



**Osadho v KCB Kenya Ltd & another (Civil Appeal E040 of 2022)
[2024] KEHC 1907 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1907 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E040 OF 2022
MS SHARIFF, J
FEBRUARY 29, 2024**

BETWEEN

MARGARET OTIENO OSADHO APPELLANT

AND

KCB KENYA LTD 1ST RESPONDENT

METROPOL CREDIT REFERENCE BUREAU LTD 2ND RESPONDENT

*(Being an Appeal from the ruling and order of Hon B.M.A Omollo
(RM) in Kisumu CMCC No. 523 of 2019 delivered on 11th May, 2022)*

JUDGMENT

A. Case Background:

1. The Respondents herein individually filed Preliminary Objections dated 26/11/2019 and 28/10/2020. The former being the 2nd Respondents and the latter, the 1st respondent's in terms that;
 - a. There being a statutory mechanism under Regulation 35(5) of the credit Reference Bureau Regulations, 2013 and the plaintiff having failed to utilize the same renders the suit ex-facie incompetent, frivolous and premature.
 - b. That in the premises, the court is divested of jurisdiction to hear and determine the suit and the plaint dated 4/11/2019 ought to be struck out with costs for constituting an abuse of the court process.
2. The parties elected to dispose of the application by way of written submissions. The court after considering the same found the preliminary objections merited.



B. Appeal:

3. The Appellant being aggrieved by the order moved this court on appeal raising the following grounds;
 - a. The learned trial magistrate erred in upholding the preliminary objection on the basis that the Appellant did not plead that she invoked the provisions of Regulations 35 of the Banking (Credit Reference Bureau) regulations, 2013 and what the outcome thereof was; which is not a legal requirement in any known law and even if it were, the same could have been remedied by a simple amendment of the pleadings.
 - b. The learned trial magistrate erred by upholding the preliminary objections without affording the parties an opportunity to adduce evidence on the contested facts thus condemning the Appellant unheard.
 - c. The learned trial magistrate erred by miscomprehending the applicable law and failing to appreciate the limitations of preliminary objections which does not afford the parties an opportunity to adduce evidence thus the relevant facts could not be established.
 - d. The learned erred by failing to take into consideration the Appellant's written submissions to the respondent's preliminary objections and instead based her ruling solely on the respondent's submissions on the preliminary objections thus coming to a wrong conclusion.
 - e. The learned trial magistrate erred in law by writing a ruling which is at variance with the pleadings and contrary to the applicable principles as established by precedent and relevant statutory provisions of law.
 - f. The learned trial magistrate erred by sacrificing substantive justice at the altar of procedural expediency contrary to the provisions of Article 159(2)(d) of *the Constitution* of Kenya, 2010.

C. Submissions:

4. The by directions of this court, the parties argued the appeal by way of written submissions.

CI. Appellant's Submissions:

5. In her written submissions, the Appellant compressed grounds 2,3 and 4 and argued that the issues raised in the preliminary objection do not constitute pure points of law but facts that need to be ascertained by way of evidence. That the filing of submissions on the preliminary objection denied the Appellant a chance to adduce evidence in her defence. That evidence cannot be adduced in written submissions as the 2nd Respondents did. Reliance is placed on *David Odhiambo Okumu (person of unsound mind suing thro' next friend) Jeremiah Omuga Okumu V Foam Mattresses Ltd*, Civil Appeal no. E045 of 2021- Kisumu HC.
6. On grounds 1, 5 and 6, the Appellant submits that the Appellant issued demand letter dated 3/10/2019 addressing the disputed information on the 2nd respondent's website before filing suit. That although the letters were responded to, the Respondents failed to do as demanded thus the suit. That the Appellant has a viable suit if heard on merits.
7. The Appellant further submits that her case is not hopeless and ought not to be dismissed in the first instance. She relies on Articles 48 and 159 of *the constitution* and the decisional authorities in *MMM V AMK* (2016) eKLR.



8. On the issue of alternative dispute resolution, the Appellant submits that she duly notified the Respondents of the dispute thus the Appellant complied with Regulation 35(5) of the CRB regulations, 2013 but the 2nd respondent failed to act. She cites *Paramount Bank Limited V Hassan Naqvi Syed UI Qamar* (2020) eKLR, *Okiya Omtatab Okoiti V Commissioner general Kenya Revenue Authority & 2 others* (2018) eKLR and *Leonard Otieno V Airtel Kenya Limited* (2018) eKLR.
9. The Respondents did not file any submissions.

D. Analysis and determination:

10. This being a first appeal, the duty of the court is as was held in *Mark Oiruri Mose vs. R* (2013) eKLR thus;

....the Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

11. The issue in this appeal is whether the trial correctly appreciated the Preliminary objection as raising pure points of law.
12. The issue herein as presented revolves around the interpretation of Regulation 35(5) of the Credit Reference Bureau Regulations, 2013 which provides;

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.

13. The import of a preliminary objection was stated in *Mukisa Biscuits Manufacturing Ltd -vs- West End Distributors* (1969) EA 696 where it observed 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”.

14. The trial magistrate in arriving at her decision stated that the Appellant had by-passed the statutory remedy provided by Regulation 35 of the Regulations and proceeded to uphold the preliminary objections.
15. The evidence on record shows that the Appellant issued a demand letter to the Respondents asking them to de-list her from the Credit reference bureau on 3/10/2019 and no compliance to the said demand letter rectify the details within 14 days.
16. The preliminary objection was disposed of by way of written submissions. The Respondents through their separate submissions argued that the applicable legal provision is Rule 35(5) of the regulations. They also cited authorities which go to state that where a statutory mechanism for resolution of disputes exist, the mechanism ought to be exploited before moving court.



17. My analysis of the above stated Regulation shows that the customer, this case the Appellant is only required to issue a notice to the bureau of the dispute. The regulation does not specify the nature or the form the notice should take. I agree with the trial magistrate that the customer is merely required to issue a notice and the bureau is thereafter required to take steps to address the complaint.
18. My reading of the regulation does not impose any duty upon the Appellant other than notifying the bureau in writing. The Appellant issued a demand letter dated 3/10/2019. In the circumstances of this case, there is no alternative mode of dispute resolution mechanism is provided by the Regulation. I find that the suit as framed di not offend Regulation 35(5) of the Banking (Credit Reference Bureau) Regulations, 2013 and the Appellant is not guilty of contravening the doctrine of exhaustion.
19. Similarly, I have looked at the 2nd Respondents' statement of defence dated 26th November, 2019 wherein it denied ever listing the Appellant (Paragraph 16 thereof) and therefore disputed the correctness of the facts as placed before the court. It is cardinal rule of Preliminary objections that a one is raised on the presumption that the pleadings are factually correct.
20. The above position was stated by Ojwang J in *Oraro vs. Mbaja* [2005] 1 KLR 141 where the learned Judge stated;

.....It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.....
21. In this case then, the denial by the 2nd respondent that it ever listed the Appellant changes the dimension of the matter so that it is now the duty of the trial court to establish that indeed the Appellant was listed by the Respondents.
22. Premised upon the above analysis, it is my finding that the preliminary Objections as raised by the Respondents did not meet the threshold of a preliminary objection as defined in law and the trial court fell into error by upholding the Respondent's preliminary objection.
23. An order is therefore hereby issued setting aside the trial court's finding and substituted with an order of dismissal of the Preliminary objections dated 26/11/2019 and 28/10/2020. The case is thus remitted back to the trial court for hearing and determination.
24. Each party shall bear its own costs of this appeal as well as the subordinate courts.
25. Orders accordingly.

DELIVERED, DATED, AND SIGNED AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024

MWANAISHA S. SHARIF

JUDGE

