Case Number:	Civil Appeal 148 of 2019
Date Delivered:	25 Nov 2021
Case Class:	Civil
Court:	High Court at Migori
Case Action:	Judgment
Judge:	Roseline Pauline Vunoro Wendoh
Citation:	National Bank of Kenya Limited v Herman Nyambu Ombok [2021] eKLR
Advocates:	Mr. Moibi for the Appellant Ms. Musebe for the Respondent
Case Summary:	-
Court Division:	Civil
History Magistrates:	Hon. R.K. Langat - SRM
County:	Migori
Docket Number:	-
History Docket Number:	PMCC 355 of 2018
Case Outcome:	Counterclaim by the appellant dismissed
History County:	Migori
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 148 OF 2019

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

-VERSUS-

HERMAN NYAMBU OMBOK.....RESPONDENT

(Being an appeal from the Judgement and Decree of Honourable R.K. Langat (SRM)

delivered on the 14th November 2019 in Rongo PMCC No. 355 of 2018)

JUDGEMENT

This appeal emanates from the Judgement and Decree of Hon. R.K. Langat (SRM) delivered on 14/11/2019 in **Rongo PM Case No. 355 of 2018 Herman Nyambu Ombok vs National Bank of Kenya.**

By a plaint dated 7/8/2018, the plaintiff **(hereinafter the respondent)** filed suit against the defendant claiming general damages for the wrongful listing of the respondent in a the credit reference bureau (hereinafter referred to as CRB) by the defendant **(hereinafter the appellant)** and a declaration that the listing of the respondent by the appellant in the CRB was wrongful, illegal null and void.

The appellant filed a statement of defence and a counterclaim dated 4/10/2018. The appellant denied the allegations in the plaint and put the respondent to strict poof. The appellant also contended that it suffered loss and damages due to the non - performing loan of the respondent and in its counterclaim, claimed a total of Kshs. 89,392.37 being the outstanding loan balance as at 3/9/2018.

At the end of the hearing, the trial court found in favour of the respondent and awarded him a sum of Kshs. 1,000,000/= as damages for emotional suffering, mental anguish and embarrassment for the wrongful listing by the appellant to the CRB together with costs and interest and dismissed the appellant's counterclaim.

Being dissatisfied with the judgement and decree of the trial court, the appellant filed the instant appeal via a Memorandum of Appeal dated 11/12/2019 which was later amended on 2/3/2020. The appellant preferred five (5) grounds of appeal which can be condensed into the following four (4) grounds:-

i. That the Learned Magistrate erred in law and fact in awarding manifestly excessive general damages of Kshs. 1,000,000/= to the respondent without any reasoning for this decision;

ii. The trial court erred in failing to consider the testimony and submissions of the appellant;

iii. That the trial court erred in law and fact in finding that the respondent suffered embarrassment and emotional anguish in the absence of any evidence;

iv. That the trial court erred in law in failing to consider convectional awards in cases of a similar nature.

The appellant therefore prays : -

i. That the judgement and decree of the trial court dated 14/11/2019 be reviewed and/set aside;

ii. Costs of the appeal be borne by the respondent.

The court directed that the appeal be canvassed by way of written submissions and both parties complied.

The appellant filed its written submissions dated 19/7/2021 on 12/8/2021. The appellant submitted that the trial court in its judgement found that the respondent did not call for evidence to demonstrate that he applied for a loan from the defendant or any bank and that the said application was rejected as a result of being listed in the CRB which led him to suffer financial loss; that the respondent did not adduce any evidence contrary to the provisions if Order 2 Rule 10 of the Civil Procedure Rules and Section 107 of the Evidence Act to prove that he suffered embarrassment and emotional anguish to warrant an award of Kshs. 1,000,000. The appellant supported its submissions with several cases and concluded that the award made to the respondent was a misdirection on its part as no evidence was adduced in support of its claim and damages suffered by the respondent.

The appellant further submitted that the trial Magistrate did not take into account its testimony, evidence and submission; that the listing in the CRB was done procedurally as all the notices were sent to the respondent prior to his listing; that the trial court found that the monthly instalments were being paid as agreed but failed to consider that the repayment of the facility advanced was not being done timely; thus the interest on the amounts was outstanding as evidenced by the bank statement, which led to the listing of the respondent by the credit CRB.

The appellant submitted that the respondent did admit to having been notified that he would be listed in the credit reference bureau because of the outstanding arrears and even after the notification, he did not repay the loan on a monthly basis as he was required to do.

Further to the foregoing, the appellant submitted that the respondent was duly advised on the changes in the repayments which had reduced significantly from Kshs. 6,993 to Kshs. 4,572.46 per month; that there were delays in making the payments; thus the arrears claimed by the appellant as of 19/7/2021 in its supplementary record of appeal amounted to Kshs. 89.392.37; that the trial court's decision that the counterclaim was not proved is in error.

The appellant concluded that the trial court's finding on the award was excessive and undeserved while referring to decisions whose circumstances were different from the one before it and further dismissing the counterclaim without considering the evidence and the appellants' testimony.

The respondent filed submissions dated 6/9/2021 and submitted on three issues. Firstly, the respondent submitted that on or about 7/7/2015, he was advised of the revised rates of the loan facility from Kshs. 6,933 to Kshs. 4,457.62; that in accordance with the advice, the respondent properly serviced his loan; that when he sought a loan from the appellant, he could not secure the same nor could his wife, from Equity Bank Limited due to the listing of the respondent by the CRB; that based on the contents of the letter, the respondent begun to service the new loan on the new terms despite not communicating on the same; that it is evident that the respondent had been diligently servicing the loan amount owed to the appellant hence he does not have an outstanding balance.

The respondent further submitted that on or about 3/10/2016 the appellant maliciously and unlawfully listed him to the CRB and as a result he was unable to access credit facilities at any bank. The respondent cited several provisions of the Credit Reference Bureau Regulations and submitted that the appellant was under an obligation to comply with them but it failed to exercise reasonable care over the entire relationship with the respondent. The respondent further cited Article 46 (c) of the Constitution and argued that he was guaranteed protection of his economic rights and in Article 35 (2) the respondent had the right to have incorrect information about him deleted.

On the award of damages, the respondent submitted that as a result of the listing and the failure of the wife to access loan facilities, he suffered financial and economic setback due to the false and malicious information published by the appellant intended to defame and injure his reputation thus he was deserving of the award. The respondent prayed that judgement be found in his favour and the appeal be dismissed with costs.

I have carefully considered the amended memorandum of appeal, the record of appeal and the supplementary an appeal and the respective rival submissions and it is this court's opinion that the issues for determination arising therefrom are:-

i. Whether the respondent adhered to the terms of the loan agreement;

ii. Whether the listing of the respondent to the credit reference bureau by the appellant was procedural;

iii. Whether the appellant's counter claim was merited;

iv. Whether the Respondent is submitted to and if so, if the award was excessive.

The ***locus classica*** on the duty of the court in appeals is the case of **Selle & Another vs Associated Motor Boat Company Ltd & Others [1968] 1EA 123** it was held:-

"…...this court is not bound necessarily to accept the judgment of fact by the court below. An appeal to this court therefore is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence."

The same position was taken in **Peters v Sunday Post Limited (1958) EA 524** it was held:-

"It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt v Thomas (1), [1947] A.C. 484."

The principles which can be derived from the above cases on the duty of an appellate court are:-

i. The appellate court is under duty to re-evaluate the evidence on record and reach its own conclusion.

ii. In re-evaluating the evidence, the appellate court should bear in mind that it did not have the advantage of seeing and hearing the witnesses testify before it.

iii. It is not open for the appellate court to review the findings of the trial court simply because it would have reached different results as if it was hearing the matter for the first time.

It is not in dispute that a loan facility was advanced by the appellant to the respondent on 10/10/2013. The terms of the loan were that it was serviceable in instalments of Kshs. 6,933/= per month for a period of 60 months. By a letter dated 29/5/2015, the appellant informed the respondent on the new base rate upon which all interest rates will be derived, as introduced by the Central Bank of Kenya.

By a letter dated 7/7/2015, the respondent was informed by the appellant that his loan terms would change to a repayment of Kshs. 4,572.46 per month for a period of 79 months. There was a further communication in the letter that if the respondent preferred not to change the terms of the loan repayment, he should inform the appellant in writing.

By a letter dated 1/8/2016, the appellant informed the respondent of its intention to list the respondent at the CRB for a default in loan repayment as his loan was classified as non - performing. By a further letter of 3/10/2016, the respondent was notified that he had been negatively listed with the credit reference bureau. It is this listing that the respondent alleged caused him to suffer considerable injury to his personal reputation and inability for him or his wife to access credit facilities from other institutions.

Turning to the first issue for determination, the respondent testified as **PW1.** It was his testimony that the appellant wrote to him a letter informing him that the Central Bank of Kenya had reviewed the interest rates. According to the respondent, the appellant

wrote to him a further second letter and notified him that the new interest rates had been implemented and the new monthly instalments has been reduced; that if he did not wish to go with the new rates, he should do so in writing which he did not. On the strength of the letter, he took it to his employer who implemented the new loan repayment terms. On cross-examination, the respondent admitted being in arrears but he differed on the amount due. On re-examination, he testified that the default only occurred after the letter of 7/7/2015 informing him of the new loan repayment rates.

James Osewe testified on behalf of the appellant as **DW1.** He stated that he was the collection officer and the respondent is one of their clients; that the respondent was notified of the change repayment rates and he was to contact the bank for further clarification. DW1 testified that he was not aware if the customer had contacted the office. Upon cross - examination, DW1 testified that the letter said that if the client did not want to change the repayment terms; he should write a letter which he did not. The letter was to take effect on 7/8/2015. He was to pay Kshs. 4,572.46 but he has been paying an amount of Kshs. 4,889.40 per month ; that the client is not in default but in arrears. On cross - examination, DW1 testified that the appellant defaulted when he paid Kshs. 4,573 and even before the letter of 7/7/2015, he was in arrears and asked him to visit any branch which he did not. The loan included interest and arrears.

The main issue in controversy is in the interpretation of the contents of the letter dated 7/7/2015. The relevant part of the letter is paragraph 2 which states:-

“Accordingly, the interest on your account will be charged at the rate of 19.83% p.a (KBRR +/(-) 9.96%) with effect from 7th August 2015. As a Bank, we understand that this increase in interest rate will result in financial impact on our customers. As a result, repayments do not change significantly. In this connection, your monthly repayments shall be Kshs. 4,572.46 over 79 months. However, should you prefer your tenor to remain unchanged, please let us know in writing.” (emphasis)

The condition on the letter was very simple and straightforward, the customer was only under obligation to notify the bank in writing if they wished to continue with the earlier re-payments terms. That is to say, if the customer wished to maintain the re-payments of Kshs. 6,993 per month for a period of 60 months as opposed to the new re-payment terms of Kshs. 4,572.46 per month for over a period of 79 months he was to notify the bank. There was no obligation needed on the part of the customer to inform the bank that they wished to adhere to the new repayment terms. DW1 on cross-examination confirmed that the letter was to take effect on 7/8/2015 and the respondent has since been paying an amount of Kshs. 4,889.40 per month. He further testified that the loan was by check - off system and the institution made the undertaking principal in this case. The respondent in his testimony in chief testified that he took the letter to his employer who effected the new re-payment system.

I find no reason to fault on the actions of the respondent. He simply informed his employer on the new loan re-payment monthly rates as adviced and the employer implemented the same since the terms of the loan re-payment were being done via check - off system. There was no obligation on his part to inform the appellant that he was to adopt the new re-payment schedule if he did not intend to alter his old loan re-payment terms. It was incumbent upon the appellant to align its system to the new loan re-payment terms as communicated to its customer. The respondent did adhere to the terms of the loan repayment as per the advisory letter of 7/8/2015. The first issue is now settled.

On whether the listing was procedural, the respondents contended that they followed the proper procedure before listing the respondent to the credit reference bureau. **Regulation 26 (1)** of the **Credit Reference Bureau Regulations 2020** provides:-

“A credit information provider who furnishes negative information to a bureau with respect to a customer shall, in writing or through electronic means, notify the customer of the intention to submit the negative information at least thirty days before submitting the negative information to the bureau or within such shorter period as the contract between the credit information provider and the customer may provide.”

The appellant did adhere to those regulations by informing the respondent of the intended listing him with the CRB vide letters dated 1/8/2016 and 3/10/2016.

Regulation 26 (4) and (6) of the Regulations provides:-

“(4) A credit information provider shall not furnish information relating to a customer to any bureau if the credit information provider has been notified by the customer, in writing or verbally, at the address specified by the credit

information provider for such notices, that the specific information is inaccurate."

"(6) Where the credit information provider has been notified of any inaccuracy in the credit information and there is reasonable cause to believe that the information may not be accurate, the credit information provider shall inform all the bureaus to which the information has already been submitted of this fact within five days from the date of the notification and shall, within fourteen days, carry out investigations and inform the bureaus of the outcome of the investigation."

There is a continuous obligation on the part of the appellant to address any concerns raised by a customer on the intended listing or already listing to the CRB. The respondent raised concerns about his listing via letters dated 15/11/2016 and 21/9/2017. From the evidence on record, the appellant has not demonstrated that they took time to investigate, attend to the complaint by the respondent and rectify the inaccurate information (if any) that was submitted to the CRB as it is required by them under the Regulations.

The appellant did not act diligently as was required of it. The bank's duty with its customers must be exercised with reasonable care and skills in regards with its operations within the contract with its customers. The appellant's actions were reckless and negligent. Therefore, I find that there was negligence and wrongful listing of the respondent by the appellant, thus the appellant is liable.

On the counter - claim by the appellant, it sought that the respondent be compelled to pay the outstanding balance of 89,392.37 as at 3 /9/2018. As this court has held above, the respondent cannot be faulted for readjusting the re-payment terms to Kshs. 4,573/= per month as adviced in the letter of 7/8/2015. In fact, from the bank statements, it shows that the respondent has been up to date in his payments. The same were made through check off system and hence regular. The counter claim has not been proved and therefore fails.

On the issue of damages, the respondent alleged that the listing in the CRB caused him and his wife to suffer financial embarrassment in procuring loan facilities, loss of business; that the publications by the appellant are malicious with the intention to defame and injure his reputation and as a result thereof, he has suffered injury in credit, reputation, character and he has suffered loss and damage. The appellant submitted that there was no evidence placed before the court in support of the claims and damages suffered by the trial Magistrate hence the award of Kshs. 1,000,000/= was inordinately high.

In the case of **Butt -vs- Khan (1977) KAR 1**, Law J.A stated that the court can interfere with the award of damages when the aggrieved persons satisfies one of two conditions:-

i. That the trial Court took into account irrelevant factors or left out relevant factors when assessing damages; or

ii. The amount of damages is so inordinately high or low that the quantum awarded must be a wholly erroneous estimate of damages.

In as much as the respondent has placed claims that he suffered loss and damage as a result of the listing in the CRB, he did not place evidence before the trial court to prove the loan application either by himself or his wife, were declined as a result of the listing in the CRB. It is trite law under **Section 107 of the Evidence Act** that whoever alleges must prove. Further, no financial loss was demonstrated by the respondent despite his name being listed at the CRB.

The question which this court can interrogate closely is whether the listing itself is defamatory. **Halsbury Laws of England Volume 32 (2019) at page 509** defined a defamatory statement as follows:-

" 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 disparage him in his office, profession, calling, trade or business "

For a claim of defamation to succeed the following have to be proved:-

i. The statement was defamatory.

ii. It was false and referred to the person.

iii. The defamatory words were published to a third party.

iv. It was maliciously published.

Section 27 of the Regulations guides the CRBs in handling any information submitted to it by the banks as follows:-

(1) A bureau shall protect the confidentiality of customer information in its possession or control under these Regulations and only report or release such information —

(a) to the customer;

(b) to the Central Bank;

(c) to a requesting subscriber;

(d) to a third party as authorised by the customer concerned; or

(e) as required by the Act, Microfinance Act, 2006, the Sacco

Societies Act, 2008, these Regulations or any other relevant

written law.

The CRBs are precluded from divulging any information given to them on the credit status of a customer except in the circumstances outlined above. The actions by the appellant in submitting the information to the CRB was not defamatory. They were seemingly exercising their statutory obligations albeit negligently. What would have been defamatory is if the CRB would have released the information to third-parties contrary to Section 27 of the Regulations thus putting the respondent in a position of ridicule to other right-thinking members of the society.

The respondent has sought in his plaint damages for loss of anticipated profits, humiliation and embarrassment, loss of professional and personal reputation, loss of goodwill, mental anguish and trauma. As I have observed hereinbefore, the respondent did not adduce any evidence to prove that his loan application or that of his wife were declined as a result of the listing. Further, the respondent has not adequately demonstrated that due to the listing with CRB, other consequences ensued like a decline in a promotion at his business or a lost opportunity in pursuing greener pastures in his professional capacity or that any losses in his wife's business were suffered.

Although the respondent did not suffer financial loss and damage, I have found earlier in this judgments that the actions by the appellant were negligent. The applicant did not take time to respond to the concerns raised by the respondent on the unlawful listing. The respondent must have suffered embarrassment and emotional anguish. I refer to the case of **Alice Njeri Maina vs Kenya Commercial Bank Limited (2018) eKLR**. In that case, the plaintiff was wrongfully listed by the defendant to the CRB. The plaintiff had similar names to one of the defendant's customers who had defaulted on her loan. The court awarded the plaintiff a sum of Kshs. 200,000/= for wrongful listing due to mistaken identity. In the case of **Namalwa Christine Masinde vs National Bank of Kenya (2016) eKLR,** the plaintiff was wrongfully listed as a defaulter by the defendant but upon realising its mistake, the defendant delisted the plaintiff. The court awarded a sum of Kshs. 200,000/= to the plaintiff for suffering financial embarrassment.

In the instant case pursuant to the communication contained in the letter of 7/8/2015, the respondent adjusted the loan re-payment terms as adviced. He cannot be faulted. Further, when the respondent raised the issue of the wrongful listing, the appellant did not initiate investigations and address its customer's concerns. The appellant did act negligently in listing the respondent with the CRB but the actions cannot be said to be defamatory. Since the respondent did not table evidence to prove the loss and damage suffered, I find that he is deserving of damages for financial embarrassment. Guided by the above persuasive precedents. I find the award of Kshs. 1,000,000/= to be inordinately high in the circumstances and that award is hereby set aside. I proceed to make an award of Kshs. 300,000/= having taken into account the time lapse from the awards made in the decisions referred to

In the end, I make the following findings.

1. A declaration be and is hereby made that the listing of the respondent by the appellant was wrongful, illegal, null and void.

2. The Judgement and decree of the lower court delivered on 14/11/20919 on the award of damages be and is hereby set aside.

3. The counterclaim by the appellant be and is hereby dismissed.

4. General damages for financial embarrassment are awarded to the respondent being a sum of Kshs. 300,000/=.

5. The costs of this appeal, and of the lower court suit and interest from the date of filing suit is awarded to the respondent.

6. The appellant shall at its own cost within seven (7) days from the date of this judgement, cause the name of the respondent to be delisted from the Credit Reference Bureau.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 25th DAY OF NOVEMBER 2021.

R. WENDOH

JUDGE

Judgement delivered in presence of;-

Mr. Moibi for the Appellant

Ms. Musebe for the Respondent

Nyauke - Court Assistant