Credit Reference Bureau immediately amended its database immediately it became aware that the information was inaccurate.

i. ***On whether the Credit Reference Bureau obtained the data from a reliable source;***

133. According to the 2nd defendant, it obtained the plaintiff's credit information from a reliable source as the 1st defendant is a limited liability company duly licensed to carry on business as a banking institution and is the largest bank in Kenya in terms of asset base. Further, that the 1st defendant at all material times maintained a banker-customer relationship with the Plaintiff who had obtained a loan with them and they at all material times maintained banking records on the plaintiff's debt in the form of statement of accounts which are prima facie evidence of their contents as recognized out in ***Section 176 of the Evidence Act CAP 80*** being banker's books as defined Section 2 of the same act as follows:

"banker's book" includes a ledger, day book, cash book, account book, and any other book used in the ordinary business of the bank, whether in written form or on micro-film, magnetic tape or any other form of mechanical or electronic data retrieval mechanism; whether kept in written form or printouts or electronic form."

134. Further, that the Regulations provide under *Regulation 28(3) & (4) of the regulations 2008* which provide as follows: -

"(3) Institutions shall be responsible for providing accurate information to Bureaus.

(4) Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations."

135. From the above it was submitted that the 1st Defendant was under a statutory duty to reasonably forward accurate information under the Regulation 2008 hence was the most reliable source of information. It was contended that this fact was conceded to by ***"DW1" Mr. Vincent Andambi*** who confirmed that they do not forward the account statements to the 2nd Defendant and confirmed by ***"DW2" Olive Muasya*** who stated that it is impractical and impossible for the 2nd Defendant to retain the books of accounts of all the banks and other institutions that submit millions of credit information entries hence industry practice dictated that they rely on the supplying 3rd party institution to guarantee the accuracy of the data forwarded.

ii. ***On whether the Credit Reference Bureau accurately transferred the data onto its database;***

136. It was submitted by the 2nd defendant that the information forwarded by the 1st Defendant was faithfully and accurately transferred into the 2nd Defendant's database and that this fact was conceded by all the parties to this case.

iii. ***On whether the Credit Reference Bureau regularly updated its database;***

137. It was submitted that ***"DW2" Olive Muasya's*** testimony in court that pursuant to ***Regulation 18(4) of the Regulations (2008)*** institutions submit both positive and negative customer information on a monthly basis which amounts to millions of entries per month. That the information is forwarded on a monthly basis electronically and institutions are required to update the said information on a monthly basis and immediately when they discover errors in the information. That the 2nd Defendant regularly updated the information in its database on a regular basis.

iv. ***On whether the Credit reference Bureau immediately amended its database immediately it became aware that the information was inaccurate: -***

138. It was submitted that the 2nd Defendant immediately amended the credit information in its database upon receiving an amendment notice from the 1st Defendant on the *25th April 2012* and subsequently issued a Notice of Change to BBK which had accessed the plaintiff's customer information. That this was confirmed by ***"DW2" Olive Muasya*** who under cross-examination about paragraph 8 of her witness statement stated that as soon as they were informed that the credit information was inaccurate they immediately deleted it.

g. ***On whether the Plaintiff's suit is statute barred under Section 31(5) of the Banking Act CAP 488 Laws of Kenya;***

139. It was submitted that the Plaintiff's suit is statute barred under ***Section 31(5) of the Banking Act CAP 488*** which provides as follows: -

> *"(5) No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to-*
>
> *(a) the Central Bank or to another institution; or*
>
> *(b) a credit reference bureau established under subsection (4),*
>
> *in the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure." (Emphasis ours)*

140. It was contended that for the Plaintiff to maintain a suit as against the 2nd Defendant's agents then he must prove that the Defendants agents were acting in bad faith when they disclosed the Plaintiff's credit information. The 2nd defendant relied on ***Mombasa Misc. Civ Application No. 387 Of 2003 Republic V The Chief Magistrate's Court At Mombasa, Hassan Ibrahim Adam & Joseph Gitonga Ndirangu*** where

the learned judge citing **An Outline Of Judicial Review In Kenya by Prof. P.L.O Lumumb*a*** noted as follows:

> ***"BAD FAITH**:*
>
> *"Judicial review will be where a decision -maker is shown to have acted "Mala fides" that is, in bad faith. 'MALA FIDES' is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have remained mainly in the region of hypothetical cases. It covers fraud or corruption. This is something which should not be lightly alleged and is difficult to prove. Moreover, it is usually unnecessary given the more familiar alternatives, such as bias and improper motive. 'Mala Fides' bad faith may be evident for instance where the decision making has been actuated by vindictiveness."*

141. In this case it was contended that the plaintiff failed to produce any evidence that the 2nd Defendant acted in bad faith or supplied the credit report through bias, improper motive or vindictiveness and that having failed to utilize the dispute resolution mechanism as set out in ***Regulation 20 of the Regulations 2008*** then the Plaintiff cannot allege bad faith or any form of malevolence as he has never formally engaged the 2nd Defendant and any allegation of malice is pure speculation.

142. It was further submitted that the provisions of Section 31(5) of the Banking Act were meant to safeguard the 2nd Defendant in the performance of its statutory duty of maintaining a database of customers credit information and the ouster clause aids Credit Reference Bureaus and Banking Institutions to share information without fear of reprisals and/or retaliation for carrying out their statutory duty. That in this instance no malice can be inferred from the conduct of the 2nd Defendant which operated within its statutory duty and adhered to all the Regulations as set out in the *Banking regulations 2008.*

143. It was submitted that the ***FCRA Act*** under ***Section 1681h (e) (supra)*** has similar provisions which provide as follows: -

> *"(e) Limitation of liability. Except as provided in sections 616 and 617 [§§ 1681n and 1681o] of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 609, 610, or 615 [§§ 1681g, 1681h, or 1681m] of this title or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report, except as to false information furnished with malice or willful intent to injure such consumer."*

144. Further, that in the case of ***Thornton ~vs~ Equifax Inc 619F 2d 700 pg 2*** *Ross J.* held as follows in relation to the above provision: -

> *"Actions or proceedings in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information, however, are specifically provided for in the Act and are limited by the Act in Section 1681h(e). If such actions are based on information disclosed pursuant to requirements of the Act, a consumer may not bring any such action or proceeding unless the relevant information is false and furnished "with malice or wilful intent to injure such consumer," section 1681h(e) is recognized as providing qualified immunity for consumer reporting agencies..."*

145. The Learned Judge proceeded to state that: -

> *"The qualified privilege under the Act is purely statutory and as previously stated is the "quid pro quo" for full disclosure."*

146. It was contended that for the Plaintiff to overcome the statute bar under ***Section 31(5) of the Banking Act*** he must prove that the Defendant's disseminated false credit information wilfully, with malice or intent to injure. In the case of ***Reeves ~vs~ Equifax Information Services, L.L.C. et al pg 25*** *Scarret J.* stated: -

> *"Additionally, the court finds that the plaintiff's libel claim is pre-empted by the FCRA and, accordingly fails as a matter of law on this independent ground. See 15 U.S.C. § 1681h(e) ("no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency . . . except as to false information furnished with malice or wilful intent to injure such consumer."); see also Cousin, 246 F.3d at 375; Rivera, 2006 WL 2431391, at *3 ("Plaintiff's state law claims in the nature of defamation, invasion of privacy, or negligence with respect to the Defendants' reporting of information to a consumer reporting agency are pre-empted by § 1681h(e) unless Plaintiff proves 'malice or wilful intent to injure' her.") (Citing Young v. Equifax Credit Info. Servs., 294 F.3d 631, 638 (5th Cir. 2002))."*

147. It was contended that the plaintiff must prove that the 2nd Defendant knowingly and intentionally committed an act in conscious disregard for the rights of others as was held in case of ***Terry Cousin ~vs~ Transunion (supra)*** where the court held: -

> *"In **Pinner**, we noted that "wilful" is a word of many meanings and that its construction is often influenced by its context. See **Pinner**, 805 F.2d at 1263. In concluding that the consumer reporting agency in that case did not commit a wilful violation, we remarked that there was no evidence suggesting that the agency "knowingly and intentionally committed an act in conscious disregard for the rights of others." **Id.**; see also **Philbin**, 101 F.3d at 970; **Stevenson**, 987 F.2d at 293. Generally, courts have allowed a wilful noncompliance claim to proceed where a defendant's conduct involves wilful misrepresentations or concealments. See **Pinner**, 805 F.2d at 1263. In those cases, a consumer reporting agency has typically misrepresented or concealed some or all of a credit report from a consumer. See **id.** (discussing **Millstone v. O'Hanlon Reports, Inc.**, 528 F.2d 829 (8th Cir. 1976)); see also **Stevenson**, 987 F.2d at 294."*

148. In this case it was contended that the 2nd Defendant was upfront with the plaintiff and at no time did it conceal parts of his credit report or misrepresent it contents hence the Plaintiff has failed to overcome the statutory immunity provided by ***Section 31(5) of the Banking Act CAP 488*** and his claim ought to fail on this ground.

*1. **The 2nd Defendant is a disclosed statutory and/or disclosed Agent of the Central Bank and/or the 1st Defendant: -***

149. It was contended that the 2nd Defendant is a *statutory and/or disclosed agent* of the 1st Defendant and cannot therefore be held liable for the acts or omissions of the 1st Defendant (principal). The second defendant elaborated on the definition of Agency as defined in the ***Black's Law Dictionary 8th Edition pg 190*** as follows:

> *"agency: 1. A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions…"*

150. The 2nd defendant contended that the *2nd Defendant* is an agent and not a servant of the 1st Defendant and therefore no *vicarious liability* could attach as against it in relation to any tortious actions as opposed to the Plaintiff's contention. Reference was also made to the learned authors of the ***Halsbury's Laws of England 3rd Edition Vol. 1*** who distinguished between an agent, servant and independent contractor as follows:

> *"... An agent is to be distinguished on the one hand from a servant, and on the other from an*

independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work (b); an independent contractor, on the other hand is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce the result (c). An agent, though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principle, is not subject in its exercise to the direct control or supervision of the principle (d)..."

151. The learned authors continue to note that:

"... An agent primarily means a person employed for the purpose of placing the principle in contractual or other relations with a third party and it is essential to an agency of this character that a third party should be in existence or contemplated (h). The essence of such an agent's position is that he shall be but a conduit pipe connecting two other parties."

152. From the above, the 2nd defendant submitted that in this instance the 2nd Defendant is merely an agent of the 1st Defendant for the primary function of acting as a conduit of the customer information in the possession of the 1st Defendant and transmitting the same to other banks which have subscribed to the Credit Reference Bureau. Therefore, that the 2nd Defendant being a *disclosed agent* no liability can attach for its act of publishing the said information to the other banks on behalf of the 1st Defendant. In this contention Reliance was placed on the ***Halsbury's Laws of England 3rd Edition Vol. 1*** in considering the liability of agent for tortious actions as against 3rd parties where they stated as follows:

"Any agent, including a public agent (b), who commits a wrongful act (c) in the course of his employment, is personally liable (d) to any third person who suffers loss or damage thereby (e), notwithstanding that the act was expressly authorised or ratified by the principle (f), unless it was thereby deprived of its wrongful character (g). It is immaterial that the agent did the act innocently and without knowledge that it was wrongful (h), except in cases where actual malice is essential to constitute a wrong (i). (Emphasis ours)

153. It was submitted that the agency relationship exists in the following respects:

viii. ***Agency by Estoppel; and***

ix. ***Agency by contract.***

Agency by Estoppel: -

154. It was contended that the *2nd Defendant* is a disclosed *Agent by Estoppel* and therefore no suit can lie as against him for the acts or omissions of the 1st Defendant (Principal). *Agency by Estoppel* is defined in the ***Black's Law Dictionary 8th Edition pg 190*** as:

"agency by estoppel. An agency created by operation of law and established by a principal's actions that would reasonably lead a third person to conclude that an agency exists. — Also termed apparent agency; ostensible agency; agency by operation of law. [Cases: Principal and Agent 25(3), 137. C.J.S. Agency §§ 61, 157, 211.]"

155. It was submitted that by virtue of the operation of *Section 31(3)(b) and (c) of the Banking Act* and *Regulation 3(1)* of the *Banking Regulations (2008)* there is created an *Agency by estoppel* as between the 1st and 2nd Defendants. This agency arises by virtue of the operation of *Regulation 13(1)(a) – (d) of the Banking Regulations (2008)* which mandates the 2nd Defendant to receive customer information from the 1st Defendant. Further, that it mandates the 2nd Defendant to publish customer information as defined in *Regulation 14(3) of the Banking Regulation (2008)* to subscribing institutions in accordance with the provisions of *Regulation 15(1) of the Banking Regulations (2008)* on behalf of the 1st Defendant.

Accordingly, it was contended that as a disclosed *Agent by Estoppel* the 2nd Defendant cannot be sued for the information published in pursuance of its statutory mandate as an agent of the *1st Defendant.* This position is further bolstered by the provisions of *Regulation 28(1) of the Banking Regulations (2008)* which states that the 1st Defendant *"...shall be solely responsible for providing accurate information to Bureaus."* Further, that *Regulation 28(4) of the Banking Regulation (2008)* provides that *"...Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations."*

156. From the above it was submitted that the provisions of the statute clearly impose strict liability on the 1st Defendant to ensure reasonable accuracy and further it shall be entirely liable for any inaccurate information and ought to full indemnify the 2nd Defendant. It was submitted that in the case of ***Gatt v Barclay Bank PLC & Another (supra)*** the learned Judge described the CRA's as a *medium* through which various banks share customer information, which was true in Kenya as the information is provided by the Bank and further its accuracy is guaranteed by the Bank which continues to exercise control over the information to the extent that it can order the deletion of any information forwarded by it by issuing an Amendment Notice to the 2nd Defendant.

157. It was thus submitted that having failed to prove express malice on the part of the 2nd Defendant, the Plaintiff could not maintain a suit as against the 2nd Defendant for the information published on behalf of the 1st Defendant pursuant to this statutory agency relationship.

*ii. **Agency by contract: -***

158. It was submitted that the above *Agency by Estoppel* is further reinforced by the contract dated *25/11/2011* between the 1st and 2nd Defendants. That the said contract in essence creates an agency by contract and for the reasons stated above the 2nd Defendant cannot be held liable for disclosing the Plaintiff's customer information without express malice. In this case it was contended that in the unlikely event that the 2nd Defendant is still found liable as an agent of the 1st Defendant in relation to liability: it is trite law that an agent is entitled to ***re-imbursement and indemnity by a principle*** for any liability incurred in the performance of their duties as was stated in the ***Halsbury's Laws of England 3rd Edition Vol. 1 pg 203*** under the heading of rights of agent against principle as follows:

> *"The relation of principal and agent raises by implication a contract on the part of the principal to reimburse the agent in respect of all expenses, and to indemnify him against all liabilities, incurred in the reasonable performance of the agency (q)..."*

159. It was submitted that the above common law position is explicitly set out in the ***Credit Referencing Agreement dated 25/11/2010*** produced as ***"2nd Def Exh 5"*** under p*aragraph 6.1* titled ***Limitation of Liability and indemnity*** of the said contract which provides:

> *"The Bank acknowledges: (a) that the data is provided to CRBAfrica by third parties which CRBAfrica does not control, in particular in relation to the accuracy or completeness of the Data; (b) that the volume and nature of the information on CRBAfrica's databases (including the Data) makes it impractical for CRBAfrica to verify it; and (c) that, if CRBAfrica was to attempt to verify the Data, CRBAfrica would not be able to offer the services or would only be able to offer the services to the Bank at significantly increased cost. Subject to CRBAfrica's compliance with Regulation 17 of the Regulations, the Bank agrees that CRBAfrica shall not in any circumstances whatsoever be liable for any loss damage action claim expense or cost of any kind whatsoever arising whether directly or indirectly from any inaccuracies faults or omissions in the data or in the provision of the Data or in connection with the provision of services generally unless caused by CRBAfrica's gross negligence or wilful default."*

160. That the said *Credit Referencing Agreement* further provides under ***Clause 6.5*** as follows: -

> *"The Bank hereby agrees to indemnify and keep indemnified CRBAfrica and its officers employees, employees, personnel and agents from time to time (each an "Indemnified Person") <u>on a **full and unqualified indemnity basis** against all and any cost (including legal fees on an advocate – client basis) claims actions proceedings damages demands liabilities losses and expenses of whatsoever nature and howsoever arising suffered or incurred by the indemnified person relating to or in connection with any person making a claim for defamation, including a breach of contract, breach of confidentiality or otherwise against the indemnified person following the use of the Ban</u>k...*
>
> *...a breach of any of the representations and warranties set out in condition 5 or the use by the Bank of the services or the Data or the listing of the Listing information unless such costs claims actions proceedings damages demands liabilities losses and expenses arise solely through the CRB Africa's gross negligence or wilful default."*

161. It was submitted that Clause 5 on the other hand titled *Listing Information* provides the warranties in relation to the accuracy of the listed information forwarded by the 1st Defendant. That the above was confirmed by ***<u>"DW1"</u>*** who confirmed that the 1st Defendant retains control of the information by retaining the account statements and only forwards the credit reports to the 2nd Defendant and further that they gave warranties to the accuracy of the information and should any claim arise they would indemnify the 2nd Defendant on a full and unqualified basis.

162. The 2nd Defendant further submitted that it filed a *Notice of Claim against the 1st Defendant dated 9th August 2012* under *Order 1 rule 24(1) of the Civil Procedure Rules (2010)* and prayed for indemnity from the 1st Defendant for any liability and additionally the costs of litigation on the *Advocate – client scale* as set out in *Clause.*

163. Although the 1st Defendant raised the issue that they were not served with a notice as provided under *Clause 6.6* hence the 2nd Defendant is not entitled to indemnity, the 2nd defendant countered this assertion by referring to the evidence of "***<u>DW2" Olive Muasya</u>*** under cross-examination wherein she confirmed that the 2nd Defendant filed a Notice of Claim as against the 1st Defendant which was filed and served within the ***30 day period*** provided under *clause 6.6. of the CRA.* It was therefore submitted that the said notice of Claim is sufficient notice as contemplated in Clause 6.6. of the *<u>CRA</u>* and it was filed within 30 days of receipt of written notice of claim against the 2nd Defendant being the summons to this suit and the Pleadings. That the notice of claim wasn't issued within 30 days of receiving the demand letter as most demand letters are never acted upon as indicated by ***<u>"DW2"</u>*** they receive around 30 demand letters a month and most are resolved through the dispute mechanism and never lead to any legal proceedings hence to avoid frustrating the business relationship a notice of claim is only issued after an actual suit is filed and served together with summons.

164. It was the 2nd defendant's submission that the term written notice also covers service of actual proceedings in the form of summons which are the legally recognized manner of notifying a party of the existence of a claim. Therefore they urged the court to reject the 1st Defendants notion that it must be a demand letter that activates the process which was never set out in the CRA.

165. In the circumstances, it was prayed that should any liability arise then this court should find that the 1st Defendant ought to indemnify the 2nd Defendant on a full and unqualified basis for any damages and/or costs that may awarded.

On assessment of damages: -

a) General damages for defamation

166. It was submitted by the 2nd defendant that in the event that parties are found liable the court should apply the principles for the award of damages as set out by the Court of Appeal in the case of ***<u>Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company advocates [2013] eKLR</u>***

where the Learned Law Lords observed as follows:

> *"I would think that in the instant case to arrive at what could have been said to be a fair and reasonable awards the learned trial Judge could have drawn considerable support in the guidelines in JONES V POLLARD [1997] EMLR 233.243 and where a checklist of compensatable factors in libel actions were enumerated as:-*
>
> *1. the objective features of the libel itself, such as its gravity, its province, the circulation of the medium in which it is published, and any repetition.*
>
> *2. The subjective effect on the plaintiff's feelings not only from the prominence itself but from the defendant's conduct thereafter both up to and including the trial itself.*
>
> *3. Matters tending to mitigate damages, such as the publication of an apology.*
>
> *4. Matters tending to reduce damages.*
>
> *5. Vindication of the plaintiff's reputation past and future."*

167. In this instance it was contended that the purported libel was never published to the general public but only to ***one (1) subscribing financial institution being Barclays Bank of Kenya Limited*** under the provisions of *the Banking Act* and the *Banking Regulations 2008* therefore the averment in *paragraph 15 and 16* of the Plaint. Further, that any inconvenience suffered by the Plaintiff was only temporary in nature as was held in the ***Smeaton case (supra)*** where the court held as follows:

> *"I agree with Mr Handyside that in most cases of applications for credit failed on account of incorrect data the harm likely to be suffered is temporary inconvenience. It is possible that the judge overlooked this as a result of his flawed conclusion that it was inaccurate data, or more precisely the alleged breach of duty which gave rise thereto, which prevented Mr Smeaton / Ability Records from obtaining credit in and after July 2006.*

167. Mr Arden submitted that it is no answer to the vice of inaccuracy of data that it can be inspected and corrected. An applicant for credit whose application is refused because of inaccurate data has thereafter a hill to climb to overcome the inaccurate impression initially formed of him. He submitted that a requirement to consider a second application does not mean that the lender has to put out of his mind what he has first learned. But with respect to Mr Arden this is precisely what the Guide to Credit Scoring 2000 says should be done. Section 8.1 provides:-

> *"Any repeat application for credit will be treated as a new application, and assessed accordingly. An applicant for credit will not be declined or accepted solely on the grounds of having made a previously declined or accepted application to that credit grantor."*

168. In this case, it was submitted that any inconvenience is only likely to be temporary as testified by the Plaintiff who subsequently obtained a loan from BBK Ltd.

169. Further that under the ***Regulation 18(2) of the Regulations*** the negative information is not the only criteria that Banks use to award loan facilities. The Regulation enacts that: -

> *"(2) Information kept in accordance with sub-regulation (1) may not be used solely to affect the customers' chances of obtaining credit but to inform the decision making process."*

Hence the gravity of the publication was not huge as it was just one factor considered in the loan application process and there being no *adverse action notice* it is clear peradventure that it was not solely relied on by BBK which had listed the Plaintiff on its own.

170. It was also submitted that in any event the information was deleted on the same day the Amendment

Notice was issued and a Notice of Change under *Regulation 20(12) of the Regulations 2008* was issued requiring the institutions that had accessed the data to seek a new credit report as there were significant changes to the Plaintiff's credit information, which act constituted a valid mitigation of any future damage that the Plaintiff's reputation might have suffered. And that to demonstrate the lack of damage to the Plaintiff, at the time of trial, he had been promoted from the *Chief Finance officer* to the *Corporate Affairs Manager* and therefore the listing had no effect on his personal or professional life at all. The 2nd defendant therefore submitted that the award of nominal general damages of ***Kshs. 100,000/-*** would be adequate given the narrow publication to one person and the fact that the 2nd Defendant was not actuated by malice or any improper motive.

i. ***Aggravated Damages: -***

171. It was submitted that the plaintiff is not entitled to an award of Aggravated/exemplary damages as he has not satisfied the requirements set out by the Court of Appeal in the ***Ken Odondi Case (supra)*** where it was held that: -

> *"Exemplary damages on the other hand had gone beyond compensation and are meant to "punish" the defendant. Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize."*

172. In the instant case it was submitted that the 1st& 2nd Defendants were acting in pursuance to their statutory mandate and neither acted oppressively, arbitrarily or unconstitutionally and further that their conduct was not actuated by malice or ill-will but that they were merely carrying out communications in the public interest, therefore no aggravated/exemplary damages should be awarded to the Plaintiff. They nonetheless submitted that the sum of ***Kshs. 100,000/-*** would be adequate compensation considering that the publication was extremely limited and further that the Defendants withdrew the said customer report and the Plaintiff was able to obtain credit.

173. In conclusion the 2nd defendant maintained that the Plaintiff had not established that the defendants were actuated by actual malice in publishing the said information hence his claim for defamation is unmerited, his claim for general damages for negligence is unsound in law and cannot be maintained and the claim for breach of statutory duty was not properly pleaded and ought to be disregarded in its entirety as a party is bound by their pleadings. They prayed that the Plaintiff's suit be dismissed with costs to the 2nd Defendant.

DETERMINATION OF ISSUES BY THE COURT

174. Based on the pleadings, oral and documentary evidence on record as well as the respective parties exhaustive elaborate submissions on the issues framed and considered by this court in line with the authorities relied on, this court finds the following issues for determination

i. ***Whether the listing by CRB as advised by KCB was false and defamatory of the plaintiff's character, profession and financial integrity.***

175. On this point, I must first establish what defamation is. Defamation was defined by the learned authors of the **Halsbury's Laws of England 3rd Edition Vol. 24 pg 6** 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).***

179. Defamation is further defined by the learned authors ***Gatley on Libel & Slander 11th Edition*** as follows: -

"A publication without justification or lawful excuse which is calculated to injure the reputation of another by exposing him to hatred, contempt or ridicule...' Even without executing such strong feeling as hatred, contempt or ridicule, a statement may amount to defamation if it tends to lower a person in the estimation of right thinking people generally or tends to make them shun or avoid him..."

177. Therefore, for the Plaintiff to successfully prove defamation he must satisfy the court that:

x. the statement was defamatory;

xi. it was false and it referred to him; and

xii. The Defendant published it to a third party.

xiii. That it was maliciously published

178. In the instant case, the publication of the information concerning the plaintiff's alleged default by way of listing is evident and is not denied by any of the defendant. The 1st defendant pleaded the defences of justification and qualified privilege. They maintained that the plaintiff defaulted in repayment for the month of May, 2010 and that that is the default that gave rise to his being listed as a defaulter hence there can be no defamation where there is truth and justification. They referred this court to the plaintiff's statements of account produced in evidence.

179. The 2nd defendant too pleaded the defence of qualified privilege and being a disclosed agent of the 1st defendant in disseminating such information which is a statutory duty imposed on it hence it contended that it cannot be held liable for exercising its statutory duty. Further, that the claim by the plaintiff is therefore statute barred.

180. The defence of justification is an absolute defence. I must therefore determine whether it was available to the defendants as an important ancillary question. As to whether the defence of justification is available to the defendants, I have carefully examined the loan account, the customer's list as send by the plaintiff's employer to the 1st defendant on a monthly basis enclosing cheque payment for the respective staff loan recovery and liquidation account statement for the plaintiff. I have also examined the correspondence regarding the KCB unsecured loan for KPAS Ltd staff on check off basis terms. The general terms included term No. 8 which states that ***"8. Repayment of the loan to commence within one month after release of funds."*** Under term ***9, repayment period in the schedule is less by one month to accommodate administrative time lapse before loan repayment commences.***" The letter of offer which was signed on 23rd April 2010 was to last for one month up to 23rd May, 2010. Since the loan was processed and paid in the last week of April, 2010, I have no doubt in my mind that the payments made by check off system to the bank in June, 2010 was as agreed upon between the 1st defendant and the plaintiff, giving one month (the month of May, 2010) to ***accommodate administrative time lapse before loan repayment commences.***"

181. Under "Loan repayment", the letter of offer stated clearly that ***"at the end of each month, KAPS will make a lump sum payment to KCB covering all loan repayments due that month alongside a list of loan applicants. The individual loan accounts will be credited at KCB Branch."***

182. The loan repayment schedule for the month of May 2010 was signed off on 24th April, 2010 and vide cheque No 8320 KCB for Kshs 221,368.00 was send on 4/6/2010. The Bank statement for the loan account shows that the money was credited to that account on 9th June, 2010 which was one month after the processing of the loan, giving an allowance for ***one month*** to ***accommodate administrative time lapse before loan repayment commences.*** The question is whether that amounted to a default. Considering that the subsequent repayment schedules were paid in arrears in the month following the due month and as lump sum, and the fact that there was no single query raised by the 1st defendant that there was a default,

this court fails to understand how the cheque remitted on 4th June, 2010 and credited on 9th June, 2010 being the first repayment instalment by check off system could have been a default. And if it was, the question is, why did the bank not submit the names of the rest of its customers on that list as having defaulted since the cheque was a single cheque covering 21 loanees of the same employer?

183. In addition, the 1st defendant by its own admission in a letter to the 2nd **defendant dated** 25th April, 2012 **clearly stated th**at ***"the listing was inaccurate as at the time it was submitted,"*** and asked the 2nd defendant ***"to delete the named customers from the default list."*** Further, in the letters dated 3rd January 2011 and 23rd January, 2011 by the 1st defendant to the plaintiff claiming loan arrears of Kshs 47,497.74 each, that letter did not specify for which months the loan repayment had not been remitted. Further, the letter of 25th April, 2012 was also clear that the Bank was in the process of having the plaintiff's name delisted from CRB. There was no mention of the alleged default. That being the case, this court finds that there was no default for the month of May, 2010 and that therefore the listing was inaccurate and or incorrect. Consequently the defence of truth and or justification is not available to the defendants as pleaded and intensely submitted on.

184. Coming to the substantive question of **whether such listing and or publication which are not denied were defamatory of the plaintiff in his credit, profession and integrity,** to answer that question, this court notes the **"Important Notice**" on the **Consumer Credit Report** that:

> ***"the information is not intended to reflect upon the solvency, financial standing or the stability, honesty or motives of any person referred to and does not imply that any party is unable to make payment or that they are not prepared to pay their debts or that they are persons to whom credit should not be given."***

185. The above important notice in my view therefore, has the effect that even if the publication was inaccurate or incorrect and read by a party other than the 2nd Defendant's subscribers, it would not impugn the Plaintiff in bad light. The Plaintiff in this case did not in fact prove otherwise. The plaintiff's attempt to define the term ***"delinquency"*** to mean criminal behaviour is not supported as the term from the notice I have reproduced above clearly shows that it is used in a technical sense and carries no imputation of criminal behaviour on the part of the plaintiff.

ii. ***The other issue for determination is whether the said incorrect listing was done maliciously***

186. In answer to this dual issue, the letter dated 25th April, 2012 by 1st Defendant to 2nd Defendant reveals that the 1st Defendant called for deletion of the Plaintiff's name from the listing after the arrears issue was resolved and upon ***realization that the information submitted for listing was inaccurate as at the time it was provided***. The 1st defendant categorically urged the 2nd defendant to ***"delete the above inaccurate information and advise our customer accordingly."*** This is a clear admission on the part of the 1st defendant that there was inaccurate information submitted to the CRB as at the time it was submitted. The only question therefore is whether there was malice or bad faith in the publication or whether the publication was made on qualified privilege.

187. Malice has been defined in the case of ***Horrocks v Lowe [1974] 1 All ER 662 at 669*** cited with approval by *Nicholls LJ* in the ***Reynolds case*** (supra) as follows:

> ***"The classic exposition of malice in this context is that of Lord Diplock in Horrocks v Lowe [1974] 1 All ER 662 at 669, [1975] AC 135 at 149. If the defendant used the occasion for some reason other than the reason for which the occasion was privileged he loses the privilege. Thus, the motive with which the statement was made is crucial. If desire to injure was the dominant motive the privilege is lost. Similarly, if the maker of the statement did not believe the statement to be true, or if he made the statement recklessly, without considering or caring whether it was true or not. Lord Diplock emphasised that indifference to truth is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true."***

The Learned Lord Justice continued to state that:

> ***"In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be "honest", i.e., a positive belief that the conclusions they have reached are true. The law demands no more."***

188. The above position was cited with approval by *Maloney J.* in the case of ***Gatt v Barclay Bank PLC & Another (supra)*** where he stated:

> ***"Qualified privilege is defeated if the Claimant can prove that the Defendant was actuated by express malice in publishing the words complained of. In this context, what must be shown is a dominant and improper motive, i.e. other than the purpose for which the privilege was given; and generally this is proved by showing that the Defendant knew that his words were untrue, or at least did not believe them to be true(see Horrocks v. Lowe [1975] AC 135). Negligence is not enough, unless it rises to the point of reckless indifference to truth. Where the Defendant is a corporation, it must also be shown that a particular employee or agent both participated in the publication and had the required malicious state of mind; Broadway Approvals v. Odhams [1965] 1 WLR 805. Here, the only such person would have to be Mr Williams."***

189. The above is also the position in the United States of America where DeMoss J. in the case of ***Terry Cousin v. Trans Union Corporation, (supra)*** held as follows: -

> ***"Under § 1681h(e), consumer reporting agencies are generally qualifiedly immune from state law claims for defamation unless they involve malice or wilful intent to injure. Both Trans Union and Cousin agree that courts have determined that malice under this statutory scheme is congruent with the common law standard. See Thornton v. Equifax, 619 F.2d 700, 703 (8th Cir. 1980). Thus, to establish defamation with malice in the present case, one must establish that the defendant when he published the words--(1) either knew they were false, or (2) published them in reckless disregard of whether they were true or not. See Gulf Publishing Co. v. Lee, 434So. 2d 687, 695 (Miss. 1983) (citing Reaves v. Foster, 200So. 2d 453, 458-59 (Miss. 1967))."***

From the above exposition, in my view, no such malice was proved as against the two defendants. This is in view of the **Important Notice** on the Consumer Credit Report reproduced above. In addition, while the plaintiff maintained that the information was forwarded to the 2nd defendant without his written consent, under cross-examination he conceded that he had expressly in writing authorized the 1st Defendant to disclose his credit information to Credit Reference Bureaus under paragraph 1.3(b) of the Letter of Offer produced as ***"P Exh 3"*** which provides as follows:

> ***"1.3 The Borrower further agrees that the Bank may disclose its personal data and/or information relating to the borrower including data and information relating to any transaction documents or the assets, business or affairs of the Borrower outside the Bank's group whether such personal data and/or information is obtained after the Borrower ceases to be Bank's customer or during the continuance of the Banker-customer relationship or before such relationship was in contemplation:***
>
> ***(b) To licensed credit reference bureaus or any other creditors…"***

191. From the above it is the view of this court that the Plaintiff duly authorized the disclosure of his credit information in writing, and hence cannot deny this, and which information could either be positive or negative. This is not to say that the plaintiff authorised the disclosure of incorrect credit information as it was the duty of the 1st defendant to submit correct and accurate credit information concerning its

customers to the 2nd defendant.

192. It must also be noted that contrary to the contents of paragraph 16(c) of the Plaint, the 2nd Defendant herein only shared information as set out in *Regulation 14 of the Banking Regulations* which details are displayed in the Credit Reports produced as "P Exh 10," 1st Def Exh 3" & 2nd Def Exh 3." An examination of the said credit reports show that they are strictly confined to the information set out in Regulation 14 hence the Defendants did not share any information outside of the Regulations. The Plaintiff also failed to prove on a balance of probabilities that there was misuse and/or misapplication of the credit information. He did not lead any evidence to that effect.

193. The Plaintiff also alleged that the information was published to the financial community in general, his family, his employer, peers, professional colleagues and right thinking members of the society which if true, would be a grievous breach of Regulation 15(1)(a) of the Banking Regulations 2008. Nonetheless, under cross-examination the Plaintiff duly acknowledged that the information was only released to the two Banks that he had applied for loans from and had given his written consent for such disclosure thus he failed to prove that the information was published to the financial community in general, his family, his employer, peers, professional colleagues and right thinking members of the society in breach of the above *15(1)(a) of the Banking Regulations 2008*.

194. It must also be noted that contrary to the Plaintiff's claim that the 2nd Defendant failed to correct or delete untrue or misleading information, the 2nd Defendant deleted the credit information on the plaintiff on *25th April 2012* the same day that it received an amendment notice. It expeditiously issued a Notice of Change to all institutions that had accessed the customer credit information on the *27th April 2012* about 2 days after receiving the amendment notice. Accordingly the 2nd Defendant adhered to the statutory timelines set out in *Regulations 20(12) of the Banking Regulations 2008*.

195. In the circumstances the Plaintiff has failed to prove an instance when the 2nd Defendant failed to adhere to its statutory obligations. The fact that the 1st defendant took some time to advise the 2nd defendant to correct the information in itself does not mean or impute malice as the record shows that the 1st defendant had to verify to ensure that the information they were supplying was accurate to avoid a replication of the mistake they had done in the first instance of submitting inaccurate information concerning the performance of the plaintiff's loan.

196. On the part of the 2nd defendant, I do not agree that they were malicious simply because they refused to delete the information insisting that they could only do so at the instance of the 1st defendant. In my humble view, the 2nd defendant did not act independently. It acted and does act on information supplied to it by the financial institutions and it is only those financial institutions that can clarify whether the information given was accurate or inaccurate and in this case, once the information was supplied by the 1st defendant, the 2nd defendant promptly did effect the amendments to the information supplied thereby clearing the plaintiff of any default.

197. In addition, the Consumer Credit Report dated 26th April, 2012 clearly show that the plaintiff had been listed as a defaulter by Barclays Bank of Kenya, the same Bank that he was claiming he was defamed before by the defendants' erroneous listing. In that report, the plaintiff was listed on 22nd March, 2012 as having defaulted on 1st January, 2011. The plaintiff admitted that he had taken a previous loan from Barclays Bank but from the evidence that he gave on oath, he avoided delving into that issue of Barclays Bank listing him as a defaulter which default was independent of the erroneous default given by the 1st defendant.

I therefore find that no malice was exhibited by the defendants in publishing the plaintiff as a loan defaulter in error.

*iii. **Whether the 2nd Defendant is a disclosed statutory and/or disclosed Agent of the Central Bank***

and/or the 1st Defendant: -

198. As earlier stated in the introductory part of this judgment, the 2nd Defendant is a *statutory and/or disclosed agent* of the 1st Defendant. That being the case, it cannot therefore be held liable for the acts or omissions of the 1st Defendant (principal) who admittedly submitted inaccurate information on the plaintiff's default at the time of such submission. Agency is clearly defined in the ***Black's Law Dictionary 8th Edition pg 190*** as follows:

> ***"Agency- 1. A fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions…"***

199. The 2nd Defendant being an agent and not a servant of the 1st Defendant, no vicarious liability can attach as against it in relation to any tortious actions. ***Halsbury's Laws of England 3rd Edition Vol. 1*** distinguishes between an agent, servant and independent contractor as follows:

> ***"... An agent is to be distinguished on the one hand from a servant, and on the other from an independent contractor. A servant acts under the direct control and supervision of his master, and is bound to conform to all reasonable orders given him in the course of his work (b); an independent contractor, on the other hand is entirely independent of any control or interference, and merely undertakes to produce a specified result, employing his own means to produce the result (c). An agent though bound to exercise his authority in accordance with all lawful instructions which may be given to him from time to time by his principle, is not subject in its exercise to the direct control or supervision of the principle (d)..."***
>
> ***"... An agent primarily means a person employed for the purpose of placing the principal in contractual or other relations with a third party and it is essential to an agency of this character that a third party should be in existence or contemplated (h). The essence of such an agent's position is that he shall be but a conduit pipe connecting two other parties."***

200. In this instance Iam in agreement with the 2nd defendant's submissions that the 2nd Defendant is merely an agent of the 1st Defendant for the primary function of acting as a conduit of the customer information in the possession of the 1st Defendant and transmitting the same to other banks which have subscribed to the Credit Reference Bureau. *Accordingly,* the 2nd Defendant being a *disclosed agent* no liability can attach for its act of publishing the said information to the other banks on behalf of the 1st Defendant. Iam fortified by the ***Halsbury's Laws of England 3rd Edition Vol. 1*** where, in considering the liability of agent for tortious actions as against 3rd parties, they stated as follows:

> ***"Any agent, including a public agent (b), who commits a wrongful act (c) in the course of his employment, is personally liable (d) to any third person who suffers loss or damage thereby (e), notwithstanding that the act was expressly authorised or ratified by the principle (f), unless it was thereby deprived of its wrongful character (g). It is immaterial that the agent did the act innocently and without knowledge that it was wrongful (h), except in cases where actual malice is essential to constitute a wrong (i).*** *(Emphasis added).*

201. Further, the *2nd Defendant* is a disclosed *Agent by Estoppel* and therefore no suit can lie as against it for the acts or omissions of the 1st Defendant (Principal). *Agency by Estoppel* is defined in the ***Black's Law Dictionary 8th Edition pg 190*** as:

> ***"agency by estoppel. An agency created by operation of law and established by a principal's actions that would reasonably lead a third person to conclude that an agency exists. — Also termed apparent agency; ostensible agency; agency by operation of law. [Cases: Principal and Agent 25(3), 137. C.J.S. Agency §§ 61, 157, 211.]"***

202. In addition, the Plaintiff's claim in this matter is for defamation and negligence arising out of a publication in an occasion of qualified privilege therefore *express malice* is essential to constitute a wrong therefore in this instance the Plaintiff having failed to prove malice as against the 2nd Defendant's agents, they cannot maintain a tortious claim as against them.

203. Additionally, by virtue of *Section 31(3)(b) and (c) of the Banking Act* and *Regulation 3(1)* of the *Banking Regulations (2008)* there is created an *Agency by estoppel* as between the 1st and 2nd Defendants. This agency arises by virtue of the operation of *Regulation 13(1)(a) – (d) of the Banking Regulations (2008)* which mandates the 2nd Defendant to receive customer information from the 1st Defendant. It also mandates the 2nd Defendant to publish customer information as defined in *Regulation 14(3) of the Banking Regulation (2008)* to subscribing institutions in accordance with the provisions of *Regulation 15(1) of the Banking Regulations (2008)* on behalf of the 1st Defendant. That being the case, as a disclosed *Agent by Estoppel* the 2nd Defendant cannot be sued for the information published in pursuance of its statutory mandate as an agent of the *1st Defendant.* This position is further augmented by the provisions of *Regulation 28(1) of the Banking Regulations (2008)* which states that the 1st Defendant *"...shall be solely responsible for providing accurate information to Bureaus."* Further, *Regulation 28(4) of the Banking Regulation (2008)* provides that *"...Institutions shall be entirely responsible and under obligation to submit and update all customer information to the Bureau in accordance with these Regulations."*

204. From the above it is clear that the provisions of the statute clearly impose strict liability on the 1st Defendant to ensure reasonable accuracy and further it would be entirely liable for any inaccurate information and to fully indemnify the 2nd Defendant.

205. In the case of ***Gatt v Barclay Bank PLC & Another (supra)*** the learned Judge described the CRA's as a *medium* through which various banks share customer information, this is true in Kenya as the information is provided by the Bank and further its accuracy is guaranteed by the Bank which continues to exercise control over the information to the extent that it can order the deletion of any information forwarded by it by issuing an amendment notice to the 2nd defendant, the way it did in this case. It thus follow that having failed to prove express malice on the part of the 2nd Defendant, the Plaintiff cannot maintain a suit as against the 2nd Defendant for the information published on behalf of the 1st Defendant pursuant to the 2nd defendant's statutory mandate and agency relationship.

206. The above *Agency by Estoppel* is further reinforced by the contract dated *25/11/2011* between the 1st and 2nd Defendants. The said contract created an agency by contract and for the reasons stated above the 2nd Defendant cannot be held liable for disclosing the Plaintiff's customer information in the absence of express malice. The ***Credit Referencing Agreement dated 25/11/2010*** produced as ***"2nd Def Exh 5"*** under p*aragraph 6.1* titled ***Limitation of Liability and indemnity*** of the said contract provides that:

> ***"The Bank acknowledges: (a) that the data is provided to CRBAfrica by third parties which CRBAfrica does not control, in particular in relation to the accuracy or completeness of the Data; (b) that the volume and nature of the information on CRBAfrica's databases (including the Data) makes it impractical for CRBAfrica to verify it; and (c) that, if CRBAfrica was to attempt to verify the Data, CRBAfrica would not be able to offer the services or would only be able to offer the services to the Bank at significantly increased cost. Subject to CRBAfrica's compliance with Regulation 17 of the Regulations, the Bank agrees that CRBAfrica shall not in any circumstances whatsoever be liable for any loss damage action claim expense or cost of any kind whatsoever arising whether directly or indirectly from any inaccuracies faults or omissions in the data or in the provision of the Data or in connection with the provision of services generally unless caused by CRBAfrica's gross negligence or willful default."***

207. The said *Credit Referencing Agreement* further provides under ***Clause 6.5*** as follows: -

"The Bank hereby agrees to indemnify and keep indemnified CRBAfrica and its officers employees, employees, personnel and agents from time to time (each an "Indemnified Person") on a full and unqualified indemnity basis against all and any cost (including legal fees on an advocate – client basis) claims actions proceedings damages demands liabilities losses and expenses of whatsoever nature and howsoever arising suffered or incurred by the indemnified person relating to or in connection with any person making a claim for defamation, including a breach of contract, breach of confidentiality or otherwise against the indemnified person following the use of the Bank...

...a breach of any of the representations and warranties set out in condition 5 or the use by the Bank of the services or the Data or the listing of the Listing information unless such costs claims actions proceedings damages demands liabilities losses and expenses arise solely through the CRB Africa's gross negligence or wilful default."

208. The above was confirmed by ***"DW1"*** that the 1st Defendant retains control of the information by retaining the account statements and only forwards the credit reports to the 2nd Defendant and further that they gave warranties to the accuracy of the information and should any claim arise they would indemnify the 2nd Defendant on a full and unqualified basis. *Clause 5* on the other hand titled *Listing Information* provides the warranties in relation to the accuracy of the listed information forwarded by the 1st Defendant.

209. In other words, even if this court were to find the 2nd defendant liable, that liability would be subject to full indemnity by the 1st defendant who was also served with a Notice of claim by the 2nd defendant. However, as I have found no liability against either of the defendants, the matter rests at that.

d. ***As to whether the defendants owed the plaintiff a statutory duty under the Banking Act and CRB Regulations***

210. I find that the defendants owed the plaintiff a statutory duty under the Banking Act and CRB Regulations. However, i find that none of the said statutory obligations were in the circumstances of this case breached by the defendants.

e. ***On whether the suit is statute-barred under section 31 (5) of the Banking Act,***

211. The 1st defendant relied on Section 31 (5) of the Banking Act which provides that:

"No duty, to which an institution or its officers may be subject, shall be breached by reason of the disclosure, in good faith, of any information under subsection (2), to:

(a) The Central Bank or to another institution; or

(b) A credit reference bureau established under subsection (4), in the course of the performance of their duties and no action shall lie against the institution or any of its officers on account of such disclosure."

212. It was further submitted that the above provision expressly prohibits the Plaintiff's very action of instituting the suit herein, as no breach has been occasioned by the 1st Defendant in disclosing the Plaintiff's information in utmost good faith to the 2nd Defendant, in the course of performing its duties.

213. My view on this is that the 1st defendant is protected by statute where they act in good faith. In this case, they owned up to the error of inaccuracy and upon such discovery of such error of listing the plaintiff as a defaulter in the absence of evidence of default, they wrote to the 2nd defendant seeking for correction and deletion of the inaccurate information. Having so found that the inaccurate listing has not been proved to be malicious, I hold that not every wrong must give rise to a cause of action and this is one

of those cases where I would find that in the absence of bad faith, the plaintiff's claim did not lie against the defendants.

f. ***As to whether the defendants acted negligently to the detriment of the plaintiff as per the particulars of negligence pleaded***

214. I find in the negative for the reasons that follow.

The *Banking (Credit Reference Bureau) Regulations 2008* only create a statutory duty and cannot without express provisions to that effect create a co-extensive duty of care in tort giving rise to a claim for general damages in common law negligence. Thus, the existence of a statutory duty does not create a co-existing duty of care in tort and/or common law between Credit Reference Bureaus and Bank customers. Iam fortified by the persuasive English Court of Appeal case of ***Keith Smeaton –vs- Equifax PLC [2013] EWCA Civ 108*** where *Tomlinson L. J.* considered this issue under similar provisions in the *UK Data Protection Act and Consumer Credit Act 1974 and the Consumer Credit (Credit Reference Agencies) Regulations 2000,* which constitute the statutory regime in England. The Learned Judge held as follows:

> ***"With respect to the judge, this reasoning falls into the error identified by Lord Hoffmann in Customs and Excise Commissioners v Barclays Bank [2007] 181 at 200:-***
>
> ***"The question of whether the order can have generated a duty of care is comparable with the question of whether a statutory duty can generate a common law duty of care. The answer is that it cannot: see Gorringe v Calderdale Metropolitan Borough Council [2004] 1 WLR 1057. The statute either creates a statutory duty or it does not (that is not to say, as I have already mentioned, that conduct undertaken pursuant to a statutory duty cannot generate a duty of care in the same was as the same conduct undertaken voluntarily). But you cannot derive a common law duty of care directly from a statutory duty."(Emphasis added).***

215. In addition, the *Banking (Credit Reference Bureau) Regulations 2008* only impose a statutory duty to retain customer information and do not impose a duty of care in tort or common law negligence. The Learned Lord Justice *Tomlinson L. J.* further stated that: -

> ***"I also consider that the judge was in error in concluding that a CRA assumes a responsibility to every member of the public simply by choosing to operate this type of business. As Lord Mance put it in the Barclays case at 217, such an approach "is to assign to the concept of voluntary assumption of responsibility so wide a meaning as to deprive it of effective utility". Thus the judge was in my view wrong to identify a duty of care in tort co-extensive with that which he had found to be imposed by the statute." (Emphasis added).***

216. Iam persuaded by the above decision and find that the CRB Regulations impose an involuntary statutory duty and do not create a corresponding duty of care in tort to the general public hence exposing Credit Reference Bureaus to indeterminate and unlimited claims in tort as this was not the intention of the enactment of the said Regulations. The Plaintiff in his submissions has relied on the case of ***Bryant ~vs~ TRW INC*** which is an American case which in my humble view is not applicable the Kenyan context. This is so because the ***Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681*** has specific provisions providing for civil liability for negligent non-compliance unlike the Kenyan CRB Regulations which mirror the United Kingdom Regulations. In particular, ***Section 617. of the Fair Credit Reporting Act*** titled ***Civil liability for negligent noncompliance*** *[15 U.S.C. § 1681o]* provides as follows: -

> ***"(a) in general. Any person who is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of-***
>
> ***(1) Any actual damages sustained by the consumer as a result of the failure;***
>
> ***(2) in the case of any successful action to enforce any liability under this section, the costs of the***

action together with reasonable attorney's fees as determined by the court.

(b) Attorney's fees. On a finding by the court that an unsuccessful pleading, motion, or other paper filed in connection with an action under this section was filed in bad faith or for purposes of harassment, the court shall award to the prevailing party attorney's fees reasonable in relation to the work expended in responding to the pleading, motion, or other paper."

217. From the above analysis, Iam persuaded that the case of ***Bryant ~vs~ TRW INC*** has no application in the Kenyan context and in effect supports the 2nd defendant's submission that without express provisions providing for common law negligence then a plaintiff cannot maintain an action for common law negligence as against the 2nd Defendant in Kenya. The position in Kenya is more akin to the position in the United Kingdom where the learned judges in the case of ***Smeaton vs Equifax (Supra)*** further considered the issue of causation, specifically, whether there existed a causal link between Mr. Smeaton's alleged loss and the listing by a Credit Reference Bureau. Tomlinson L. J's consideration are relevant to the issues herein where he held that:

"Approaching the matter on the basis of the traditional three-fold test of foreseeability, proximity and whether it is fair, just and reasonable to impose a duty, Mr Handyside supplied four compelling reasons which, to my mind, demonstrate conclusively why it is inappropriate here to superimpose on whatever is the statutory duty a co-extensive duty of care in tort. Thus:-

"(1) It is doubtful whether it was reasonably foreseeable that the recording of incorrect data on Mr Smeaton's credit reference would cause him any loss, having regard to the practices operated by the credit industry set out in the Guide to Credit Scoring 2000. A person whose credit application was rejected because of adverse CRA data would be told of that fact and would be entitled to take steps to correct (or dispute) that data and to require the lender to reconsider the application for credit having regard to further, correcting information provided by the applicant.

(2) It would also not be fair, just or reasonable to impose a duty. In particular, imposing a duty owed to members of the public generally would potentially give rise to an indeterminate liability to an indeterminate class.

(3) It would also be otiose given that the DPA provides a detailed code for determining the civil liability of CRAs and other data controllers arising out of the improper processing of data.

(4) Apart from the DPA, Parliament has also enacted detailed legislation governing the licensing and operation of CRAs and the correction of inaccurate information contained in a credit file in the CCA 1974. This provides for the possibility of criminal sanctions, but does not create any right to civil damages. In such circumstances it would not be appropriate to extend the law of negligence to cover this territory."

218. This court associates itself with the above decision and find that the plaintiff's claim is not foreseeable and further that the Plaintiff had the opportunity to dispute and/or rectify the allegedly erroneous information under *Regulation 20 of the Regulations 2008* and seek further financial assistance from the Bank, which, he did not pursue. In any event, as the learned Judge in the ***Smeaton –vs- Equifax case (Supra)*** rightly noted, any inconvenience is only likely to be temporary in nature. The learned judge observed that that:

"I agree with Mr Handyside that in most cases of applications for credit failed on account of incorrect data the harm likely to be suffered is temporary inconvenience. It is possible that the judge overlooked this as a result of his flawed conclusion that it was inaccurate data, or more precisely the alleged breach of duty which gave rise thereto, which prevented Mr Smeaton / Ability Records from obtaining credit in and after July 2006."

219. In relation to the right to correction the courts in Kenya have also found that where a party fails to pursue the statutory reliefs provided under *regulation 20 of the Banking Regulations 2008* then they

cannot bring a suit to claim damages as the same is brought prematurely having by-passed the statutory provisions. In support of this position, the case of ***Amy Kagendo Mate –vs- Prime Bank Limited & Credit Reference Bureau Africa Limited in Nairobi HCCP No. 17 of 2013 –*** is instructive where *Ngugi J.* held as follows:

> ***"In the present case, the petitioner complains and seeks a declaration, inter alia, that the 2nd respondent has violated her rights under the Constitution by maintaining in its database and disseminating 'inaccurate, outdated and untruthful credit information regarding thePetitioner and without due notice to her of the same…'***
>
> ***The petitioner has not pleaded that she invoked the provisions of Regulation 20, and what the outcome thereof was. On the pleadings before me, it appears that the petitioner sought the assistance of this court after by-passing the statutory remedy which is intended to address her grievances with respect to the information held by the 2nd respondent. I would therefore agree with the 2nd respondent that this petition is improperly before me on this point."***

220. Iam also persuaded by the decision in ***Nairobi HCCC No. 551 of 2011 Daniel Gachanja Githaiga –Vs- Credit Reference Bureau Africa Ltd & 2 Others*** where *Ogola J.* held as follows: -

> ***"Finally, in my view, the application is premature as the procedure for correction and/or deletion of a customer's information shared with the 1st Defendant is clearly and intricately provided for under Regulation 20 of the Banking (Credit Reference Bureau) Regulations, 2008, which procedure inter-a-alia requires a customer to notify the 1st Defendant in writing that he disputes the reference, after which the 1st Defendant carries out investigations and decides whether to delete or retain the reference. The Plaintiff has not invoked and/or exhausted the aforesaid procedure, and therefore this application is premature."***

221. The plaintiff in this case failed to pursue a statutory recourse and hence cannot maintain a claim in negligence. Further, it would not be fair, just or reasonable to impose such a duty on Credit Reference Bureaus to the general public as the Bureaus merely carry out a statutory duty which imposition would lead to unlimited liability to an undefined class.

222. Further, the Regulations have detailed provisions on the resolution of any dispute under *Regulation 20 of the Banking Regulations 2008* which are adequate and similar to the *UK Data Protection Act and Consumer Credit Act 1974* and the *Consumer Credit (Credit Reference Agencies) Regulations 2000, the Banking Act and the Regulations 2008* impose criminal liability and statutory fines on Bureaus which fail to follow the regulations hence it would be improper to impose civil Liability specifically where: -

> v. Sharing of credit information without the consent of the customer is a criminal offence as set out in *Section 31 of the Banking Act* as read together with *Section 49 of the said Act*;
>
> vi. a Bureau violates the regulations, there are statutory fines imposed under *Regulation 13(3)* that where a Bureau engages in unauthorized activity it can be fined *Kshs. 500,000/-*;
>
> vii. under *Regulation 15(5)* where a Bureau flouts the restriction on the use of customer information a similar fine can be imposed; and
>
> viii. Under *Regulation 30* the Central Bank of Kenya has powers to impose fines and even to revoke a Bureau's license.

223. Thus, it is clear that there are criminal sanctions and therefore it would be inappropriate to extend the law of negligence to this area since the *Banking Regulations 2008* do not impose civil liability for common law negligence.

224. Based on my above analysis of the evidence and the law, I find that the plaintiff has failed to prove

his case against both the defendants on a balance of probabilities on all the reliefs sought and I therefore dismiss the plaintiff's suit herein against both defendants.

*g. **damages***

225. In case I am wrong in the verdict I have just reached, let me briefly address the issue of damages I would have awarded the plaintiff had I entered a verdict in his favour. In this regard, I am of the persuasion, as was stated in **High Court Civil Case No. 833 of 2000, Joseph Rading Wasambo –vs- The Standard Limited**, that in the assessment of damages, the legal process must for its own credibility, strike a proper balance between the demands by litigants and what is fair and reasonable in given circumstances. Guidance is from the observations found in **Thompson –vs- Commissioner of Police of the Metropolis and HSU -vs- Commissioner of Police of the Metropolis [1997]2 AII ER 762 (at page 771):**

> ***"Any legal process should yield a successful plaintiff appropriate compensation, that is, compensation which is neither too much nor too little - - - - No other result can be accepted as just …. But it serves no public purpose to encourage the plaintiffs to regard a successful libel action, risky though the process undoubtedly is, as a road to untaxed riches. Nor is it healthy if any legal process fails to command the respect of lawyer and layman alike …."***

236. The plaintiff complained that he was categorized by the defendant among loan defaulters and therefore not creditworthy and a delinquent hence a criminal. Theft/stealing are a criminal offence under the Penal Code attracting up to 3 years imprisonment. Section 16A (1) of the Defamation Act provides, *inter alia*, as follows:

> ***"16 A (1) in any action for libel, the court shall assess the amount of damages payable in such amount as it may deem just:***
>
> ***Provided that where..… The libel is in respect of an offence punishable by imprisonment for a term of not less than three years the amount assessed shall not be less than four hundred thousand shillings."***

227. Evidence adduced in the present case is to the effect that publication of the defendant's impugned information was to a cluster of its subscriber banks and other financial lending institutions. It must also be noted that any inconvenience suffered by the Plaintiff in the circumstances of this case was only temporary in nature as held in the ***Smeaton case (supra)*** where the court held as follows:

> ***"I agree with Mr Handyside that in most cases of applications for credit failed on account of incorrect data the harm likely to be suffered is temporary inconvenience. It is possible that the judge overlooked this as a result of his flawed conclusion that it was inaccurate data, or more precisely the alleged breach of duty which gave rise thereto, which prevented Mr Smeaton / Ability Records from obtaining credit in and after July 2006.***
>
> ***Mr Arden submitted that it is no answer to the vice of inaccuracy of data that it can be inspected and corrected. An applicant for credit whose application is refused because of inaccurate data has thereafter a hill to climb to overcome the inaccurate impression initially formed of him. He submitted that a requirement to consider a second application does not mean that the lender has to put out of his mind what he has first learned. But with respect to Mr Arden this is precisely what the Guide to Credit Scoring 2000 says should be done. Section 8.1 provides:-***
>
> ***"Any repeat application for credit will be treated as a new application, and assessed accordingly. An applicant for credit will not be declined or accepted solely on the grounds of having made a previously declined or accepted application to that credit grantor."(Emphasis added).***

228. I fully associate myself with the above authority that any inconvenience is only likely to be temporary as testified by the Plaintiff who subsequently obtained a loan from BBK Ltd. In addition, under

Regulation 18(2) of the 2008 Regulations the negative information is not the only criteria that Banks use to award loan facilities to customers. The said Regulation provides that: -

> ***"(2) Information kept in accordance with sub-regulation (1) may not be used solely to affect the customers' chances of obtaining credit but to inform the decision making process."***

229. It therefore follows that the gravity of the publication was not huge as it was just one factor to be considered in the loan application process and there being no ***adverse action notice*** it is clear the listing not solely relied on by Barclays Bank of Kenya which had by itself listed the Plaintiff as a loan defaulter.

230. It must further be noted that the impugned information was deleted on the same day the Amendment Notice was issued and a Notice of Change under *Regulation 20(12) of the Regulations 2008* was issued requiring the institutions that had accessed the data to seek a new credit report as there were significant changes to the Plaintiff's credit information. This in my view constituted a valid mitigation of any future damage that the Plaintiff's reputation might have suffered. Further, the court takes cognizance of the fact that at the time of trial the plaintiff had been promoted from the *Chief Finance officer* to the *Corporate Affairs Manager* and he did not show to the court any evidence of his employer shunning him for promotional purposes due to the listing by the defendants as a defaulter. In other words, the plaintiff did not prove that the listing had a negative impact on his personal or professional life.

231. The plaintiff sought 20,000,000 inclusive of aggravated damages whereas the 2nd defendant submitted that the award of nominal general damages of ***<u>Kshs. 100,000/-</u>*** would be adequate given the narrow publication to one person and the fact that the 2nd Defendant was not actuated by malice or any improper motive

232. Bearing in mind that the Plaintiff failed to adduce any evidence to prove that he had applied for a loan with BBK Ltd and was denied such loan on the basis of the listing by the defendants, and further under cross-examination he stated that he was never issued with a letter or notice from BBK Ltd indicating that the customer information forwarded by the 1st Defendant had caused him to be denied credit and the fact that the plaintiff was also listed as a defaulter by Barclays Bank and he did not dispute that evidence on record, I would in such circumstances, had I found in favour of the plaintiff, have awarded him a sum of Kshs.500, 000/= as contemplated by section 16 A(1) of the Defamation Act.

233. I would not have awarded any exemplary damages as no basis was laid for such an award though pleaded. Equally, I would have declined to award any damages for negligence as pleaded as the plaintiff did not submit on that claim and neither did he lay any basis for the claim. The claim for an apology or damages in lieu would have been declined as the 1st defendant did write to the plaintiff regretting the inaccurate information and correcting the same with speed upon such discovery without engaging the plaintiff in endless denials and or threats to defend suit if filed. An apology given was therefore appropriate in the circumstances.

234. I would also have awarded costs to the plaintiff together with interest at court rates to run from date of judgement until payment in full.

235. Nonetheless, as the plaintiff failed to prove his case against the defendants on a balance of probabilities, I award him nothing.

236. In the end, I find that the plaintiff has not proved his case against the defendants jointly and severally on a balance of probabilities to warrant judgment in his favour and accordingly, the plaintiff's suit is hereby dismissed.

237. Costs follow the event and are in the discretion of the court. In this case, considering the relationship between the plaintiff and the defendants, especially the 1st defendant who were still his bankers at the time of this trial, which relationship should be fostered rather than destroyed, I order that each party bears its own costs of the dismissed suit.

Dated, signed and Delivered in open Court at Nairobi this 9th day of February, 2016.

R.E.ABURILI

JUDGE