Mutyaene v Kenya Commercial Bank Limited & another (Civil Appeal E012 of 2020) [2025] KECA 907 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 907 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E012 OF 2020

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

REUBEN KIOKO MUTYAENE ..... APPELLANT

AND

KENYA COMMERCIAL BANK LIMITED ..... 1ST RESPONDENT

TRANSUNION T/A CREDIT REFERENCE BUREAU AFRICA LIMITED ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nakuru (Mulwa, J.) dated 27th May 2020 in HCCC Suit No. 38 of 2017)

JUDGMENT

1. From the plaint dated 23rd April 2017 and filed on 24th August 2017 by the appellant against the respondents before the High Court, the appellant was a party to a loan facility agreement with the 1st respondent, based on an employment relationship. The 1st respondent was the defendant, and the 2nd respondent was the Interested Party. The 1st respondent was the appellant's bank and former employer and caused the listing of the appellant with the 2nd respondent, a Credit Reference Bureau (CRB), upon termination of the employment.

2. Prior to the filing of this suit, the appellant's claim was time-barred by virtue of section 4(2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, being a claim based on the tort of negligence, which ought to have been filed within three years from the date on which the cause of action accrued; and, in the case of an action based on libel or slander, within 12 months from such date. Upon application, the court (Ndungu, J.) granted the appellant leave to file the suit out of time on 17th August 2017, vide Nakuru HCCC No. 35 of 2017 (O.S.) - Reuben Kioko Mutyaene vs. Kenya Commercial Bank Ltd & TransUnion.

3. The appellant contended that the listing of his loan facility with the 1st respondent as a non-performing account in the 2nd respondent's blacklist was malicious and effected without notice or justification. Specifically, the appellant claimed that the 1st respondent made the listing without issuing "adverse action notices" as required under the Banking (Credit Reference Bureau) Regulations 2020 (the "CRB Regulations") made under the *Banking Act*. As a result, the appellant's loan applications to various other banks and notably, Transnational bank on 14th February 2013 for Kshs. 700,000/- and Housing Finance Corporation Ltd on the 27th June 2017 for Kshs. 6,500,000/- were declined due to the adverse listings. As a further consequence, the appellant's construction of a commercial property under the name Kyamu Construction Co. Ltd was adversely affected by lack of funds. This caused the appellant financial embarrassment, anxiety, humiliation and unwarranted expenses, leading to undue emotional stress for which he held the respondents liable.

4. In the suit, the appellant sought, among other reliefs, declarations that the respondents' actions were negligent, constituted a breach of statutory duty of care and breach of contract; and violated his constitutional rights and fundamental freedoms as stated in the plaint. He sought an order to expunge the non-performing item from all CRB records; damages in lieu of a written apology for the inconveniences caused since the erroneous listing in 2012; special damages of Kshs. 35,000; and general and aggravated damages.

5. The suit was opposed by the respondents. The 1st respondent asserted its legal rights and statutory mandate to list the appellant with the 2nd respondent due to his default under the loan agreement. The 2nd respondent, who had been listed as an Interested Party, filed a Notice of Claim against the 1st respondent on the 14th September 2018, seeking an indemnity for any damages or costs arising from the credit information.

6. Upon conducting a trial, the learned Judge, in a judgment delivered on 27th May 2020, framed four main issues for determination. On the first issue, whether the exparte leave granted to file the suit out of time on 17th August 2017 was merited, and if not, whether the court ought to set it aside and dismiss the suit. the trial court found that the appellant met the threshold under sections 4(2) and 27(2) of Cap 22, and thus, the extension of time was proper.

7. Considering the entirety of evidence and taking into account the respondents' defence, the learned Judge found on the second issue framed that leave to bring the action for defamation against the respondents was merited but after considering the defence and the evidence of the respondents, she dismissed the appellant's claim for defamation. The learned Judge thereafter proceeded to determine the claim for negligence and any accruing damages arising therefrom.

8. Regarding whether the 1st respondent's actions in negatively listing the appellant with the 2nd respondent amounted to negligence and breach of statutory duty of care, or breach of contract, the trial court held that, pursuant to Regulation 25 of the CRB Regulations, the 1st respondent acted imprudently by listing the appellant without notice while negotiations were ongoing, and based on an inaccurate loan amount.

9. The learned Judge further observed that the 1st respondent failed to comply with Regulation 25(8), even after agreeing on the correct loan amount. It did not rectify the listing or inform the appellant that his credit information had been forwarded to the Credit Reference Bureau. Thus, the deliberate failure continued up to, and after, the indebtedness was cleared. The court thus found that the 1st respondent's actions amounted to negligence, breach of statutory duty, and breach of contract, resulting in loss and damage to the appellant.

10. On the final issue on whether the 2nd respondent was entitled to indemnity and/or contribution from the 1st respondent, the court dismissed the prayer. As for damages, the appellant was awarded Kshs. 400,000/= in general and aggravated damages. The prayer for special damages was dismissed. In the end, the suit was partly successful.

11. Dissatisfied, the appellant appealed, citing 15 grounds. In rather extensive submissions spanning 127 paragraphs contained in 39 pages, the appellant asserts that the appeal revolves around the irregular and illegal listing of the appellant in the CRB database by his bankers and former employer (the 1st respondent).

12. From the submissions filed on 12th April 2024, the appellant emphasizes the significance of CRB Regulations and its impact on the financial sub-sector coupled by the public concern on the restriction to credit access. He adds that blacklisting in the CRB database has serious implications on the person's creditworthiness calling upon exercise of due diligence prior to listing. Central to the dispute in the appellant's view is the non-compliance by the respondents to promptly expunge disputed/ erroneous entries at the CRB database even after the expiry of the period stipulated under the regulations. He points out that damages are awardable for unlawful/ irregular listing.

13. The appellant framed the following broad questions for determination:

    a. Whether the prevalent holding that by being negatively listed in CRB the harm and inconvenience caused to the customer is temporary is a sound legal proposition applicable in all instances.

    b. Whether in view of Regulation 19(2) of CRB Regulations, Bureaus, as a disclosed agent of the Central Bank, and by principle of qualified privilege are guaranteed absolute immunity from civil liability in instances where negligence, default, and non-compliance of CRB regulations and the law are proven.

    c. The legality of converting employees' loan facilities granted by employers at preferential interest rates and listing at the CRBs when the termination from employment is under challenge in court and/or termination is declared unlawful (Civil Appeal 296 consolidated with 301 of 2016, Barclays Bank of Kenya Ltd & Another vs. Gladys Muthoni & 20 Others [2018] eKLR).

14. The appellant has reduced the grounds of appeal into seven broad grounds. Firstly, he faults the trial Judge for failing to find that the 1st respondent's action of listing the appellant in the CRB was premature, irregular, illegal, null, and void ab initio owing to the fact that there was an ongoing dispute of dismissal from employment at the Employment and Labour Relations Court. This is despite concurring with the learned Judge's apt consideration and analysis of facts based on negligence, breach of statutory duty of care and breach of contract as stipulated under CRB Regulations 25 (1), 25 (8), 50 (l) (b) and Article 35 (1) (b) of *the Constitution*.

15. Secondly, he faults the trial Judge for failing to find that the appearance of the words "Non Performing Accounts - Account reference MG1210700357; Principal Amount Kshs. 2,678,961.02" in the appellant's CRB reports are prejudicial to his standing and image, and that his reputation was tainted as evidenced by various loan rejections. He argues that the harm caused to him was not merely a temporary inconvenience; that there was contestation as to when the entry was delisted; that he suffered loss of earning capacity as detailed in the Independent Auditor's Report; and that orders to permanently expunge the non- performing item from the CRB database were warranted. The appellant emphasizes that the repercussions of negative CRB listing have a detrimental effect on an

individual's creditworthiness, image, trust, and reputation. Having endured this for over eight years, the appellant urges the Court to revise the award for damages, which he contends was inordinately low. Reference was made to Civil Appeal Nos. 51 & 58 of 2016 (consolidated) - Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others [2018] eKLR.

16. Thirdly, the appellant faults the Judge for failing to find that the 2nd respondent violated the CRB Regulations, the law, and *the Constitution*, and for erroneously absolving it of any malfeasance and liability. He also asserts that the Judge erred in adopting and relying on the 2nd respondent's submissions dated 19th February 2020, which were never served upon him. Reference is made to Regulations 15, 26, 27, 28, 32, 33, 34, 35, 49, 50(3), (4), (5), and 55(1) of the CRB Regulations.

17. Fourthly, the appellant disagrees with the learned Judge's failure to adjudicate, determine, and order delisting of the second item illegally listed by the 1st respondent, detailed "Performance Accounts Account reference MG0829084837, Principal amount Kshs. 2,024,428.10" which he asserts was cleared way back in 2009. In addition to relying on Regulation 25 (7) and 33 (5), the appellant urged that the mandate of the 1st respondent to maintain correct customer data is set out in section 3.2.11 of the Central Bank Prudential Guidelines (Protection of Consumer Data and Privacy).

18. Fifth, the appellant disputes the trial court's failure to find that the respondents acted contrary to the rules of natural justice, *Fair Administrative Action Act*, and *Consumer Protection Act*. This amounted to a violation of his constitutional rights and fundamental freedoms.

19. The appellant's sixth ground related to the award of Kshs. 400,000/- in general and aggravated damages which the appellant submits was not commensurate with the proven transgressions and judicial precedents. He also faults the Judge for failing to award distinct damages in lieu of a written apology for the inconveniences he endured due to the erroneous negative listing since 2012.

20. In the final broad ground, the appellant takes issue with the failure by the trial court to order costs of the suit to the successful appellant without issuing palpable reasons.

21. From its submissions filed on 12th June 2024, the 1st respondent maintains, in opposition to the appeal, that it performed all that was required of it under the contractual and statutory provisions in handling the affairs of the appellant as a customer and lender. In response to grounds that specifically concern it, the 1st respondent argues that it exercised reasonable care and due diligence during the subsistence of their bank-customer relationship and the borrower-lender relationship. Regarding the CRB listing, the 1st respondent asserts that it was a lawful and justified action prompted by the appellant's admitted loan default. It denies any malice in its actions

22. On the harm suffered by the appellant, the 1st respondent argues that it is clear the same was not permanent but of temporary inconvenience as illustrated in the specified paragraphs of the impugned judgment. That this is informed by the fact that since the listing of the appellant with the CRB has been lifted, the appellant has and is at liberty to seek credit facilities from various financial institutions of his choice.

23. The 1st respondent concluded by urging that the appeal lacks merit and should be dismissed entirely with costs to the 1st respondent.

24. The 2nd respondent filed submissions dated 14th May 2024, urging for the dismissal of the appeal on several grounds. It supports the trial court's finding that the appellant's defamation claim was improperly pleaded contrary to Order 2 Rule 7(1) of the Civil Procedure Rules, citing Mudi & 2 Others vs. Nation Media Group Limited (Civil Appeal No. 407 of 2017) [2024] KECA 20 (KLR);). It further asserts that the leave granted to the appellant to file a libel claim out of time was unlawful under

section 27 of the *Limitation of Actions Act*, (see Dr. Lucas Ndungu Munyua vs. Royal Media Services Limited & Another [2014] eKLR and Martha Miyandazi vs Kenyatta University [2012] eKLR).

25. Further, that the learned Judge was correct in finding that the 2nd respondent cannot be found liable for the negligent acts and omissions of the 1st respondent (Christopher Orina Kenyariri vs. Barclays Bank of Kenya Limited & Credit Reference Bureau Africa Limited [2018] eKLR and Jamlick Gichuhi Mwangi vs. Kenya Commercial Bank Ltd & Another [2016] eKLR); the learned Judge was correct in declining to award the appellant general damages for defamation, exemplary damages and damages for loss of earnings; and that the court was correct in awarding Kshs. 400,000/= against the 1st respondent for breach of contract and negligence as it aligned with awards in similar circumstances where Banks were found to have been negligent (Anthony Kinyua Mwaniki & Another vs. Kenya Commercial Bank Limited & Another [2017] eKLR; Namalwa Christine Masinde vs. National Bank of Kenya Ltd [2016] eKLR; Alice Njeri Maina vs. Kenya Commercial Bank Ltd [2018] eKLR and Jedidah Wanjiru Wairimu vs. Simon Karogha Njoroge & 3 Others [2021] eKLR).

26. In conclusion, the 2nd respondent did not see any fault in the trial court's exercise of discretion in directing that parties bear their own costs. It added that the appellant was served with the 2nd respondent's submissions filed within the court's directions and evidenced in the appellant having adduced them in the record of appeal.

27. At the hearing, the appellant acted in person with Mr. Opondo Advocate acting for the 1st respondent and Mr. Kisinga Advocate appearing for the 2nd respondent. All the parties indicated that they had filed submissions, respectively, which they adopted.

28. Being a first appeal, we are mandated under Rule 31 of the Court of Appeal Rules to re-evaluate the evidence on record and, where we deem appropriate, make our own findings. However, we remain cautious to uphold the trial court's exercise of discretion and only interfere with the findings of fact when it is manifest that the trial court acted injudiciously and capriciously.

29. The main issue in this appeal is the appellant's grievance with his listing as a defaulter in the CRB database maintained by the 2nd respondent. The trial court already found that the 1st respondent's actions in causing the negative listing amounted to negligence, breach of statutory duty of care, and breach of contract. The remaining questions are whether the 2nd respondent can be held liable for the 1st respondent's actions and whether the damages awarded were adequate.

30. On the first issue, we note that the issue of breach of contract and negligence on the part of the 2nd respondent was not part of the prayers sought by the appellant before the High Court. We reproduce the prayers sought against the 2nd respondent in the plaint as follows:

> "...
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> d. An order directing the Defendant and Interested Party to permanently expunge the non- performing item from their records and that of any other credit reference bureau.
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> e. An order directing the Interested Party and any other credit reference bureau holding the erroneous information to issue "notice of change" to any institution(s) which may have sought the Plaintiff's status report in the last 12 months as per CRB Regulation 35 (12)."

31. On this issue, we note that the 2nd respondent had been incorporated into the suit as an Interested Party, and the trial court made the following observation:

> "36. Thus, and without a doubt, the above obligations rested with the defendant to furnish the Interested Party with the correct and accurate information, and to seek for updates as and when it became necessary. This too, the Defendant failed to do.
>
> To that end, I find and hold that the Interested Party cannot be blamed for the negligent acts and omissions of the Defendant. I find and hold that the Interested Party, having not contributed to the plaintiff's woes, cannot shoulder any blame. The claim against the Interested Party is therefore dismissed."

We do not, therefore, see how the issue of liability for negligence and breach of duty by the 2nd respondent arises.

32. Moreover, being a regulated entity, the 2nd respondent is protected from liability under Regulation 20 for any loss or damage caused or is likely to be caused by anything which is done or intended to be done in good faith in pursuance of these Regulations or guidelines issued hereunder. The only limitation to the protection is on account of any such disclosure made by anyone of them and which is unauthorized or fraudulent, or contrary to the provisions of these Regulations, guidelines, or any other law to which these Regulations relate. Further, the entity is allowed to seek indemnity from the person who was at fault.

33. As already pointed out and held by the trial Judge, the 2nd respondent merely relied on information granted to it by the 1st respondent, and the appellant failed to demonstrate any culpability on the part of the 2nd respondent to justify a finding of liability against it. In any event, Regulation 72 stipulates the penalties that CRBs, such as the 2nd respondent, are subjected to for the various breaches contemplated under the Regulations.

34. From the foregoing, we have no reason to interfere with the learned Judge's finding on this issue of liability against the 2nd respondent. We find no merit in this ground of appeal and disallow the same.

35. Turning to assessment of damages, we note that the appellant sought damages in lieu of written apology for the numerous inconveniences caused to the appellant since the erroneous negative listing effected in 2012; special damages of Kshs. 35,000/- general and aggravated damages.

36. The trial court was not persuaded that the appellant had strictly proved the special damage relating to the hiring of a paralegal assistant to help the appellant in research, drafting, and filing the pleadings. On this aspect, the Judge found that no proof was adduced of this expenditure; documentary or otherwise. The claim was, therefore, in our view, rightly dismissed.

37. The appellant seems aggrieved by the learned Judge's finding that; though no apology was tendered to him by the 1st respondent, the harm and inconvenience was temporary as the appellant failed to settle the debt within the agreed timelines, though time was extended. We have carefully considered the Judge's reasoning in arriving at this finding. We note the following sentiment by the trial Judge:

> "
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> "45. The Plaintiff cleared the loan with the Defendant on the 29/11/2013. Under section
> 33 (1) of the CRIB Regulations, the listing could only be lifted five years thereafter, meaning about December 2014. To that extend, the plaintiff with that knowledge knew that any

other applications for credit facilitation would be rejected. There is no contestation that the listing was lifted while

this case was ongoing. I therefore discount the Auditors cash flow projections as a basis for loss of earning capacity."

38. The learned Judge also took note that the appellant did not, by any evidence, prove any actual loss.

39. The trial court concluded that the appellant did not, by any evidence, prove any actual loss. Similarly, the court noted that despite the 1st respondent causing the appellant's name to be listed with CRB prematurely, it never acknowledged its mistake or apologized to the appellant, but continued to engage with him as if nothing had happened. The trial court berated this conduct as not meeting the threshold required of the duty of care in a bank- customer relationship, shrouded in secrecy and bad faith.

40. In addressing the claim for general and exemplary damages for diminished earning capacity, the court reasoned that though not specifically pleaded as such, the claim flows from the direct, natural and probable consequences by the acts complained of, loss of earnings and loss of earning capacity is a special damage claim, and ought to be pleaded and strictly proved. The damages therefrom may also be classified as a general damage that also must be proved upon a balance of probability.

41. It is that context that the court proceeded to assess and award damages. Guided by the case of Keith Smeaton vs. Equifax PLC [2013] EWCA Civil 108, and pursuant to section 8.1 of the Regulations, to the affect that any repeat application for credit will be treated as a new application and assessed accordingly; the learned Judge was persuaded that an applicant for credit will not be declined or accepted solely on the ground of having made a previously declined or accepted application to that credit grantor. As the listing with CRB has been lifted, the plaintiff is at liberty to seek credit facilities to whomsoever financial institution as he may desire. To that extent, therefore, the temporary incapacitation had since been remedied.

42. It is on that basis that the Judge concluded that a sum of Kshs. 400,000/- would be fair and sufficient to remedy the loss and damage. This was on the basis of the case of Jamlick Gichuhi Mwangi (supra), which in her view was in quite similar circumstances wherein the Bank was found to have been in contravention of the CRB Regulations 2013 in listing the plaintiff with CRB. In that case, the court awarded a sum of Kshs. 100,000/= to the plaintiff as general damages for defamation and Kshs. 100,000/= nominal on aggravated damages. The 2nd respondent has also adduced several authorities in which damages in the similar range were awarded by courts in comparable circumstances.

43. In our view, the appellant has not demonstrated that the trial court considered wrong principles or exercised judicial discretion capriciously in assessing and awarding damages to warrant our interference. Needless to add, it remains fundamental that assessment of loss and damages remains that which must be done on a case-by-case basis. The appellant appears to be inviting us to make far-reaching general orders beyond his specific circumstances into the financial sub-sector in relation to the regulation and conduct of CRB. In our view, this invitation amounts to judicial overreach into policy or otherwise legislative spheres, something that we must decline. This is not to mean that any person is prevented from challenging any specific regulation or statutory provision as against *the Constitution*.

44. The upshot of our decision is that the appeal is unmerited and is dismissed with costs to the respondent against the appellant.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY 2025

M. WARSAME

JUDGE OF APPEAL

J. MATIVO

JUDGE OF APPEAL

M. GACHOKA

JUDGE OF APPEAL