

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. E1360 OF 2024

WHITEPATH COMPANY LTD.....
.....APPELLANT

VERSUS

JOSEPH KIHARA KABURUGU.....RESPONDENT

**(Appeal from the judgement and decree, of Hon. SN Muchungi
(Mrs), in Milimani CMCCC No. E623 of 2023, of 8th November
2024)**

JUDGEMENT

1. The original record, relating to the proceedings that were conducted at the trial court, were not availed. I shall proceed to determine this appeal on the presumption that the record of appeal captures the true record of what transpired before the trial court.

2. The suit, at the trial, had been at the behest of the respondent herein, against the appellant. It was a defamation claim, for compensation and injunctive relief. The respondent had borrowed money, from the appellant, through an online application, that he had downloaded. When he delayed, in payment of an instalment, employees or agents of the appellant, made unlimited calls to him, threatening him. They also contacted his relatives, friends and colleagues, who began to contact him, asking why he had registered them as his guarantors without their knowledge and consent. The respondent averred that the information given, to his contacts, by the appellant, that he was a default, and had listed them as his guarantors was false. He pleaded distress from those calls, and economic loss, as some of his business clients and partners deserted him.

3. The appellant resisted the claim; acknowledged the money lending relationship between it and the respondent, but denied making unlimited calls to the respondent, and issuing threats, nor contacting his contacts and making claims to them about the respondent's conduct. He also counterclaimed for Kshs. 34,210.00, with interests, and costs.
4. A trial was conducted, and 1 witness testified for the appellant, and 2 for the respondent. Judgment was delivered on 8th November 2024, in favour of the respondent, and damages were awarded for defamation, at Kshs. 700,000.00. The counterclaim was also allowed, with interests and costs.
5. The appellant was aggrieved. The appeal raises several grounds: evidence of the defamation not being presented; the particulars of defamation not being pleaded in the plaint; the defamatory messages not traced to the appellant; the evidence of the witness for the respondent not being corroborated; the judgment being against the weight of evidence; the defamation not proved to the required standard; among others.
6. The respondent also cross-appealed. His grounds were that the trial court failed to find violations of the Banking Act, Cap 488, Laws of Kenya, which had allegedly made the contract illegal; and the damages awarded were on a lower sale.
7. Directions were given, on 21st January 2025, for canvassing of the appeal, by way of written submissions. Both complied, by filing written submissions, which I have read and considered.
8. The key issues, raised by the appellant, are whether the defamation had been properly pleaded and proved.

9. One of the arguments is that the plaint was not properly framed, in terms of pleading the facts required, by Order 2 Rule 7 of the Civil Procedure Rules, in defamation suits. I have perused the plaint, dated 20th February 2023, and found that the respondent could have done better, in terms of pleadings. Pleadings for different claims are framed differently, based on the rules of pleadings, and the Civil Procedure Rules. The respondent does not appear to have been faithful to what Order 2 rule 7 requires. However, that was not enough to drive him out of the judgment seat. Article 159 of the Constitution has changed the matrix; in the way pleadings are to be treated and handled by a court., The pleadings in the plaint, filed at the trial court, provided adequate information on what the respondent was complaining about, sufficient for the appellant to file an answer, and adduce evidence in defence.
10. On whether the claim was proved to the required standard, I believe it was. The standard of proof, in civil cases, is on a balance of probability, not beyond reasonable doubt. It is not disputed that the appellant loaned moneys to the respondent, and there was default in re-payment. The respondent established, by concrete evidence, that he received nasty phone calls and texts, for payment, in default of which consequences were to follow. He also established, by concrete proof, that the consequences followed, for persons from his contact book contacted him, indicating that they had either been called or texted, being informed that he was a loan defaulter and a devious and dishonest person. The appellant filed a counterclaim for amounts of moneys that were in the same region as that owed by the respondent. Logically, the nasty demands for payment could only come from the person who he owed money. He did not have to establish that the phone numbers used were registered to the appellant, so long as the moneys, the subject of the calls and texts, were to be paid to the appellant.

11. On the counterclaim, I reiterate, again, that the borrowing was not disputed. Indeed, the basis of the suit was the loan or the borrowing. To say that the respondent should not repay moneys that he had borrowed and received, just because of a breach of some regulation, would encourage unjust enrichment. The respondent should not have dealt with an unlicensed vendor, in the first place, if at all the appellant was one. It was not established that the contract was illegal. On the damages being on the lower scale, that has not been demonstrated. To award anything higher would be to profit a loan higher defaulter, who provoked the reaction from the appellant in the first place. All these had to be balanced, and, no doubt, the trial court did not err in that balancing.
12. Overall, I do find merit in the appeal and cross-appeal herein. I hereby dismiss the both of them. Each party shall bear its own costs. Orders accordingly

**DELIVERED, VIA EMAIL, DATED AND SIGNED IN
CHAMBERS, AT BUSIA ON THIS 9TH DAY OF FEBRUARY
2026.**

**WM MUSYOKA
JUDGE**

Mr. Arthur Etyang, Court Assistant, Busia.

Ms. Carolyn Oyuse, Court Assistant, Milimani, Nairobi.

Advocates

**Mr. Eredi, instructed by Eredi Mulama & Company, Advocates
for the appellant.**

Messrs. Njoroge & Company, Advocates for the respondent.