

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. 19 OF 2019

BETWEEN

DICKSON MUNENE NKANATA.....

.....PLAINTIFF

AND

FR. CELESTINO BUNDI MUTEA.....1ST

DEFENDANT

MISSIO INVEST.....2ND

DEFENDANT

CATHOLIC DIOCESE OF MERU.....3RD

DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiff filed this suit through the Plaint dated 22nd January 2019 claiming that on 30th September 2018, he entered into a money-lending agreement with the 1st Defendant (now deceased), a catholic priest employed by the 3rd Defendant and appointed as the Regional Coordinator of the 2nd Defendant (“the Defendants”). The Plaintiff avers that he advanced Kshs.15,000,000.00/= in cash

to the deceased and that the funds were purportedly needed for "serialization" to unlock USD 5,000,000.00 meant for charity. That the deceased agreed to repay the principal plus 50% interest, that is, Kshs.22,500,000.00/=, within 30 days and that before his death, he filed a Statement of Admission on 1st February 2019, confirming the debt and stating he acted with the knowledge and approval of the Defendants.

2. The Plaintiff states that the deceased breached the terms of the agreement by failing to repay the said amount when the same became due for repayment on 30th October 2018 and that the Defendants are vicariously liable for wrongful acts committed by their employee within the scope of his duties. He thus requests the court to find them vicariously liable and compel them to pay the outstanding Kshs.22,500,000.00/=, interest and costs of the suit.
3. In response to the suit, the Defendants filed a Statement of Defence dated 7th July 2021. They argue that they were never parties to the loan agreement and that the deceased acted entirely in his personal capacity. They maintain that the Plaintiff's reliance on the deceased's status as a priest does not create legal liability for the Defendants. The Defendants state that no resolution or written authority was ever produced to prove the deceased had the

power to borrow money on their behalf. They highlight that the deceased's appointment was governed by strict Kenya Conference of Catholic Bishops (KCCB) policies, which did not include a mandate for borrowing large sums of money. The Defendants state the Plaintiff, an advocate of the High Court, failed to undertake basic due diligence to confirm the deceased's capacity to enter such a contract and that they had no duty to interfere in the deceased's personal financial affairs and that vicarious liability does not apply because his actions fell outside his official duties.

4. In any event, the Defendants describe the terms of the loan, specifically a 50% interest rate payable in 30 days, as "unbelievable" and "untenable" for any reasonable person and they dismiss the Plaintiff's story regarding "serialization" of coded money as an "afterthought and a wild goose chase" unsupported by any documentation. As such, the Defendants urge the court to dismiss the suit against them with costs, asserting that the Plaintiff's case is based on mere assertions without documentary proof linking them to the debt.
5. The matter was set down for hearing where the Plaintiff called ELIPHUS MUTUMA MURITHI as his witness (PW 1) and he relied on his witness statement dated 22nd January 2019. The Plaintiff himself

testified on his own behalf (PW 2) adopting his witness statement dated 22nd January 2019 and producing the Bundle of Documents of the same date (PExhibit 1-2). On their part, the Defendants called FR. MATHEW KAIMENYI (DW 1) who adopted his witness statement dated 4th April 2022 and produced the Bundle of Documents of even date (DExhibit 1-4). Thereafter, the parties were directed to file written submissions which I have considered together with the evidence on record and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

6. In making this determination, the court is guided by the fact that the standard of proof in civil cases is on a balance of probabilities and that the burden of proof is on the party alleging the existence of a fact which they want the Court to believe. This is anchored in **section 107 (1) and (2)** of the ***Evidence Act(Chapter 80 of the Laws of Kenya)*** which provides that *“whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”* and that *“When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person”*. In ***Miller. v. Minister of Pensions 1947 ALL E.R 372,***

Lord Denning aptly summarised the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

7. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that *‘Courts will make a finding based on which party’s version of the story is more believable.’*
8. With the above in hindsight, I will now proceed to determine this matter. From the parties’ submissions, the following issues arise for the court’s determination:

- 1) *Whether there was a valid money lending agreement*

2) *Whether the deceased was acting on behalf of the Defendants and whether he acted within the authority of the Defendants thereby binding them*

3) *Whether the Defendants are liable for the actions of the deceased*

4) *Whether there exists privity of contract between the Plaintiff and the Defendants*

Validity of the money lending agreement

9. The Plaintiff produced the Money Lending Agreement dated 30th September 2018 between himself as the lender and the deceased as the borrower of Kshs.15,000,000.00/=. The Plaintiff testified that he executed the Agreement and PW 1 stated that he witnessed the execution between the Plaintiff and the deceased and that he also witnessed the cash being given to the deceased. The Defendants do not substantially challenge the validity of the Agreement but rather, its application and they state that the deceased signed the agreement as the sole borrower in his own capacity, with no express statement that he was authorized by the Defendants.

10. In essence, the core contractual elements of offer, acceptance, consideration, and intention to create legal relations appear to be present in the Agreement and I find that indeed, there was a valid Money Lending Agreement between the Plaintiff and the deceased.

Agency and Authority of the deceased

11. The Plaintiff contends that the deceased acted as an agent for the Defendants and that as a Catholic priest and Regional Coordinator of the Defendants, the deceased held the authority to bind his employers. The Plaintiff submits that because the Defendants failed to repudiate the deceased's actions or take disciplinary action against him before his death, they are barred from denying the agency relationship under **section 120** of the **Evidence Act**. The Plaintiff asserts that the Defendants are vicariously liable for wrongful acts committed by their employee within the scope of his duties and he submits that as a third party, he was not required to investigate the internal "indoor" management or approval processes of the Defendants. That he was entitled to assume that the deceased had the necessary internal authority to borrow the funds.

12. In his testimony, PW 1 stated that there was no person representing the Defendants during the transaction and that he did not know what "serialization" meant. He also stated that the deceased was "in a fix" and that he just recorded what the deceased told him about the serialization. On his part, the Plaintiff testified and admitted that there was no clause in the Agreement confirming that the deceased obtained the money on behalf of the

Defendants and that he did not have any document confirming that the deceased obtained money on behalf of the Defendants. He also admitted that he never consulted the Defendants before giving out the money and that he also did not understand how “serialization” was done. He stated that the Defendants are not involved in the printing of dollars or bank notes and admitted that he was aware that the US Dollar currency is produced by the US’s *Bureau of Engraving and Printing* and not *De La Rue* as informed by the deceased.

13. In his testimony, DW 1 stated that the deceased started working with the Defendants in 2018 and that they only became of this money lending case after the suit was filed. From the copy of “Terms of Service for Clergy” produced by the Defendants, the deceased was appointed as Regional Coordinator for *Missio* under the KCCB, not as an agent authorized to enter into financial agreements on behalf of the Diocese or *Missio*. His duties were specific to liaison and advisory roles not borrowing or financial transactions and he had no authority to enter into Loan Agreements. DW 1 stated that deceased was never authorized to enter into agreements outside his scope of work and the Plaintiff did not provide any evidence proving otherwise.

14. From the evidence, it is clear that the Defendants had no knowledge of any loan agreement between the Plaintiff and the deceased and if any such agreement existed, it appears to have been entered into in his personal capacity. A letter from KCCB confirms that the deceased was recalled by his Bishop in December 2019, effectively ending his secondment to KCCB/*Missio* but the recall shows the Diocese's lack of ongoing oversight or ratification of his actions.

15. The Plaintiff admitted there was no clause in the agreement confirming the deceased borrowed on behalf of the Defendants and that he never consulted the Defendants before lending the money. He did not understand the purpose of the loan, that is, the "serialization" and knew the deceased's explanation was factually incorrect as US dollars are not printed by *De La Rue*. For vicarious liability to attach, the employee's wrongful act must be closely connected to their employment and within the scope of their duties (see **Securicor Kenya Ltd v Kyumba Holdings Ltd [2005] KECA 348 (KLR)**). Here, borrowing money for "serialization of donor funds" was not part of the deceased's role as Church Relationship Liaison.

16. Further, whereas the Plaintiff argued that the Defendants are barred from denying agency under **section 120** of the **Evidence**

Act because they did not repudiate the deceased's actions before his death and that he had ostensible authority, it should be noted that for ostensible authority to exist, the principal must have held out the agent as having authority (see **Total Kenya Limited v D Pasacon General Construction & Electrical Services [2022] KECA 593 (KLR)**). The Defendants never represented the deceased as having borrowing authority and the deceased himself never held out as if he was borrowing on behalf of the Defendants

17. Furthermore, whereas the Plaintiff argued he was entitled to assume the deceased had internal authority, this rule applies to corporate transactions where an officer acts within usual authority. In my view, borrowing Kshs. 15 million for "serialization" is not a usual or incidental duty of a priest or liaison officer. In the end, what comes out is that the loan agreement was a personal transaction by the deceased, the Defendants did not authorize, ratify, or have knowledge of it, the Plaintiff failed to take reasonable steps to verify authority or purpose of the loan and therefore, the Defendants are not vicariously liable, and the suit against them cannot stand. Having reached the conclusion that there was no agency relationship between the deceased and the Defendants, it follows therefore the two other issues identified for consideration by the Court do not require a determination.

18. While this judgment turns on the legal principles of agency, authority, and vicarious liability, the court cannot overlook the troubling nature of the transaction at the heart of this dispute. The evidence reveals a loan agreement purportedly entered into for the purpose of “serialization of donor funds,” a term which neither the Plaintiff nor the deceased could adequately explain, and which, upon scrutiny, appears devoid of legitimate commercial or financial meaning.

19. The Plaintiff testified that he did not understand what “serialization” meant, that he was aware that US currency is produced by the United States’ *Bureau of Engraving and Printing* and not by a private entity such as *De La Rue*, and that PW 1 simply recorded what the deceased told him without independent verification. The Plaintiff lent a substantial sum, Kshs.15,000,000/=, in cash, based solely on the assurances of a person who, by the Plaintiff’s and PW1’s own admission, was “in a fix”. In my view, these facts bear the hallmarks of what is colloquially known as a “wash wash” fraud; a scheme in which victims are induced to provide funds under the false pretense of accessing or processing large sums of money, often through fabricated processes such as “chemical washing,” “serialization,” or “activation” of banknotes. Such

schemes prey on greed, opportunism, or misplaced trust, and they invariably result in significant financial loss.

20. I would advise the Plaintiff and the public at large that transactions that promise unusually high returns, involve obscure or nonsensical financial processes, or require secrecy and urgency, should be approached with extreme caution. Legitimate financial and charitable institutions do not operate through shadowy, unexplained methods, nor do they solicit personal loans from individuals for purposes they cannot openly explain. Parties entering into financial agreements have a responsibility to conduct basic due diligence. This includes verifying the authority of any person purporting to act on behalf of an institution, understanding the purpose and mechanics of the transaction, seeking independent legal or financial advice before parting with funds and being wary of explanations that defy common sense or widely known facts.

21. Where a transaction appears too good to be true, or where its purpose is shrouded in jargon or secrecy, it is almost certainly not legitimate. The courts will not come to the aid of those who, blinded by the prospect of gain, fail to take reasonable steps to protect themselves from obvious fraud. While the Plaintiff's loss is regrettable, this case serves as a sobering reminder that the law

cannot protect individuals from their own lack of prudence when the signs of deception are plain to see. Let this judgment stand as a cautionary tale against participation in schemes that operate in the shadows of credibility and legality.

Conclusion and Disposition

22. In the upshot, the Plaintiff's suit is dismissed with costs to the 2nd and 3rd Defendants. It is so ordered.

**DATED SIGNED and DELIVERED virtually this 12TH DAY OF
FEBRUARY 2026**

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**J.W.W. MONGARE
JUDGE**

IN THE PRESENCE OF

1. Ms. Magogo holding brief for Mr. Malenya for the Plaintiff.
2. Mr. Akumu for the Defendants.
3. Amos - Court Assistant