



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

**Civil Case 897 of 2001**

**KAGWI CATHOLIC CHURCH DEVELOPMENT FUND SACCO LTD.....PLAINTIFF**

**VERSUS-**

**DR. REV. FATHER NGURE .....1<sup>ST</sup> DEFENDANT**  
**JOSEPH KANYIHA KAGUNYI .....2<sup>ND</sup> DEFENDANT**  
**PETER KIMANI NG'ANG'A .....3<sup>RD</sup> DEFENDANT**  
**MARTIN THAITHI GACHECHE .....4<sup>TH</sup> DEFENDANT**  
**NDINGURI KARANJA .....5<sup>TH</sup> DEFENDANT**  
**MURICHO KIBUU .....6<sup>TH</sup> DEFENDANT**  
**MARY WANGAI NG'ANG'A .....7<sup>TH</sup> DEFENDANT**

**RULING**

By an undated Plaintiff filed on the 31<sup>ST</sup> May 2001, Kagwi Catholic Church Development Fund Sacco Ltd. (hereinafter called " **the Plaintiff** ") instituted this suit against Dr. Rev'd. Father Ngure (hereinafter called " **the First Defendant** ") and the six other persons named in the Plaintiff.

On the 17<sup>th</sup> March 2004 the Defendants filed their joint statement of amended defence dated the 16<sup>th</sup> March 2004 in which the First Defendant counterclaimed against the Plaintiff and the twenty-one other persons named in the Counterclaim for judgment in the sum of KShs. 13,710,497, among other reliefs. The Plaintiff and the other twenty - one Defendants to the counterclaim filed their respective defences dated the 31<sup>st</sup> March 2004 and the 29<sup>th</sup> April 2004 on the 1<sup>st</sup> and 29<sup>th</sup> April 2005 respectively.

The 151 Defendant in a Notice of Motion dated the 16<sup>th</sup> June 2004 and brought under Order 12 rule 6 of the Civil Procedure Rules has moved the court for orders ( *Inter alia* ) : -

**"1. That this Honourable court be pleased to enter judgment for the plaintiff (in the Counterclaim) in the sum of K. Shs. 13, 710, 497/ = against 1<sup>st</sup> to 22<sup>nd</sup> Defendants (in the Counterclaim) on admissions made in the pleadings."**

The Motion, premised on the ground that the Plaintiff and the other defendants to the counterclaim have

admitted the First Defendant's claim, is supported by the affidavit of Peter Kimani Ng'ang'a made on the 16<sup>th</sup> June 2004 and the supplementary affidavit of Mwaura Shairi, learned counsel for the Defendants in the suit, also made on the 16<sup>th</sup> June 2004. The application is opposed on the basis of two affidavits respectively sworn on the 5<sup>th</sup> and 8<sup>th</sup> July 2004 and both filed on the 8<sup>th</sup> July 2004 by Michael Wanyoike Kungu on behalf of all the defendants to the counterclaim.

In his submissions, Mr. Mwaura Shairi urged that the application be allowed on two principal grounds, namely:

a) that in paragraph 10 of the defence to counterclaim dated and filed on the 19<sup>th</sup> April 2004, the 1<sup>st</sup> to the 21<sup>st</sup> defendants (inclusive) admit having had their possession or custody and having retained the sum of K.

Shs. 13,710,497/= which the First Defendant claims from them jointly and severally; and

b) that the Plaintiff has failed to file a defence to the counterclaim.

Paragraph 10 of the defence to counterclaim dated and filed on the 29<sup>th</sup> April 2004 reads as follows:-

**“10. The 1<sup>st</sup> to 21<sup>st</sup> Defendants further aver that there was never any transfer of funds from Kagwi Catholic Church Development Fund, which consisted some of the outstations as stated by the Plaintiff. It is herein avered by the Defendants that no transfer was necessary on Kagwi Catholic Church Development Fund legally convened itself Into Kagwi Catholic Church Development Fund and later into Kagwi Christian Development Fund in Sacco Ltd.”**

Having considered the contents of this paragraph in conjunction with the whole of the said defence to the counterclaim and of paragraphs 6, 8, 9 and 11 to 16 (inclusive) thereof in particular, I would and do respectfully agree with Mrs. Mungai, learned counsel for the plaintiff and the other defendants to the counterclaim, that the contents of paragraph 10 do not constitute nor can they be construed being an admission as contended by the 1<sup>st</sup> Defendant as or at all.

I am unable to exercise my discretion in that behalf in favour of the First Defendant as I am not satisfied nor at all persuaded that the contents of paragraph 10 aforesaid even remotely come close to meeting the conditions enunciated by the Court of Appeal **Agricultural Finance Corporation -v- Kenya National Assurance Company Ltd.** (in Receivership) (Civil Appeal No. 271 of 1996) (unreported) cited by Mr. Mwaura Shairi, in which the court followed its own decision in **Choitram -v- Nazari** ( 1982 – 88)1 KAR 437 and held that :-

**“Judgment ought not to be passed on admissions unless clear, unambiguous and unconditional .... Where a defendant has raised objections which go to the very root of the case, it would not be proper to exercise this discretion”** (emphasis added).

This ground of the First Defendant's application therefore fails as does his second ground as the Plaintiff has clearly filed its defence to counterclaim dated the 31<sup>st</sup> March 2004 on the 1<sup>st</sup> April 2004 as noted hereinabove. Having arrived at this conclusion, I do not find it necessary to determine whether or not the deponent of the supporting affidavit, who is not a party in the counterclaim, is competent to make his affidavit sworn on the 16<sup>th</sup> June 2004 which has been challenged by the Plaintiff and the other respondents to the application.

Accordingly, the Notice of Motion dated the 16<sup>th</sup> June 2004 and filed on the 23<sup>rd</sup> June 2004 fails and it is ordered that the same be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 24<sup>th</sup> day Of February 2005

P. Kihara Kariuki

Judge.