



**Mawingo Construction Ltd v Arn Security Consultants & Training Services Limited & another  
(Commercial Case E034 of 2024) [2025] KEHC 12105 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 12105 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
COMMERCIAL CASE E034 OF 2024  
F WANGARI, J  
MARCH 27, 2025**

**BETWEEN**

**MAWINGO CONSTRUCTION LTD ..... PLAINTIFF**

**AND**

**ARN SECURITY CONSULTANTS & TRAINING SERVICES  
LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**METROPOL CREDIT REFERENCE BUREAU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a Ruling on in respect to an application dated 4<sup>th</sup> July, 2024 which is brought under the provisions of Orders 51 Rule (1), 10 (1), (2) and 52 of the Civil Procedure Rules, sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. It seeks the following orders: -
  - a. Spent;
  - b. That the Honourable Court be pleased to issue temporary injunction against the negative listing of the Applicant on the Credit Reference Bureau run by the 2<sup>nd</sup> Respondent pending the hearing and determination of the application;
  - c. That the Honourable Court be pleased to issue temporary injunction against the negative listing of the Applicant on the Credit Reference Bureau run by the 2<sup>nd</sup> Respondent pending the hearing and determination of the suit; and
  - d. That the costs of the application be provided for.
2. The grounds in support of the application are that the 2<sup>nd</sup> Respondent falsely listed the Applicant on a Credit Reference Bureau on 29<sup>th</sup> January, 2020. The listing was for an alleged debt owed to the 1<sup>st</sup> Respondent amounting to Kshs. 51,711,200/= . Without any colour of right, confirmation or



- any verification of the alleged debt, the 2<sup>nd</sup> Respondent proceeded to publish a negative listing of the Applicant.
3. It is stated that the Respondent proceeded to publish an erroneous negative credit score against the Applicant based on the alleged debt contrary to Regulation 18 (3) of the Banking (Credit Reference Bureau) Regulations, 2020. It is averred that the 2<sup>nd</sup> Respondent on incessant calls by the Applicant to delete the inaccurate and false information wrote to the Applicant on 18<sup>th</sup> June, 2024 admitting that the negative listing of the Applicant was erroneous and false.
  4. Further that for nearly two (2) years from 29<sup>th</sup> January, 2020 to 22<sup>nd</sup> October, 2021, the Applicant had been negatively listed on the Credit Reference Bureau for an erroneous debt that does not exist. The negative listing of the Applicant was wrongful and based on false, inaccurate and unverified information. Since learning of the error of negative listing, the 2<sup>nd</sup> Respondent amended the negative listing to indicate an alleged amount owed of Kshs. 969,064/=.
  5. However, the 2<sup>nd</sup> Respondent did not amend the credit score associated with the erroneous amount of Kshs. 51,711,200 and thus the credit score against the Applicant remains exceedingly low. Because of the negative credit score, the Applicant is unable to secure sound lending from credible financial institutions and the score is reflecting negatively on the financial probity of the Applicant.
  6. The 2<sup>nd</sup> Respondent failed to comply with Regulation 18 (5) by ensuring that the institution or third party information provider submitting credit information to them provided complete and accurate information. It goes ahead to enumerate how the Respondent breached/failed and absconded its duty under Regulation 28 among others ensuring that the Applicant's information is obtained from reliable and credible sources which take responsibility for the accuracy, completeness and timeliness of the information.
  7. Further breaches are that the 2<sup>nd</sup> Respondent failed to ensure that they take reasonable measures to verify the accuracy of any customer credit information submitted to it. It further accuses the 2<sup>nd</sup> Respondent of failing to properly adhere to the Regulations by failing to comply with Regulations 33. Among the accusations are that the 2<sup>nd</sup> Respondent kept in its database false information on the Applicant which it ought not to be in the database, issuing a credit report that erroneously represented the status of credit information of the Applicant and failure to ensure that the 1<sup>st</sup> Respondent was a licensed, registered subscriber or a credit information provider.
  8. It is further stated that the 2<sup>nd</sup> Respondent failed to ensure that the 1<sup>st</sup> Respondent who furnished the Applicant's information to the CRB updated the Applicant's information immediately there was change of information as per the Regulations. Therefore, as a result of the failure to change the Applicant's information for nearly two (2) years, the Respondents breached their duties under the Regulations. It concludes that the Respondents occasioned untold losses to the Applicant such as loss of funding by financial institutions, damage to reputation and defamation of financial probity of the Applicant.
  9. The application is supported by the affidavit of one Clive Erskine, its director sworn on even date. It restates more or less the grounds in support of the application and I do not see the need to rehash the same.
  10. The application is opposed. In 23-paragraphs replying affidavit sworn by one Fridah Naitore Mwiti on 22<sup>nd</sup> October, 2024, the Applicant's claims are vehemently denied by the 1<sup>st</sup> Respondent. To begin with, it is averred that the Applicant's suit is time barred as it is founded on the torts of defamation, negligence, misrepresentation and malicious actions which are said to have occurred on 29<sup>th</sup> January, 2020.



11. It is further averred that frivolous, vexatious and an abuse of court process as the orders sought are incapable of being enforced or performed since the alleged wrongs already occurred, a fact said to have been admitted by the Applicant and thus the injunctive orders sought are futile.
12. Without prejudice to the above averments, the 1<sup>st</sup> Respondent states that on 24<sup>th</sup> April, 2018, it submitted information to the 2<sup>nd</sup> Respondent that the Applicant was owing it a sum of Kshs. 517,112/=, an amount said the Applicant had neglected to pay for a long period of time. The information was submitted to one of the 2<sup>nd</sup> Respondent's representative through email and reviewed the same. Prior to the submission, it is averred that the 1<sup>st</sup> Respondent had issued sufficient notice to the Applicant to settle the long overdue debt of Kshs. 517,112/= and which notice the Applicant failed to honour.
13. The 1<sup>st</sup> Respondent contends that it submitted the correct information given that indeed the Applicant was owing it Kshs. 517,112/= and that the excel sheet was prepared in accordance with the guidelines provided by the 2<sup>nd</sup> Respondent representative and further, the same was shared with the 2<sup>nd</sup> Respondent representative prior to uploading.
14. On the error relating to the amount owed, it is the 1<sup>st</sup> Respondent's contention that it did not originate from it. It states that it submitted the amount in cents following guidelines issued by the 2<sup>nd</sup> Respondent that the amount be submitted in cents and not shillings. Accordingly, the 1<sup>st</sup> Respondent states that there was malice, negligence or misrepresentation on its part. It is averred that on 11<sup>th</sup> May, 2018, it issued a post listing notice to the Applicant as guided by the 2<sup>nd</sup> Respondent.
15. It is averred that on 29<sup>th</sup> January, 2020, the 2<sup>nd</sup> Respondent representative contacted it making a request that an excel sheet be prepared indicating whether has made any payments to enable the 2<sup>nd</sup> Respondent update the information in their systems. The 1<sup>st</sup> Respondent states that the 2<sup>nd</sup> Respondent instructed it to indicate the amount owed in cents.
16. The 1<sup>st</sup> Respondent goes ahead to state that on 4<sup>th</sup> November, 2021, it was contacted by the 2<sup>nd</sup> Respondent's representative that the Applicant had contacted them claiming that the amount stated against their account was erroneous and sought clarification on how much the Applicant was owing. It was then that it discovered that the Applicant was indicated to be owing the 1<sup>st</sup> Respondent Kshs. 51,711,200/=.
17. Upon being notified of the error in the amount, the 1<sup>st</sup> Respondent promptly identified the discrepancy and corrected the figure within few hours of receiving the 2<sup>nd</sup> Respondent's communication. At that point, the debt had increased from Kshs. 517,112/= to Kshs. 969,064/=. In sharing the updated excel sheet, it indicated the amount in cents as earlier guided.
18. It is averred that in any case, the Applicant owed the 1<sup>st</sup> Respondent a sum of Kshs. 969,064 as upheld by court in Mombasa MCCC No. 1368 of 2021 where it is stated that the court awarded the 1<sup>st</sup> Respondent a sum of Kshs. 969,064/= in special damages together with interests and costs. It is averred that the Applicant has partially satisfied the decree but still owes Kshs. 80,000/=. The 1<sup>st</sup> Respondent states that the 2<sup>nd</sup> Respondent amended the listing to rectify the error and it is its contention that the Applicant admits as much at paragraph 7 of its supporting affidavit.
19. The 1<sup>st</sup> Respondent has poured cold water on annexures marked CE-3 and CE-4 as being inadmissible as they are printouts of the electronic records in the absence of certificate of electronic record under section 106B of the *Evidence Act*. The 1<sup>st</sup> Respondent states that although the Applicant is yet to fully satisfy the decree of Kshs. 969,064/=: interests and costs, without any provocation from the Applicant,



- it wrote to the 2<sup>nd</sup> Respondent on 4<sup>th</sup> September, 2024 requesting that the listing be updated to indicate that the debt was fully paid and which the 2<sup>nd</sup> Respondent did.
20. In totality, the 1<sup>st</sup> Respondent avers that it was neither negligent, malicious nor guilty of misrepresentation or defamation in submitting the Applicant's information to the 2<sup>nd</sup> Respondent. It concludes that the court lacks jurisdiction to entertain both the suit and application as are time barred.
  21. In the alternative, the 1<sup>st</sup> Respondent urges the court to make a finding that the application is frivolous, vexatious and an abuse of court process as the orders sought are incapable of enforcement since the wrongs complained have already occurred. Thus, any injunction would be futile. It urges that the application be dismissed with costs.
  22. The 2<sup>nd</sup> Respondent have responded to the application by filing a replying affidavit sworn by Pharis Kiama dated 13<sup>th</sup> August, 2024. It has further filed a notice of preliminary objection dated 14<sup>th</sup> October, 2024 contending that the suit is time barred and the court lacks jurisdiction to adjudicate over the matter as it was filed out of time contrary to section 4 (2) of the [Limitation of Actions Act](#).
  23. In its replying affidavit, the 2<sup>nd</sup> Respondent avers that the information contained in the credit report relating to the Applicant was supplied to it by the 1<sup>st</sup> Respondent who has approval from Central Bank of Kenya to share credit information of its customers to the 2<sup>nd</sup> Respondent. It states that it received a duly filled dispute form from the Applicant claiming that account 007 which was his was erroneously listed.
  24. The 2<sup>nd</sup> Respondent avers that it flagged the account and wrote to the 1<sup>st</sup> Respondent through a letter dated 22<sup>nd</sup> October, 2021 asking them to confirm the accuracy of the information submitted. The 1<sup>st</sup> Respondent responded through its letter dated 4<sup>th</sup> November, 2021 and confirmed that indeed the Applicant was owing but the amount listed was incorrect. The 1<sup>st</sup> Respondent then updated the disputed account to Kshs. 969,064/=.
  25. It avers that in publishing such information, it was exercising its duty which is approved by Central Bank of Kenya to share as per Regulation 18 of the Credit Reference Bureau Regulations. It states that it informed the Applicant through an email dated 5<sup>th</sup> November, 2021 of the outcome of the investigation of the dispute and advised that there is an alternative statutory procedure provided by Regulation 37 of the Regulations which the Applicant can exhaust if dissatisfied with the resolution. On 8<sup>th</sup> June, 2024, it is contended that the Applicant wrote to the 2<sup>nd</sup> Respondent seeking clarification on when the account was erroneously listed and it responded through an email of even date.
  26. According to the 2<sup>nd</sup> Respondent, it neither keeps bank accounts nor credit accounts but relies on information passed to it by banking and financial institutions like the 1<sup>st</sup> Respondent for publication and disseminating to credit information users. It maintains that the orders sought are defective and cannot issue as prayed as there is a clear procedure and mechanism on rectification of the [Banking Act](#) and the Regulations and which mechanisms have not been exhausted.
  27. It is averred that the Applicant's action of ignoring the statutory requirement and rushing to court amounts to abuse of the judicial system and court's scarce resources. It thus prays that the application be dismissed with costs.
  28. The Applicant filed a lengthy replying affidavit in response to the notice of preliminary objection dated 14<sup>th</sup> October, 2024. The Applicant contends among others that it only learnt of its credit listing on 29<sup>th</sup> September, 2021 and as such, it had three (3) years from 29<sup>th</sup> September, 2021 to file the suit. Therefore, having filed it on 16<sup>th</sup> July, 2024, it was well within the statutory period.



29. I note that the Applicant moved the court through originating summons dated 20<sup>th</sup> November, 2024 which in principle seeks leave to continue with the suit outside the limitation period of three (3) years. The application is strenuously opposed by the 1<sup>st</sup> Respondent through a lengthy replying affidavit dated 29<sup>th</sup> January, 2025. In a nutshell, the 1<sup>st</sup> Respondent states that the Applicant was well aware of the limitation period and thus cannot feign ignorance. It prays that the same be dismissed with costs.
30. Similarly, the 2<sup>nd</sup> Respondent filed its replying affidavit dated 4<sup>th</sup> February, 2025. In a nutshell, it is their contention that the delay in instituting the suit out of time has not been sufficiently explained. It concludes that time started running when the tort was committed and not after an outcome of mediation, dialogue or any other form of dispute resolution. Therefore, they pray that the application be dismissed with costs.
31. Consideration that there were several applications, directions were taken to have all of them disposed together. Parties agreed to file their respective submissions and all parties duly complied. The Applicant's submissions are dated 25<sup>th</sup> November, 2024. The 1<sup>st</sup> Defendant's submissions are dated 21<sup>st</sup> November, 2024. The 2<sup>nd</sup> Defendant filed two sets of submissions, the ones dated 29<sup>th</sup> October, 2024 and those dated 6<sup>th</sup> February, 2025. There are further submissions by the 1<sup>st</sup> Defendant dated 11<sup>th</sup> February, 2025.
32. The court wishes to thank the parties' advocates for their industry in putting in well researched submissions and authorities to support their respective clients' position. They go a long way in helping the court arrive at a just conclusion either way. If this ruling does not meet the expectations of their clients, it shall not be on account of any failure on their part.

### **Analysis and determination**

33. I have carefully considered the two applications on record, the notice of preliminary objection and the responses thereto. I have also considered the filed submissions as well as the law and in my view, the following issues fall for determination: -
  - a. Whether the notice of preliminary objection has merits;
  - b. If the answer in (a) above is in the affirmative, what orders ought to issue?
  - c. If in case the answer in (a) is in the negative, whether the applications dated 4<sup>th</sup> July, 2024 and 20<sup>th</sup> November, 2024 have merits; and
  - d. Who bears the costs?
34. It is now old hat that where the court's jurisdiction is questioned, the issue must be determined first. This position was settled way back in 1989 by the Court of Appeal in the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi, JA expressed himself thus: -

“...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”
35. Through the notice of preliminary objection dated 14<sup>th</sup> October, 2024, the 2<sup>nd</sup> Respondent raised an objection to this court's jurisdiction on account of the statute of Limitations of Actions Act and in



particular, section 4 (2) thereof. According to the 2<sup>nd</sup> Respondent, the Applicant's claim is based on the torts of defamation, negligence, misrepresentation and malicious actions.

36. Before delving on each of the said torts, the court must first examine whether the preliminary objection is well founded. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is the locus classicus on the issue of what constitutes a preliminary objection. The court observed thus: -

“...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”

37. Sir Charles Newbold P in the same decision stated thus: -

“...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop...”

38. In *Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others* [2014] eKLR, the Supreme Court stated thus: -

“...A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”

39. The same court in *Hassan Nyanje Charo v Khatib Mwashetani & 3 Others* [2014] eKLR held as follows: -

“...Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record...”

40. Evidently, a preliminary objection must be founded upon a settled point of law to the intent that its application to undisputed facts leads to but one conclusion; that the facts are incompatible with the point of law.

41. Having said as above, are there any facts to be ascertained or is it an exercise of discretion? In answering this question, it is imperative to note that in its plaint dated 4<sup>th</sup> July, 2024, the Applicant expressly pleaded that the 2<sup>nd</sup> Respondent falsely listed it on a Credit Reference Bureau on 29<sup>th</sup> January, 2020. Therefore, it is not in dispute that the cause of action arose on 29<sup>th</sup> January, 2020. I thus find that the preliminary objection is well founded.

42. Now putting the preliminary objection in its correct context, section 4 (2) of the *Limitation of Actions Act* is very categorical and states thus: -

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued: Provided that an action for libel or slander may not be brought after the end of twelve months from such date.”



43. All the actions pleaded fall under the category of torts which are defined as civil wrongs. They exclude contracts. As such, any claim under this category must be lodged within three (3) years of their occurrence. However, the tort for libel or slander is limited to twelve (12) months from the time of its occurrence.
44. The rationale behind the time limits imposed under Statute of Limitation is to shield tortfeasors from having to defend stale claims when evidence they would have relied upon may have dissipated.
45. Under the Applicant's first claim for defamation, it is clear that the period for lodging such claim lapsed on 30<sup>th</sup> January, 2021. Various decisions abound and I ascribe to the school of thought that espouses that actions based on defamation are not amenable to the saving grace afforded under section 27 (1) of the *Limitation of Actions Act*. In *Evelyne Onyamo Agindu v Evelyne Onyamo Agindu* [2022] eKLR, the court observed as follows: -

“...This court therefore having considered the undisputed date on which the instant cause of action arose finds that, on a plain reading of Section 27(1) of the *Limitation of Actions Act*, and based on precedent, there is no jurisdiction conferred on this court to extend time for the filing of a defamation suit...”

46. Therefore, the claim anchored on the tort of defamation falls by the way side. The other three (3) fall within the bracket of three (3) years as per section 4 (2) above. This being the position, the cause of action having arisen on 29<sup>th</sup> January, 2020, the Applicant ought to have filed his suit on 30<sup>th</sup> January, 2023. The suit was filed on 4<sup>th</sup> July, 2024, over one and half years after lapse of the requisite period.
47. Can section 27 of the Limitation of Actions come to the rescue of the Applicant? In answering this question, I wish to make reference to section 27 (2) of the *Limitation of Actions Act*. It provides as follows: -

- “(2) The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which—
- (a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and
- (b) in either case, was a date not earlier than one year before the date on which the action was brought.”

48. The Applicant's claim falls short of the above provision for several reasons. First, when the 2<sup>nd</sup> Respondent raised its preliminary objection, the Applicant filed a replying affidavit to the preliminary objection. It averred that it only came to know of the listing on 29<sup>th</sup> September, 2021. It did not have to wait for almost three (3) years to lodge its claim before court.
49. Secondly, despite stating that it only came to know of the claim in September, 2021, when the 2<sup>nd</sup> Respondent filed its preliminary objection, the Applicant in an attempt to defeat the Respondents' accrued defence filed the application dated 20<sup>th</sup> November, 2024. If indeed it was true that it was unaware about the listing, it should have argued its response to the preliminary objection.



50. In *Bartilol & 3 Others v Bartilol & Another* (Civil Application 001 of 2024) [2024] KECA 607 (KLR) (24 May 2024) (Ruling), the Court of Appeal citing with approval the Supreme Court’s decision in *Nicholas Kiptoo Korir Arap Salat v IEBC* [2014] eKLR held as follows: -

“...It is now settled that extension of time is not an automatic right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court...”

51. I do not find the Applicant deserving of this extension. Even if I had found so, I note that the orders of injunction have been spent as what is complained already occurred. Further, the Applicant has not exhausted the remedies found at Regulation 37 of The Banking (Credit Reference Bureau) Regulations, 2020. There is no evidence that the Applicant complied with Regulation 37 (13) in terms of disputing the resolution of the dispute.
52. Further, there is no evidence of compliance with Regulation 37 (15). I thus find that the Applicant’s actions were not in compliance with the law. I think I have said enough to show that the notice of preliminary objection is well taken.
53. Having found as above, I find it an academic exercise to dwell on issues (b) and (c).
54. On costs, the court exercises discretion and the court reserves the right as to award the same. Though the suit is time barred, I note that there is no doubt that there was wrong listing of the Applicant. This being the case, I direct that each party shall bear own costs.
55. Following the foregone discourse, the upshot is that the following orders do hereby issue;
- a. That the Notice of Motion dated 4<sup>th</sup> July, 2024 and the Originating Summons dated 20<sup>th</sup> November, 2024 lack merit and they are hereby dismissed.
  - b. The Notice of Preliminary Objection dated 14<sup>th</sup> October, 2024 is well taken and the same is upheld;
  - c. Consequent to (b) above, the plaint dated 4<sup>th</sup> July, 2024 is hereby struck out for being time barred;
  - d. Each party to bear own costs.
  - e. File is hereby closed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA, ON THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

.....  
**F. WANGARI**

**JUDGE**

In the presence of;

M/S Njarangi Advocate h/b Mogaka Advocate for the Plaintiff/ Applicant

M/S Matu Advocate for the 1<sup>st</sup> Respondent

M/S Achola Advocate h/b for Odhiambo Advocate for the 2<sup>nd</sup> Respondent

M/S Salwa, Court Assistant

