

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. E001 OF 2023

PETER BOKOLE BALICHA.....PLAINTIFF
-VERSUS-
PLATINUM CREDIT LIMITED.....RESPONDENT

RULING

1. By a plaint dated 23 December 2023, the plaintiff sued the defendant for various reliefs which I reproduce here verbatim owing to their centrality to this ruling. The plaintiff has prayed for:

“a. A declaration that the deduction of the Plaintiff salary and remittance of the same to the defendant in the disguise of the settlement of a loan owed by the Plaintiff and payable to the Defendant is illegal, unlawful and/or unconstitutional.

b. An order directing the Defendant to make a payment of the funds received from the Plaintiff salary

c. An order that the acquisition of the Plaintiff’s personal data by the Defendant was a violation of the Plaintiff’s right to privacy and right to data protection, breach of the data protection laws as such illegal and/or unlawful.

d. An order compelling the Defendant to delete, erase, anonymise and/or pseudonymise all data belonging to the Plaintiff in its custody within such a time as specified by the Honourable court

and that the office of the Data Protection Commissioner do enforce the order granted.

e. A permanent injunction restraining the Defendant from illegally accessing the Plaintiff's data and/or illegally utilizing the same

f. General damages for breach of privacy, data protection rights and/or loss, damage and/or emotional distress suffered by Plaintiff

g. Interest of b above

h. Costs of the suit”.

2. According to the plaintiff, he works as a police constable with the Kenya Prisons Service at Hola Prisons. Sometimes in the month of September, 2023, he noticed from his payslip for that particular month, that his salary had been deducted by a sum of Kshs. 2,031/= ostensibly in part-settlement of a loan of Kshs. 202,031 alleged to be due to the defendant. The plaintiff had neither applied for nor granted any loan by the defendant.
3. Upon enquiry from the defendant, the plaintiff was informed that the deduction was in error and that he would be refunded his money. Despite this assurance, the plaintiff's salary for the month of October 2023 was deducted by another Kshs. 2,031/= as the monthly instalment due to the

defendant in settlement of a loan which the defendant itself had admitted does not exist.

4. The plaintiff has termed the defendant's action illegal and particularised in the plaint what he thinks are the illegalities perpetrated by the defendant.
5. The plaintiff has further pleaded *“that for the Plaintiff (sic) to perpetrate its wicked and/or unlawful enterprise and/or plan it required personal data belonging to the plaintiff including the Plaintiffs passport photo, copy of Id and/or Id number, monthly salary, employee personal number, mpesa statement, details of the Plaintiff's next of kin and/or copy of pay slip some of which constitutes sensitive personal data and that the same were acquired without the Plaintiff's consent and/or knowledge.”*
6. It is the plaintiff's contention that the defendant's action amounts to breach of his privacy contrary to data protection laws and, as a result, he has suffered *“immense loss, damage and/or distress.”*
7. He has further pleaded that he has lodged complaints with the Office of Data Protection Commissioner, the Directorate of Criminal Investigation and the Central Bank of Kenya and that that those complaints are pending investigation.
8. The defendant filed a defence basically admitting that the deduction of the plaintiff's salary was a mistake but attributed the mistake to the

plaintiff's employer. In the pertinent paragraphs of its defence, the defendant has pleaded as follows:

“4. Without prejudice to the preceding paragraph, the Defendant states that vide its letter dated 19th January, 2024, it explained to the Plaintiff that it was the Plaintiff's employer, the Kenya Prisons Service, who erroneously forwarded the Plaintiff's details to it. Interestingly, the Plaintiff has not joined his employer as a Defendant in this suit. The Plaintiff is put to strict proof.

5. Further to the foregoing paragraph, when the Defendant realized that the Plaintiff's employer had erroneously processed the Plaintiff's data, the Defendant immediately rectified the situation by deleting the Plaintiff's data from its systems and thereafter proceeded to refund the Plaintiff the money that had been deducted from him. The Plaintiff is put to strict proof.”

9. That notwithstanding, the defendant filed a preliminary objection objecting to the plaintiff's suit on the grounds:

“(a)That this Honorable court lacks the requisite jurisdiction to hear and determine the present suit pursuant to section 56, 57 and 58 of the Data Protection Act which clothes the Data Commissioner with original jurisdiction to handle claims/complaints emanation from the Data Protection Act.

(b) That under Section 64 of the Data Protection Act this Honourable Court is only clothed with jurisdiction to entertain an appeal against any administrative action that is taken by the Data Protection.

(c) That the Complaint dated 23rd December, 2023 is therefore hopelessly and fatally incompetent as well as a blatant abuse of the Court process and should be dismissed with costs.”

10. I must say at the outset that although the defendant is questioning the jurisdiction of this Honourable Court to entertain this suit, it has categorically admitted in its defence that, indeed, the Court has such jurisdiction. To be precise, in paragraph 11 of its defence, the defendant has pleaded as follows:

“The Defendant admits the jurisdiction of this Court”.

11. Order 2 rule 6 (1) of the Civil Procedure Rules is a rule against departure and prohibits a party from speaking from both sides of the mouth in its pleadings. The entire rule reads as follows:

6. Departure

(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Sub rule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

12. According to sub rule (2) a departure from a previous pleading must be preceded by amendment of that pleading unless, of course, it is a pleading in the alternative. Without an amendment or pleading in the alternative, it would be prejudicial and embarrassing to the plaintiff that, on the one hand, the defendant submits to the jurisdiction of the court in its defence and, on the other hand, disputes the same jurisdiction by way of a preliminary objection.

13. In **Pushavati Alok Narayan Gajapathiraj versus Secretary of State AIR 1926 PC 18** the Privy Council observed that:

“A litigant who was all along maintained a position in support of one branch of his unit cannot be permitted when he fails upon this branch to withdraw from the position and assert the contrary more especially when he thereby places his opponents at a great disadvantage”.

14. To the extent that the preliminary objection does not stand up to Order 2 rule 6 of the Civil Procedure Rules, it is misconceived.

15. Secondly, my reading of the plaintiff’s claim is that it is not solely based on the breach of the Data Protection Act, cap. 411C; subject to proof, the

plaintiff's claim, it would still be a viable or sustainable suit independent of breaches of the Data Protection Act.

16. The Court of Appeal in **D.T. Dobbie Kenya Co. Ltd versus Joseph Mbaria Muchina & Leah Wanjiku Mbugua (1982) KLR 1** reiterated that where there is a glimmer of a suit, the court will be hesitant in striking it out on the basis that it does not disclose a reasonable cause of action. The court held as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks is right. If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact

by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

On the other hand, if there is a point of law which merits a serious discussion, the court should be asked to proceed under order XIV rule 2. (Per Madan JA at page 9)

17.If, without pleading the alleged breaches of the Data Protection Act the plaintiff's suit cannot be sustained, this Honourable Court, would on its own motion, and even without being prompted by the defendant, insist that the plaintiff exhausts the review or appellate mechanisms provided under the Data Protection Act before invoking the jurisdiction of the Court for redress of his grievances against the defendant.

18. For the reasons I have given, the preliminary objection is overruled. Costs will abide the outcome of the suit. Orders accordingly.

Signed, dated and delivered on 10 April 2026

Ngaah Jairus
JUDGE