



**Kimeu v Family Bank Limited & another (Civil Appeal 586 of 2018)
[2024] KEHC 7064 (KLR) (Civ) (24 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 7064 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 586 OF 2018

DKN MAGARE, J

MAY 24, 2024

BETWEEN

MARTIN KIMEU APPELLANT

AND

FAMILY BANK LIMITED 1ST RESPONDENT

CREDIT REFERENCE BUREAU 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Judgment and Decree of Hon. K.I Orange– Senior Resident Magistrate dated 3011/2081 arising from Milimani CMCC No 586 of 2018.
2. The Memorandum of Appeal set out Grounds that the Learned Magistrate erred in law and fact in:
 - a. Finding that the Appellant was not servicing the loan initially
 - b. Finding no sufficient evidence in favour of the Appellant’s case
 - c. Finding that malice and bad faith were proved against the Respondents
 - d. Applying wrong principles of law on defamation
 - e. Dismissing the Appellant’s suit.

Pleadings

3. In the Complaint dated 10th October 2011, the Plaintiff pleaded among others that:-
 - i. The Plaintiff was customer of the 1st Defendant.



- ii. Sometimes in 2009 and 2010, the Plaintiff applied and the 1st Defendant granted two loan facilities.
 - iii. The Plaintiff continually serviced the loans by way of monthly installments.
 - iv. Later in August 2011, the Plaintiff applied for a study loan from Kenya Commercial Bank but was informed that he was ineligible as he had been listed by the 2nd Defendant as defaulter.
 - v. On follow up with the 1st Defendant as to why, the 1st Defendant vide its letter emailed letter dated 21st January 2021 conformed to the Plaintiff that the listing was in error and would be corrected but this never happened.
 - vi. The listing was malicious and was occasioned by the 1st Defendant.
 - vii. As a consequence, he incurred loss of profits and business at Kshs 14,000,000/-per month for 3 months.
 - viii. The plaintiff avers that the listing caused him bad reputation, distress and embarrassment.
 - ix. The Plaintiff therefore sought damages for embarrassment, malicious listing, and defamation.
 - x. The Plaintiff blamed the defendants for listing him without seeking his prior comment.
4. The 1st Defendant filed its Defence dated 17th November 2011 in which it denied the averments in the Plaintiff and also pleaded inter alia as follows:
- i. The report leading to the listing was erroneous
 - ii. The 1st Defendant moved to amend the listing under the Banking (CRB) Regulations, 2008.
 - iii. The 1st Defendant then instructed the 2nd Defendant to remove the name of the Plaintiff.
5. The 2nd Defendant also filed Defence. This was in the form of the Notice to Claim Against a Co-defendant dated 27th October 2011.
6. It was stated that the listing was pursuant to the instructions of the 1st Defendant.
7. It was pleaded that the 1st Defendant subsequently informed that 2nd Defendant that the listing was inaccurate and instructing the 2nd Defendant to delete it.
8. It was contended that the cause of information relating to the accuracy of information rested with the 1st Defendant and the 2nd Defendant was not liable.

Evidence

- 9. The Plaintiff testified as PW1. He relied on his witness statement and bundle of documents dated 10th October 2011.
- 10. It was his testimony that Kenya Commercial Bank denied him a loan due to erroneous listing by the 1st and 2nd Defendants.
- 11. It was his case that the Defendants admitted that the information was inaccurate.
- 12. On cross examination, he stated that he cleared the two loan in 2011.
- 13. The 1st Defendant called DW1 who stated that he worked with the 1st Defendant as credit administrator.



14. He stated that the Plaintiff's names was deleted after 7 days. That the Plaintiff cleared the loan repayments in February 2012 after the suit had been filed.
15. In cross examination, he stated that there used to be a notice of 60 days to pay in respect of arrears on loan. That there was no notice issued to the Plaintiff.
16. DW2 relied on his statement and documents and testified for the 2nd Defendant. He testified that the 1st Defendant was responsible for the accuracy of the information.
17. It was his case that the listing was thus erroneous and the 1st Defendant was to blame.

Submissions

18. The Appellant and 2nd Respondent do not appear to have filed submissions as there is none on the court record.
19. The 1st Respondent filed submissions. It was submitted that the Appellant defaulted in loan repayment and he did not deny this fact.
20. They submitted that the trial court was correct in finding that the reporting was not in itself defamatory.
21. They also submitted that the Appellant did not prove defamation as alleged. They cited the case of *Kariunga Kirubia & Co Advocates v The Law Society of Kenya & others* (2009) eKLR.
22. They also relied on the case of *Jamlick Guchubi Mwangi v Kenya Commercial Bank & another* (2016) eKLR to submit that the reporting was not malicious. Based on this case, it was further submitted that the Appellant did not prove any loss that he suffered following the alleged erroneous listing.
23. I was urged to dismiss the Appeal.

Analysis

24. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
25. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

“...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
26. The duty of the first appellate Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the locus Classicus case of *Selle and another v Associated Motor Board Company and others* [1968] EA 123, where the law looks in their usual gusto, held by as follows; -

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court's finding of fact if it appears either that he failed to take account of particular



circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

27. The Court is to bear in mind that it had neither seen nor heard the witnesses. It is the trial court that has observed the demeanor and truthfulness of those witnesses. However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them.

28. In the case of *Peters v Sunday Post Limited* [1958] EA 424, court therein rendered itself as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

29. I now proceed to establish whether the Respondent was entitled to the reliefs awarded. In *David Bagine v Martin Bundi* [1997] eKLR, the Court of Appeal cited the judgment by Lord Goddard CJ. in *Bonham Carter v Hyde Park Hotel Limited* (1948) 64 TLR 177, where he that:

[The] Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying ‘this is what I have lost’, I ask you to give me these damages; they have to prove it.

In Attorney General of *Jamaica v Clerke (Tanya)* (nee Tyrell), Cooke, J.A. delivering the judgment of the court stated that special damages must be strictly proved; the court should be very wary to relax this principle; that what amounts to strict proof is to be determined by the court in the particular circumstance of the case and the court may consider the concept of reasonableness.

30. The issue before the court is whether the Learned Magistrate erred in dismissing the Appellant’s suit.

31. In analyzing this issue, the court will inevitably establish whether the Defendants’ actions in causing the listing of the Plaintiff as a debt defaulter amounted to negligence and defamation.

32. On this subject, Section 107 (1) of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

33. Therefore, it follows that the Appellant had the duty to prove his claim against the Respondents. Courts have belabored the burden and standard of proof in civil cases which I find necessary to lay down as below.

34. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”



35. It follows that the initial burden of proof lies on the Appellant, but the same may shift to the Respondents, depending on the circumstances of the case.

36. Further, in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person... The appellant did not discharge that burden and as Section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side.”

37. The question then is what amounts to proof on a balance of probabilities. Kimaru, J in *William Kabogo Gitau v George Thuo & 2 others* [2010] 1 KLE 526 stated that:

“In ordinary civil cases a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred.”

38. Similarly, Lord Nicholls of Birkenhead in *Re H and others (Minors)* [1996] AC 563, 586 held that;

“The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriated in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability....”

39. Furthermore in *Palace Investment Ltd v Geoffrey Kariuki Mwenda & another* [2015] eKLR, the Judges of Appeal held that:

“Denning J, in *Miller v Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

40. I understand the *Credit Reference Bureau Regulations, 2013* are established under the *Banking Act*, and are operationalized under Section 31 and 34 of the *Microfinance Act*, who are mandated to submit both



positive and negative information the performance of the credit facilities extended to its customers. However, the matters in controversy in this suit arose in 2011 before the said Regulations came in force in 2013. Therefore, I find that the learned magistrate erred in referring to the 2013 Regulations that were not applicable. It is the 2008 Regulations that were applicable.

41. Under Regulation 14 (1) of the *Banking Act* (Credit Reference Bureau Regulations, 2008) as read with Section 31 (4) of the *Banking Act*, the 2nd Defendant is mandated to facilitate the sharing of information concerning non-performing customers between institutions licensed under the *Banking Act*.
42. It follows that the 1st Defendant, under the Act, has an obligation to forward to the 2nd Defendant names of customers who default in their obligations to service their loans, and the 2nd Defendant has a corresponding duty to receive such information. See also *Co-operative Bank of Kenya Ltd v Peter Ochieng* (2018) eKLR.
43. The 1st Respondent admitted that the listing was erroneous and it was deleted after 7 days. this was also the case of the 2nd Defendant who made attempt to abstain from any liability tracing liability to the 1st Respondent only.
44. There is no contestation that the Bank listed the Plaintiff as a defaulter with the 2nd Defendant and in fact did so without giving the Plaintiff notice of its intentions to list negative information against the Plaintiff, and that even after doing so, it deemed it not necessary to inform the Plaintiff, and kept him in ignorance up until he discovered by himself upon applying for a loan with Family Bank. Even after the Plaintiff thought he had clarified the issue to the 1st Defendant and he should have been cleared, he was still subsequently perturbed upon applying for a loan from Equity Bank who responded declining the Application and referring him to clear his name first.
45. On defamation, I understand the Appellant to contend that by the 1st Defendant causing him to be listed as a result of which he did not qualify for the anticipated Kenya Commercial Bank loan applied, the Appellant, was embarrassed and defamed, from which he seeks general damages.
46. The meaning of defamation was succinctly put by this Court in *S M W v Z W M* [2015] eKLR:-

“A statement is defamatory of the person of whom it is published if it tends to lower him/her in the estimation of right thinking members of society generally or if it exposes him/her to public hatred, contempt or ridicule or if it causes him to be shunned or avoided.”
47. Similarly, Windeyer J. In *Uren John Fair Fax & Sons Pty Ltd* 117 CLC 115 at 115 stated.

“Defamation is the publication of a statement which tends to lower a person in the estimation of right thinking members of society generally, or which tend to make them shun or avoid that person.”
48. Further, Halsbury’s Laws of England defines a defamatory statement as:

“A defamatory statement is a statement which tends to lower a person in the estimation of right thinking members of society generally or to cause him to be shunned or avoided or to expose him to hatred, contempt or ridicule or to convey an imputation on him disparaging or injurious to him in his office, profession, calling, trade or business.”



49. It was held in the case of *John Patrick Machira v Wangethi Mwangi & another* Nairobi HCCC No 1709 of 1996 that: -

A defamatory publication is the publication of a statement about a person that tends to lower his reputation in the opinion of right thinking members of the community or to make them shun or avoid him

50. I also defer to Order 2 Rule 7(1) of the *Civil Procedure Rules* which provides thus:

(1) where in an action for libel or slander the plaintiff alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning he shall give particulars of the facts and matters on which he relies in support of such sense.

51. On my analysis, I do not find the manner in which the Appellant was defamed. The impugned CRB listing was occasioned by the 2nd Respondent on instructions from the 1st Respondent. The same information was deleted after 7 days. The way I understand the law on defamation, such words are material facts and they must be set out verbatim in the particulars of claim.

52. As was held in the case of *Christopher Orina Kenyariri v Barclays Bank of Kenya Ltd & Credit Reference Bureau Africa Ltd* (2012) eKLR, the court is obligated to decide on the nature and effect of the words complained of. The Defendant too must be able to know the exact claim that it faces. There must be clear certainty in the claimants pleading with particulars clearly pleaded. When it is a corporation like in this case, it must be shown which particular employee or agent or both published the complained of words.

53. In *Alice Njeri Maina v Kenya Commercial Bank Ltd* (2018) eKLR, this court, faced with issues similar to the present ones made findings that the Defendant Bank in publishing to the CRB the Plaintiff's non-performing loan was not actuated by malice, though negligent, and that by diverging confidential information of a customer, a Bank may not be in itself defamatory. On my analysis. The listing was informed by the Appellant's prior default in servicing the loan and was timeously corrected after 7 days when the 1st Respondent confirmed that it was in error. This court is unable to find malice or bad faith on the part of the Respondents.

54. I have also considered the Appellant's evidence, including the material facts in support of the claim for defamation. The allegations thereof in my view do not meet the threshold of proof in a claim for defamation. Unlike in the claim of the tort of negligence, nothing was laid before the court in support of defamation. Considering the entirety of evidence therefore, and considering the Defenses by the Defendants, I come to a finding that the claim on defamation was not proved to the required standard.

55. I note the learned magistrate did not state the award that would have been applicable if the suit had been allowed. This was in error. In this case, nominal damages would suffice as there was no damage. I would have awarded the Appellant nominal damages of Kshs 10,000/-.

Determination

56. In the upshot, I make the following Orders:

- a. The Appeal is devoid of merit and is dismissed in limine.
- b. Appeal dismissed with costs of Kshs 50,000/= to each Respondent. 30 days stay.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**



KIZITO MAGARE

JUDGE

In the presence of:-

Chege for the Appellant

Chanjo for Kisinga for the 2nd Respondent

Miss Naazi for the 1st Respondent

Court Assistant: Brian

