REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER E013 OF 2021

ELMAS NJOROGE MUNGAI……. PLAINTIFF

VERSUS

NCBA BANK KENYA……DEFENDANT

ORIGINAL

JUDGEMENT

The Pleadings.

1. By Plaint dated 17th May, 2021 and amended on 10th November 2022 the Plaintiff sued the Defendant for allegedly wrongly listing him with the Credit Reference Bureau (CRB) as a defaulter over an unpaid loan. He contends that the listing was unlawful; caused him stress;

damaged his reputation and prevented him from accessing credit facilities necessary for his business.

2. The plaintiff in the premises seeks the following prayers;

   a) **Damages for defamation.**
   b) **Compensatory damages.**
   c) **Costs of the suit.**
   d) **Interests on (a), (b) and (c) above at Court rates.**
   e) **Aggravated damages and interest thereon at Court rates.**
   f) **Orders directing the Defendant to tender an appropriate apology.**
   g) **Orders directing the Defendant to cause delisting of the Plaintiff with the Credit Reference Bureau as a loan defaulter.**
   h) **Any other relief that this Honourable Court may deem fit to grant.**

3. The Defendant filed its Defence dated 12th May, 2023 on 18th May, 2023 denying ever having listed the Plaintiff with the CRB. The claim of malice and particulars of defamation alleged are also denied. The Defendant further states among other contentions that the alleged negligence is not

ORIGINAL

particularized and it is not shown that the claimed damages were caused by the Defendant.

The Parties' Oral Evidence.

4. The Plaintiff offered oral evidence adopting his statement dated and producing his bundle of documents filed herein as evidence. While reiterating the averments in the suit, he testified to obtaining a loan from the Defendant Bank in 2014, which he cleared in 2018 and got his motor vehicle logbook that was collateral for the loan released to him.

5. The Plaintiff contends that in 2020 while seeking to secure another loan from Co-operative Bank he was informed that he had been blacklisted on the CRB platform as a defaulter. Upon checking out, he established that the reference was made by the Defendant, despite having no outstanding loan with the Bank. He maintains that the listing was illegal, caused him stress and denied him access to loans which affected his business while tarnishing his name.

6. The Plaintiff further testified that he was unaware of any transaction amounting to Kshs. 19,100/= he also allegedly entered into with the Defendant . The Defendant did not

ORIGINAL

explain how the debt arose as he was never appraised for any loan in 2020 when the facility was purportedly extended to him.

7. On cross examination the Plaintiff stated that he did not know if he had been so listed with the CRB. He confirmed that his account number in respect of the repaid loan was 1000258721 as pleaded and denied ownership of the account reflected in the Defendant's list of documents at page 11. The Defendant noted that the Defendant's records showed his credit score was 736 and 731. He nonetheless admitted to not filing any documents to show that he was denied a loan by Co-operative Bank or any other lender.

8. Upon re-examination by his Counsel, the Plaintiff maintained that the disputed listing was done by the Defendant which is now known as NCBA after a merger. The credit score alluded to above referred to Kshs. 19,100/= that was paid in 2020 yet had no such transaction that year, adds the Plaintiff.

ORIGINAL

9. The Defence Witness (Meshack Ong'era) is the Business Relationship Manager of the Defendant. He adopted his witness statement dated 14th June, 2023. He further produced the Defendant's bundle of documents filed on 22nd June 2023 in support of their case which include reports filed with the CRB.

10. The witness confirmed that the Plaintiff was a customer of the Bank and had obtained a loan which was admittedly fully repaid in 2018. The loan had been secured by a motor vehicle logbook, which was released upon repayment. He explained that the Plaintiff also held a personal account with the Bank, separate from the loan account that had been opened specifically for the facility.

11. The Defence Witness stated that one of the reports they lodged with the CRB indicated a default on 11th January 2019, arising not from the loan account, but from an overdraft facility of Kshs. 19,100/= charged to the Plaintiff's operating account. He clarified that the overdraft was distinct from the asset finance loan that had been fully repaid.

ORIGINAL

12. It is further testified that a creditworthy customer cannot be denied a loan merely on account of CRB listing, since such listing only guides banks in assessing loan applications . According to the exhibited CRB reports, the last repayment was made on 11th May 2020.

13. The Witness continued to state that he had no documents showing how the sum of Kshs. 19,100/= was processed or repaid by the Plaintiff, and that the relevant deposit slip was not available. He explained that overdraft accounts are not closed but are regularized upon repayment, and he could not confirm when the Plaintiff's operating account was closed, or its current status.

14. In re-examination the Witness clarified that the Plaintiff was not listed on the CRB in respect of the asset finance loan but rather on account of the overdraft facility. He stated that the Plaintiff repaid the sum of Kshs. 19,100/= on the overdraft facility.

Plaintiff's Submissions

ORIGINAL

15. It is submitted that the Plaintiff never owed the Defendant any money and the the negative listing had the effect of denying him credit facilities.

16. The Plaintiff's Advocates also submit that the impugned CRB listing was done without giving the Plaintiff notice of intention to list negative information as contemplated under **Section 25 (1) and (1) of the Credit Reference Bureau Regulations**. Their Client was subjected to financial embarrassment when it became apparent that he could not get a credit facility from Co-operative Bank**.**

17. Regarding damages, the Plaintiff states that **Section 16A (1) of Defamation Act** provides assessment of damages in the circumstances. Further reliance is placed on the case of **C. Mehta & Co. Ltd. Standard Bank Limited [2024] eKLR** for the proposition that injury to credit can be ameliorated by reasonable compensation without proof of special damages.

18. Further reliance is placed in the case of **Peter M. Kariuki vs Attorney General [2014] eKLR** where the Court of

ORIGINAL

Appeal also citing the Ugandan case of **Coussens vs Attorney General [1999] 1 EA** held that the object of an award of damages is to reasonably compensate an injured party for the loss or damage and that assessment of damages is not arithmetical.

19. Regarding the claim for aggravated damages, the Plaintiff submits that he is entitled to an award under this head saying that such damages are awarded against a Defendant who acts out of improper motive especially when actuated by malice; insistence on a frivolous defence of justification or failure to apologize. According to the Plaintiff and award of Kshs. 20,000,000/= would be reasonable compensation.

20. The Plaintiff submits that even after the erroneous listing was brought to the attention of the Defendant, the Defendant is yet to issue or offer an apology to the effect and should therefore be compelled to do so.

Respondent's submissions

21. According to the Defendant, the Plaintiff never at any given time approached the CRB for correction of the erroneous listing as stipulated under **Regulation 37 (5)** of the

ORIGINAL

Banking (Credit Reference Bureau) Regulations 2020. Reference is made to **HCCA No 83 of 2017 Co-operative Bank of Kenya Limited vs Peter Ochieng [2018 eKLR** where the Court held that the Respondent therein should have first pursued the statutory remedy pursuant to the stated Regulations before filing suit.

22. Further reference is made to the case of **Mutahi v Co-operative Bank of Kenya & another [2022] KEHC 13962 (KLR)** where the Court held :-

> **"..... The Plaintiff's failure to make use of the mandatory procedure highlighted under the regulations means that the suit is premature.....''**

23. The Defendant insists that the Plaintiff was never listed negatively and he failed to prove defamation on the evidence as purportedly found in similarly circumstances in **J. Kidwoli & Another v Eureka Educational Training Consultants & 2 Other [1993] eKLR.** It is the Defence position that the information on the CRB was neither defamatory nor published to the general public. The information is said to have only been shared within a

ORIGINAL

lawful and confidential framework between data providers and licensed CRBs as required by the Central Bank of Kenya.

24. Counsel also cite the judicial determination in **Tom Ojienda vs Kenya Forest Service & 3 others [2018] eKLR, in** which the Court held that sharing of credit information with CRBs is not equivalent to defamation unless falsehood and malice are demonstrated.

ORIGINAL

25. It is therefore stated that the claim for defamation is unfounded as the Plaintiff has not provided any evidence that the Defendant published false information maliciously, or that the information was disseminated beyond the authorized framework.

26. It is argued further that no evidence has been given to suggest that the Plaintiff suffered economic damage because he was denied credit by banks and that the Defendant caused loss of his reputation {(see **Equity Bank vs Gerald Wangombe (2015) EKLR** and **Cooperative**

Bank of Kenya Limited vs Peter Ochieng [2018] EKLR also relied upon **}**

27. As per the decision in **Metropolitan Credit Reference Bureau Limited & another vs Mongare & 2 others [2023] KEHC 19480 (KLR)** the Defendant also refers to**,** the Court emphasized on proof of any actual loss or embarrassment arising from the CRB listing

28. The Defendant therefore submits in the final analysis that the Plaintiff has not demonstrated any economic loss, loss of opportunity, or damage to reputation that can be directly linked to the contentious CRB warranting compensatory or aggravated damages to be awarded, as observed in ***N*ation Media Group Ltd v Hon. Chirau Ali Mwakwere [2018] eKLR.**

ORIGINAL

Analysis and Determination

29. Having carefully considered the pleadings filed by the parties, the testimonies, the written submissions and the authorities cited in support of the respective positions, the

Court is now tasked with resolving the questions that lies at the heart of this dispute as follows:

a) **Whether the doctrine of exhaustion is applicable in the circumstances.**
b) **Whether the listing was defamatory in its natural and ordinary meaning**
c) **Whether the Plaintiff is entitled to the reliefs sought**

30. The Defendant contends that the Plaintiff failed to utilize the mechanism provided under **Regulation 37 (5) of the Banking (Credit Reference Bureau) Regulations, 2020** before filing this suit and, therefore, the suit is a non-starter.

31. On the question of Doctrine of Exhaustion, the Court in **William Odhiambo Ramogi & 3 others vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR** opined thus:

> **"[52].The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The**

ORIGINAL

exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts…"

32. The doctrine of exhaustion is a broad principle of administrative law. It requires that where a statute provides a specific mechanism or remedy, an aggrieved party must first use that mechanism before approaching the Courts.

33. **Regulation 37 (5)** thus provides as follows:

"Customers' rights of access and correction.

''1…

2…

3…

4…

5.Where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed…..''

34. In **<u>Amy Kagendo Mate vs Prime Bank Limited Credit Reference Bureau & another</u> [2013] KEHC 6640 (KLR)** it was observed;

ORIGINAL

"[20] .....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 therefor agree with the 2nd respondent that this petition is improperly before me on this point. As Majanja J observed in the case of Kennedy Nyagudi vs Central Bank & Others (supra) with reference to the Banking (Credit Reference Bureau) Regulations)...."

35. Similarly, in **Daniel Gachanja Githaiga vs Credit Reference Bureau Africa Ltd & 2 others [2020] KEHC 3174 (KLR)** Lady Justice G. Nzioka delivered herself thus;

"[54].....The next question is whether the 1st Defendant is liable as claimed. I have considered the evidence adduced and I find that, the Plaintiff does not deny the fact that, the 1st Defendant advised him to follow the laid down procedure under Regulation 20 of the Banking

(Credit Reference Bureau) Regulations, 2008. The said Regulation states as follows: -

> **20 (5) "Where the customer believes that the information contained in the database is inaccurate, erroneous or outdated, the customer may notify the Bureau in writing of the information disputed……"**

[55.] The Plaintiff did not adhere to these provisions. In that regard I find that, the 1st Defendant's argument that the suit is premature is well founded in law. Indeed, a litigant who surpasses any lawful procedure laid down in law for dispute resolution or any other process abuses the court process.

36. In **Mutahi vs Co-operative Bank of Kenya & Another [2022] KEHC 13962 (KLR)** Court was of this view :-

> **"[44] ……Further there is no evidence that the plaintiff availed himself of the Statutory remedy provided by Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations 2013 which sets out the procedure to be followed by a customer who is aggrieved by his reference to the CRB Regulations CRB Regulation 35(5) provides:-**

ORIGINAL

> **"Where the customer believes that the information contained in the database is inaccurate, erroneous or out-dated, the customer may notify the Bureau in writing of the information disputed.**
>
> **[45].The plaintiff's failure to make use of this mandatory procedure in the event he was aggrieved by the Reference to the CRB means that the suit is premature. The plaintiff ought to have pursued this statutory remedy before filing suit against the Bank. This is in line with the Doctrine of "exhaustion of remedies" which provides that a party ought to first pursue (exhaust) other statutory remedies before approaching the Courts….."**

37. From the above precedents, the common thread running through them is that any person who is aggrieved with a bank sharing information with a CRB ought to exhaust the procedure under the relevant CRB Regulations.

38. Lady Justice Mumbi Ngugi in **Mwatu vs Credit Bank Limited; Spire Bank (Formerly Equatorial Commercial Bank Limited) & 2 Others (Interested Parties) [2024] KEHC 12754 (KLR)** was, however, of the view that since

the Petitioner therein had attempted statutory remedies available to try and resolve the matter but the Respondent failed to correct or expunge the disputed information, the Petitioner was justified to file suit. She stated that:

> **"……The doctrine of exhaustion of remedies cannot thus be used to defeat this Petition in the light of these facts because before instituting this Petition, the Petitioner had taken steps to have the matter resolved but the Respondent neglected and continues to neglect to cause the information it provided against the Petitioner expunged. The Petitioner stated in para 5 of his affidavit of 11th July, 2023…."**

39. The Court in **Anthony Maina Mutahi vs Co-Operative Bank of Kenya & another [2018] KEHC 9817 (KLR)** seems to agree, stating;

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

ORIGINAL

Constitution has more force that a regulation or rule.

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

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

ORIGINAL

Constitution of Kenya, 2010 to hear and determine the dispute herein…..''

40. In the same breadth, Mbogholi Msagha J. in **Gerase Maingi Ndonga v. AAR Credit Services Ltd & Metropole Credit Reference Bureau KEHC [2018] 5486 (KLR)** was equally of a contrary view.

> **"……The two defendants have joined hands in submitting that the plaintiff's suit should be struck out for being incompetent, frivolous and premature. The cause of action is defamation. I have related the pleadings and prayers in the plaint to the provisions of Regulation 35 (5) cited by the defendants. In the event the plaintiff were to notify the Bureau of the information disputed, and that information turns out to be false, the remedies are to be found in Regulation 35 (8) where the Bureau is called upon to delete or correct the offending information. The prayers sought by the plaintiff in his plaint include damages, costs and interest. There is nowhere under this Regulation that the Bureau is compelled to award damages, costs and interest as pleaded in the plaintiff's suit. The invocation of this Regulation therefore cannot determine the dispute between the parties here. Going by the observations in the Mukisa case, the step taken**

ORIGINAL

by the two defendants is improper practice that should stop.

The Regulation is not mandatory; the plaintiff was aggrieved by the information said to have been disseminated by the two defendants and therefore had the right to elect which forum to follow. Above all, the two defendants at paragraphs 26 and 17 respectively in their defences have admitted the jurisdiction of this court....''

41. The Courts have therefore developed two distinct approaches to the doctrine of exhaustion in disputes involving listings with the CRB. The strict approach insists that litigants must first pursue the statutory mechanism before filing suit, treating failure to do so as rendering the claim premature and an abuse of process. This approach emphasizes procedural discipline and respects the hierarchy of remedies.

42. In contrast, the flexible approach, recognizes exceptions where statutory remedies are ineffective, illusory, or inadequate to address claims such as defamation. The Courts in this regard stress that exhaustion should not

ORIGINAL

become a barrier to substantive justice, especially where remedies cannot provide relief like damages, or where respondents neglect to act.

43. Where the primary cause of action is defamation, as in this instant case, the statutory mechanism cannot fully resolve the dispute because it does not address reputational harm or compensatory relief or other issues attendant to a claim for defamation.

44. Thus, while the CRB Regulations *supra* are applicable to appropriate cases, they cannot oust the jurisdiction of the Court in matters where the Plaintiff seeks remedies beyond the scope of the **Banking (Credit Reference Bureau) Regulations** framework. The prayers sought by the Plaintiff herein are those that require judicial intervention.

45. I accordingly find that the Plaintiff did not have to have to exhaust the suggested alternative remedy in the circumstances and he properly brought this suit.

Whether the listing was it defamatory in its natural and ordinary meaning?

ORIGINAL

46. **Black Law's Dictionary 12th Edition** defines defamation as;

> **"Defamation is the act of injuring a person's character, fame, or reputation through false and malicious statements communicated to a third party. It involves the unprivileged publication of false statements that tend to hold a person up to ridicule, contempt, or scorn".**

47. The Court of Appeal in **B A & Another vs Standard Group Limited & 2 Others [2016] KECA 515 (KLR)** stated in relation to the tort of defamation;

> **"[27].....Winfield and Jolowicz on Tort describes defamation thus:**
>
> > **"Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. For historical reasons defamation takes the form of two separate torts, libel and slander, the former being generally more favourable to the claimant because it is actionable per se and injury to reputation will be presumed. However, whether the case is one of libel or slander**

the following elements must be proved by the claimant:

1. **The statement must be defamatory**
2. **It must refer to the claimant, i.e. identify him**
3. **It must be published, i.e. communicated to at least one person other than the claimant.**

In practice the statement ("imputation" is the technically correct description) is almost always in the form of words but it can take any form which conveys meaning, for example a picture, a cartoon or a statue." – WVH Rogers, Winfield and

48. **Winfield & Jolowicz on Tort (8th edition) 1967** at page 255 thus state;

"The answer is the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard."

49. The Court of Appeal in case of **Wycliffe A. Swanya vs Toyota East Africa Limited & Another (2009) eKLR** outlined the elements of defamation as follows:-

> **"It is common ground that in a suit founded on defamation the plaintiff must prove:-**
>
> **(i) That the matter of which the plaintiff complains is defamatory in character.**
>
> **(ii) That the defamatory statement or utterance was published by the defendants. Publication in the sense of defamation means that the defamatory statement was communicated to someone other than the person defamed.**
>
> **(iii) That it was published maliciously.**
>
> **(iv) In slander subject to certain exceptions that the plaintiff has suffered special damages."**

ORIGINAL

50. In the present case, the Plaintiff asserts that the Defendant maliciously and falsely caused his name to be listed with the CRB as a defaulter. He contends that this publication was accessible to lending institutions and the wider public thus lowered his reputation; embarrassed him among peers; forced him to resign from leadership positions and denied him access to credit facilities. He further maintains that the

alleged overdraft of Kshs. 19,100/= was neither communicated to him nor legitimately incurred, and that the listing was therefore false.

51. On the other hand, the Defendant argues that the listing arose from an overdraft facility distinct from the cleared loan, and that CRB reports are advisory tools which do not automatically bar access to credit.

52. The Defendant admitted that the Plaintiff had cleared his loan in 2018 and received back his logbook. The Defendant nonetheless proceeded to list him as a defaulter for an overdraft amount of Kshs. 19,100/=. The credit reports filed indicate that the amount was settled on 25th June, 2020. The Defendant's failure to produce documents explaining how the overdraft account came into existence leaves a critical evidentiary gap. Without documentary proof of the overdraft facility, the Defendant cannot not satisfactorily justify the listing. In the absence of clear records, the listing appears irregular.

ORIGINAL

53. On whether the Plaintiff suffered harm, on record there is a letter dated 20th May, 2020 from the Co-operative Bank seeking clarification from the Defendant on the status of the Plaintiff's listing.

54. Beyond these, however, there is no evidence that the Plaintiff suffered actual prejudice as a result of the listing. He did not tender documentary proof that he was denied credit facilities, or that he lost the positions or opportunities he refers to. In the circumstances, while the Plaintiff may have been aggrieved by the listing, he has not demonstrated that it translated into injury.

55. On the issue of malice, the Plaintiff has equally fallen short. No evidence was tendered to demonstrate ill-will, spite, or recklessness in the publication. Malice in defamation requires proof that the Defendant knew the information was false or was indifferent to its truth, yet proceeded to publish it.

56. In **Phineas Nyagah vs Gilbert Imanyara [2013] eKLR** the court held that :

> **"Malice here does not necessarily mean spite or ill will but recklessness itself may be evidence of**

ORIGINAL

malice. Evidence of malice maybe found in the publication itself if the language used is utterly beyond or disproportionate to the facts.

Malice may also be inferred from the relationship between the parties before or after the publication or in the conduct of the defendant in the course of the proceedings. Court should however be slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsely."

Determination

57. I do not find that the Plaintiff has proved defamation. The listing complained of was made to authorized institutions under the Banking Act and the Credit Reference Bureau Regulations. There is no evidence that the information was disseminated or published to unauthorized persons or to "right-thinking members of society" or that the same was made with malice in the sense contemplated in defamation law. The Plaintiff did not call third parties to testify as to

ORIGINAL

how they thought of him after learning of the listing. In particular, no evidence was procured from Co-operative Bank showing that he was denied a loan because of the disputed CRB listing.

58. In the end, I find that the Plaintiff did not prove his case against the Defendant on a balance of probability and the same is hereby dismissed. As the Defendant caused institution of the suit by wrongly listing the Plaintiff in the CRB when the debt had been paid, it shall bear the costs of the suit.

ORIGINAL

J. M. NANGEA-JUDGE

Judgement delivered virtually this 2nd day of March, 2026.

In the presence of;

Plaintiff's Advocate, Ms Sitati for Ms Oganga

Defendant's Advocate, Ms Nyabuto for Mr. Makori

C/A Jeniffer

J. M. NANGEA-JUDGE