



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 231 of 2000

FATHER JOHN (GIOVAN) SAOVE PLAINTIFF

VERSUS

1. JOSEPH PILALO OLE MUTEMBEI

2. PAUL KINAI MATOLO DEFENDANTS

JUDGMENT

1. By his plaint dated 15/8/2000, the Plaintiff claimed Kshs.604,500/= plus costs and interest from the Defendants made up as follows:-
 - i. Kshs.400,000/= advanced by the Plaintiff to the Defendants as a friendly loan which the latter were to use towards the Ulu Water Project but which sum was allegedly to be refunded to the Plaintiff.
 - ii. Kshs 204,500/= being the cost of travel between Italy and Kenya and also within Kenya in pursuit of the refund above.
2. The 1st Defendant filed a statement of Defence on 22/5/2001 in which he admitted receiving the sum of Kshs.400,000/= but averred at paragraph 4 thereof that the same was a gift to him and at no time was there an agreement that the said sum would be refunded to the plaintiff.
3. I did not see any response by the 2nd Defendant and no judgment in default seems to have been entered against him.
4. On 26/5/2003, Nambuye J took the evidence of the Plaintiff who had travelled from Italy for the purpose of this suit. It was his evidence that between 1993 and 1995, he was stationed at Kiongwani Parish, Machakos Catholic Diocese. While serving there, he received information from the Development Officer, Machakos District that Ulu area within Kiongwani Parish required a water project and the defendants were instrumental in convincing him that the project was useful to the people of the area. It was generally agreed that the community in Ulu would raise a quarter of the cost of the project while the Catholic Church would provide the remaining portion of that cost. The Plaintiff initially donated Kshs.200,000/= from the Catholic Church and he publicly gave it out one Sunday morning to a person he could not recall. When he was recalled back to Italy and having personal money in cash, he decided to donate it to the project and so he gave out Kshs.509,000/= for that purpose.

5. Before the Plaintiff left Kenya, the Defendants allegedly approached him and asked him for a loan to enable them to complete the project as the community apparently had difficulties raising the quarter cost of it as they had promised to. He consulted and since the two appeared to be trustworthy, he agreed to give them Kshs.400,000 “as a loan they said they would use...on the Ulu Water Project.” To ensure that the money would reach the project, he decided to send it from Italy to a bank account operated by Kiongwani Secondary School at Machakos Town. He then wrote to the Defendants to go and collect the money from the Headmaster of Kiongwani Secondary School and in October 1995, he confirmed that indeed the money had been passed on to the Defendants. In February 1996, he returned to Kenya and on enquiry was informed that the money was never used for purposes of the Water Project. He proceeded to Sultan Hamud and met the Defendants who denied ‘stealing’ or misusing the money although they were unable to produce any receipt showing expenditure incurred towards the project. That the 2nd Defendant then took him to a shop in Machakos Township where they had allegedly bought water pipes but the shopkeeper said that while indeed the pipes were bought, the Defendants later returned them and they were given back the money they had initially paid. After that incident, the Plaintiff made a report at Salama Police Station and after a long search; the two were arrested and charged in Criminal Case No. 247/1996 at Kilungu RM’s Court. They were not convicted and the Plaintiff insisted that the money was given as a loan and not a present or gift to the Defendants.

6. PW2, Pius Mulwa Mwatu, a teacher at General Mulinge High School recalled that in 1993 – 1995, he knew all the parties to the suit as he was then stationed at Kiongwani High School. He became aware that the Plaintiff wanted to give Kshs.400,000/= as “a loan to Ulu Water Project” which he was to be refunded by the Defendants at a later stage. The Plaintiff asked PW2 and one Jude Ndambuki to receive the money at an account which they were signatories to, and then pass it on to the Defendants. When the money was sent by the Plaintiff, it was indeed paid to the Defendants who acknowledged its receipt. Later, PW2 discovered that the money was not used for the project as agreed and later the Defendants were charged with theft of that money but were discharged when the Plaintiff failed to testify.

7. On 12/3/2008 when the matter came for hearing before me, Mr Musila appeared for the Defendants and when I asked him to go and pay court adjournment fees as ordered by Onyancha J on 14/12/2005, he never returned and there being no evidence for the defendants, I presumed that there was no evidence to be tendered by the Defendants and I proceeded to ask parties to file submissions before I retired to write this judgment. Only the advocate for the Plaintiff complied with that direction.

8. To my mind, only one question requires to be answered:- since the 1st Defendant admits that he and the 2nd Defendant received Kshs.400,000/= from the Plaintiff, was that money given as a gift or a loan?

9. All evidence before me points to the fact that the Plaintiff gave out Kshs.200,000/= initially to assist the Defendants and others to start the Ulu Water Project. Later and before he left Kenya for Italy, he forked out kshs.509,000/= of his personal money towards the actualization of the same project. On both occasions, there is no doubt that he was magnanimous towards the people of Ulu and he had no intentions of anyone refunding him that money. In fact when the plaintiff testified, he was unable to tell who exactly in Ulu he gave the money because he had no intention of following it up later. However, regarding the Kshs.400,000/=, my reading of the record as made by Nambuye J, would leave one in no doubt that the plaintiff and his witness were telling the whole truth as to what he intended and what the Defendants also had in mind. He never intended that the money would be a gift nor a present either to the Defendants or the Ulu Water Project. He was naïve in dealing with the Defendants but he had the sixth sense to have witnesses to the transaction hence the involvement of PW2 and one Jude Ndambuki who has since moved on to the United States of America, as such witnesses. It is instructive that no evidence whatsoever has been called to rebut the clear, concise, naively honest testimony of the Plaintiff which is fully corroborated by that of PW2.

10. The Plaintiff trusted his money to people he thought were trustworthy but who then used the money for unknown purposes and now refuse to refund it as was the agreement. Even if there was no agreement to refund the money, and I find that there was, once the Plaintiff’s hand earned money was converted to personal use, as did the Defendants, then he was entitled to a refund as a matter of right. Since it has not been shown that the money was indeed used for the Water Project, it should return to its rightful owner. I

say this because the evidence before me is that the Defendants bought water pipes but returned them, reclaimed the money and their actions smirk of an illegality.

11. Regarding the expenses incurred by the Plaintiff, there is no doubt that he travelled to Kenya to pursue his lost money and he is entitled to the cost caused by the bad conduct of the Defendants.

12. Without saying more, the Defendants having given no credible answer to the Plaintiff's claim, Judgment is now entered for the Plaintiff in the sum of Kshs.604,500/= plus costs and interest, against both Defendants jointly and severally.

13. Orders accordingly.

Dated and delivered at Machakos this 13th day of May 2008.

ISAAC LENAOLA

JUDGE

In the presence of: Mrs Mwangangi for plaintiff

N/A for Defendant

ISAAC LENAOLA

JUDGE