



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 102 OF 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

KIZITO CHESSESIO.....1ST DEFENDANT

EARNEST KIMITEI.....2ND DEFENDANT

PETER KIPRONO.....3RD DEFENDANT

JUDGMENT

1. The plaintiff claims Kshs 400,000 together with costs and interest. The plaint is dated 22nd May 2007. The plaintiff pleads that the three defendants fraudulently opened an account at the Co-operative Bank of Kenya, Eldoret purporting it to be for the benefit of *Uswo Water Project*. The latter was one of the projects funded by the then *Eldoret East Constituency Development Fund*. The plaintiff asserts that the defendants falsely presented themselves as the chairman, secretary and treasurer of the project. They then obtained a cheque for Kshs 400,000 from the fund; deposited it into the fictitious account; and, siphoned out the money.

2. The bedrock of the plaintiff's claim is that the defendants defrauded the public; and, unjustly enriched themselves. The plaintiff craves restitution. The defendants will have none of it. Through statements of defence filed on 10th September 2007 and 14th September 2007, the 1st and 2nd defendants denied the claim *in toto*. The third defendant entered an appearance through counsel on 4th September 2007 but failed to file defence. Interlocutory judgment was entered against him. The 3rd defendant has continued to defend the claim in person.

3. The plaintiff called five witnesses. PW1 was Gladys Chelagat. She was an accounts officer at Co-operative Bank, Eldoret branch. She testified that the defendants fronted as officials of the project: Ernest Kiprotich Kimitei as the chairperson; Peter Kipkosgei Kiprono as the treasurer; and Kizito Chessesio as the secretary. They opened an account in the name of *Uswo Water Project*. They presented to the bank their national identification cards; passport photographs; minutes of the 7th meeting of *Eldoret East Constituency Development Fund Committee* held on 4th June 2005; and, a certificate of registration number UG/SS/REG/7044/2003 for the project. Copies of the documents were produced as exhibit 1.

4. Upon verification of the documents, the bank opened an account number 0112086938500 in the name of the water project. It also issued the defendants with a cheque book. She testified that on 21st July 2005,

a cheque for Kshs.400,000 was deposited into the account. She made references to the original bank statement for July 2005 (exhibit 2). The cheque was drawn on the Eldoret East Constituency Development Fund Account No. 0112086365800 held at Co-operative Bank, Eldoret branch. She referred to the bank statement of the fund (exhibit 3).

5. The witness stated that the defendants drew down Kshs 399,000 as follows: Kshs 70,000 on 2nd August 2005 by the 3rd defendant vide cheque number 00000003; Kshs. 210,000 on 3rd August 2005 by the 1st defendant through cheque number 00000004; and, Kshs 129,000 on 10th August 2005 by the 2nd defendant by cheque number 00000005 (exhibits 4 [a] to [c]). Only a credit balance of Kshs 1,000 was left in the account. She testified that the account is no longer operational.

6. PW2 was Hillary Kiplangat. He was elected as the secretary of Uswo Water Project on 4th January 2002. The other elected officials were Jonathan Keror as the chairman; and, Mwangi Kimani as the treasurer. He produced the minutes of the meeting (exhibit 5). He testified that there were no subsequent elections. The aim of the project was to assist about 220 members with clean water for domestic use or irrigation. He was categorical that the project never operated an account at Co-operative Bank of Kenya Limited; and, that the official banker of the project remained National Bank of Kenya Limited, Eldoret branch. Furthermore, the defendants have never been officials of Uswo Water Project; and, they do not hail from the area.

7. PW3 was Cheruiyot Rop. He is the District Social Development Officer, Eldoret East. He confirmed that the bonafide officials of the project were Pius Seronei as chairman, Hilary Kiplangat as secretary and Mwangi Kimani as the treasurer.

8. PW4, Joash Ongati was the District Accountant, Uasin Gishu District. He testified that the signatories to the account for Eldoret East Constituency Development Fund were as follows: Secretary, Kizito Chesusio; chairman, Raymond Chemweno; treasurer Evans Mutiso; and, Joash Odhiambo Ongati (PW4). The patron was Joseph Lagat, Member of Parliament, who was not a signatory to the account.

9. PW4 confirmed that the fund issued cheque number 000082 for Kshs 400,000 dated 12th July 2005. It was in favour of Uswo Water Project. When cross examined by learned counsel for the 1st and 2nd defendants, he said he had not attached supporting documents to his witness statement; and, that he did not bring to court any evidence of employment at the National Treasury. Upon further cross examination by the 3rd defendant, he said he was not a member of the Uswo committee; and, that he could not verify if water pipes were delivered to the project.

10. The last witness was Emmanuel Arunga (PW5). He was a forensic investigator. He obtained a warrant to investigate the bank accounts of the project. He established that the account opened by the defendants at Co-operative Bank was bogus; and, that the genuine account of the project was the one held at National Bank, Eldoret. He said the cheque of Kshs 400,000 in issue was banked by the defendants; and, that they later withdrew the money. Finally, he stated that the true officials of the water project never learnt of the fraud until the investigations commenced.

11. When cross examined by learned counsel for the 1st and 2nd defendants, he confirmed that exhibit 2 was an original bank statement. Responding to a question from the 3rd defendant, he was emphatic that the Kshs 400,000 in issue did not reach the water project; and, that no pipes were supplied.

12. That marked the close of the plaintiff's case. None of the defendants took to the stand despite being granted an adjournment to do so. On 16th June 2016, the defendants were granted a last adjournment. When the trial resumed on 30th June 2016, the defendants closed their case without any rebuttal.

13. The plaintiff filed written submissions on 28th July 2016; the 1st and 2nd defendants on 18th August 2016. The 3rd defendant did not do so. I have paid heed to the pleadings, the evidence, the records and materials.

14. From the pleadings and the evidence, the issues for determination are two-pronged-

i. Whether the defendants fraudulently appropriated Kshs 400,000 belonging to either Eldoret East Constituency Development Fund; or, the Uswo Water Project;

ii. Whether the plaintiff is entitled to recover the sum together with costs and interest.

15. From the evidence of PW1, I am satisfied that the three defendants misrepresented to the Co-operative Bank that they were genuine office bearers of Uswo Water Project. They opened account number 0112086938500 at the bank in the *name* of the water project. On 21st July 2005, the cheque in issue of Kshs 400,000 was deposited into that account. This is evident from the original bank statement for July 2005 (exhibit 2). The cheque was drawn from the Eldoret East Constituency Development Fund Account number 0112086365800 held at Co-operative Bank, Eldoret branch. It is material that the 1st defendant doubled up as the secretary, Eldoret East Constituency Development Fund. It sheds some light on how the cheque was diverted into the counterfeit account of the water project.

16. From the evidence of PW2 and PW3, the genuine officials of the water project were Pius Seronei as chairman; Hilary Kiplagat as secretary; and, Mwangi Kimani as the treasurer. The defendants were thus masquerading as officials of the project.

17. It is also clear beyond peradventure that the defendants drew down the sum of Kshs 399,000 as follows: Kshs 70,000 on 2nd August 2005 by the 3rd defendant vide cheque number 00000003; Kshs 210,000 on 3rd August 2005 by the 1st defendant through cheque number 00000004; and, Kshs 129,000 on 10th August 2005 by the 2nd defendant vide cheque number 00000005 (exhibits 4 [a] to [c]). The account is no longer operational. The credit balance of Kshs 1,000 is still in that account under the power and control of the defendants.

18. That evidence was largely uncontroverted. Like I said, the defendants did not call any evidence to rebut the claim. The evidence of the five witnesses was credible and not shaken by the brief cross examination by the defendants. The defendants were not entitled to the money. They jointly contrived a scheme to skim away public funds to enrich themselves. From the evidence of PW2, PW4 and PW5, the money from the Eldoret East Constituency Development Fund never reached or benefited Uswo Water Project. In a nut shell, the defendants fraudulently appropriated the entire sum of Kshs 400,000. It was theft plain and simple. I thus answer the issue framed as number *i)* above in the *affirmative*.

19. The last issue is whether the plaintiff is entitled to recover the amount from the defendants. From the evidence of PW4, the Kshs 400,000 originated from the Eldoret East Constituency Development Fund Account No. 0112086365800 held at Co-operative Bank, Eldoret branch. These were public funds unlawfully sidetracked by the defendants into their private hands. The plaintiff is the precursor to the Ethics and Anti-Corruption Commission. The latter is established under Article 79 of the Constitution. Its functions are found in chapter six of the Constitution; section 11 (K) of Ethics and Anti-Corruption Act; and, section 7 of the Anti-Corruption and Economic Crimes Act.

20. I thus find that the plaintiff has constitutional and statutory underpinning to maintain the suit; and, to recover the stolen public funds. It follows as a corollary that the plaintiff is entitled to recover Kshs 400,000 filched by the defendants from either the Eldoret East Constituency Development Fund; or, the Uswo Water Project. Issue number *ii)* above is thus answered in the *affirmative*.

21. In the end, I find that the plaintiff proved its case on a balance of probabilities. I enter judgment in favour of the plaintiff against the defendants, jointly and severally, in the sum of Kshs 400,000. I award the plaintiff interest on the above sum at court rates from 24th May 2007 (the date of the suit) until full payment.

22. Costs follow the event and are at the discretion of the court. I grant the plaintiff costs to be met, jointly and severally, by the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 6th day of September 2016.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open Court in the presence of-

Mrs. Natome for the plaintiff instructed by the Ethics & Anti-Corruption Commission.

No appearance for the 1st and 2nd defendants.

3rd defendant (absent).

Mr. J. Kemboi, Court Clerk.