

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NUMBER 249 OF 2009
EVERY CHILD MINISTRIES}... PLAINTIFF
VERSUS
DAVID LUBAALE} DEFENDANT
BEFORE HONOURABLE JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff is an international non-governmental organisation (NGO) incorporated in the State of Indiana USA. The plaintiffs claim against the defendant is for recovery of a liquidated sum of the United States dollars 40,000; a temporary injunction against the defendant; general damages interests and costs of the suit. It is averred in the plaint that in the year 2006, the plaintiff organisation appointed the defendant as its director for Uganda and Sudan. Between the year 2007 and 2008, the plaintiff advanced to the defendant a sum of United States dollars 80,000 for the purpose of purchasing a building, office space in Gulu and a bus respectively.

Out of a sum of USD 80,000, USD 30,000 was to purchase a bus, and USD 25,000 was to buy property to develop a chicken project at Kampala, USD 25,000 was to purchase a building at Kampala while USD 10,000 was to purchase office space in Gulu. The plaintiff's complaint is that the defendant never purchased the bus or the office space in Gulu. The land and the building for the chicken project, he purchased at Gayaza Kasangati, Kyankima LC1 Wakiso District, the defendant connived with another person to evict the plaintiff out of it. Several attempts had been made to recover the above sums from the defendant but in vain and hence the plaintiff decided to file this suit. The plaintiff avers that it has suffered a lot of loss and damages due to the defendant's action.

In his written statement of defence the defendant denies the claims in the plaint and pleads that in 2007 he was appointed a director for the plaintiff organisation but was never at any point paid any salary. The plaintiff organisation had promised to pay him US\$ 1000 per month which they never did. The defendant bought land for the plaintiff at Kyankima where the office is, chicken farmland and half an acre of land at Gulu and the documents for the said transactions were pending handover to the plaintiff organisation. Consequently the defendant contends that he is not responsible for any loss or damages suffered by the plaintiff if any. Arising from the above averments the defendant maintains that the plaintiff's suit is misconceived, bad in law. That the suit cannot be maintained and it ought to be dismissed for lack of a cause of action and for being frivolous and vexatious.

The suit went through the mandatory mediation procedure under the rules of court. It was initially handled by Honourable Lady Justice Stella Arach Judge of the Commercial Division as she then was before she was elevated to the Court of Appeal. The suit was never heard though it was filed in June 2009 before it was allocated for trial to me. The mediator's report shows that mediation hearing never took place because the defendant never showed up for any scheduled mediation session on 10 September 2009, 21st of September 2009, 8 of October 2009 and 5th of November 2009. The file was then sent to for commencement of the trial. The parties first appeared before me on 21 April 2011. The case was fixed for scheduling on 2 June 2011 at 9.30 and I ordered that the defendant be served by substituted service in the newspapers and the notice was to indicate that the defendant should appear in person.

When the matter came up on 2 June the defendants counsel appeared but the defendant did not. The plaintiff's counsel was present while the plaintiff was represented by a co-director John B Roster. Both Counsels' of the parties agreed to the appointment of a government valuation surveyor to value the properties bought by the defendant on behalf of the plaintiff. The matter was adjourned to 16 June 2011 at 2 PM for mention. Thereafter the suit was mentioned several times before it could proceed on the 30th of June 2011 and then on the 4 July 2011 ex parte for reasons given herein below.

At the hearing the plaintiff was represented by Counsel Joseph Luzige while initially the defendant was represented by Counsel Robert Kafuko – Ntuyo. When the suit proceeded ex parte and counsel for the plaintiff put in written submissions:

The written submissions of the plaintiff counsel

Counsel submitted that the plaintiff's organisation appointed the defendant its current director in the year 2006. Between 2007 and 2008 the plaintiff sent to the defendant total sum of United States dollars 90,000 for purchasing the following items:

- i. A minibus which was agreed to cost United States dollars 30,000.
- ii. Land for the chicken project which was supposed to cost US\$25,000.
- iii. A building at Kampala to housing offices which was supposed to cost US\$25,000
- iv. land at Gulu at a cost of 10,000 United States dollars

Instead the defendant bought a Kibanja at Kyankima L.C. 1 at Kasangati which houses the plaintiff's offices, bought a plot of land in the neighbourhood for the chicken project and the property at Gulu. The defendant was served with due process of law at no single time did he appear before this court resulted in the suit proceeding ex parte. The issues in the written submissions are:

1. Whether or not the defendant received 90,000 from the plaintiff's organisation.
2. Whether or not the properties purchased by the defendant on behalf of the plaintiff are worth the agreed cost and if not,
3. Whether the plaintiff is entitled to recover the money which is the difference of the agreed cost and money had and recovered by the defendant.
4. Remedies available

The plaintiff's organisation called three witnesses who included the plaintiff's international co-directors based in Indiana United States of America. Counsel

submitted that the evidence of the plaintiff's witnesses satisfactorily proves its case.

The issue of whether or not the defendant received US\$90,000 from the plaintiff's organisation counsel submitted that he did as testified by both PW1 and PW2. The money was sent to purchase various properties which were, land for the office space at Kampala at a cost of US\$ 25,000 though the defendant instead bought property at Kyankima and not Kampala, land to house a chicken project at a cost of United States dollars 25,000 at Kyankima, land at Gulu at a cost of United States dollars 10,000 and a minibus at a cost of United States dollars 30,000 which he did not buy at all.

In respect of the above properties the defendant made various agreements which were exhibited in court having on them the face value of the amount of money sent, that the properties purchased were not worth the attached prize value or tag.

The property at Kyankima LC 1 which is the office property has a face value of US\$25,000 while land for the chicken project at Kyankima has a face value of Uganda shillings 13,500,000. Though US dollars 25,000 was sent which was to cover the cost of the land as was testified by PW2 Lorella Rouster, the Defendant had to use the money to purchase poultry project equipments.

The above is an indication that the defendant received the money in question since he attempted to justify the cost of these properties above my placing on them the exact amount he said they would cost for the plaintiffs international directors. If he had not received the said money, then there would be no such agreements. Coupled with the above, the said agreements were executed and witnessed by the defendant's counsel who represented him before this court.

Further proof of receipt of the above money is exhibit P2 which is a wire transfer of funds from the plaintiffs organisation from the United States to the defendant, which fact is buttressed by the testimony of PW1 and PW2 to the effect that they did open an account with Stanbic bank where at first David, the defendant was

the sole signatory and then pastor Francis Aguti was added on but that the defendant forged his signature and withdrew all the money without his consent.

The defendant agrees in his defence particularly paragraphs 3 (b) that he bought the said properties and that the documents were pending handing over to the plaintiffs organisation which is further proof that he did receive the money.

In the premises and in light of the above the court should resolve the issue number one in the affirmative and find that the defendant did receive a sum of US dollars 90,000 from the plaintiffs organisation.

On the second issue of whether the properties purchased by the defendant on behalf of the plaintiff are worth the stated value; counsel submitted that first of all, the defendant never purchased the minibus despite receiving the money. This was proved by the testimony of PW1 and PW2 that United States dollars 30,000 was wired for purposes of purchasing the said minibus and the defendant received the money but never purchased it.

PW1 John Rouster testified that he has never seen the said bus and despite pleading the issue clearly in the plaint, the defendant just keep quiet about it in his defence and does not plead to it. The said funds could not have been utilised for the benefit of the plaintiff's organisation, for if that was the case there should have been an explanation as to why the minibus was not purchased and where the funds went. Counsel prayed that court finds that the defendant received the funds but never purchased the minibus which entitles the plaintiff organisation to a refund of US dollars 30,000.

In respect of the land at Gulu counsel submitted that the land purchased was not worth 30,000 United States dollars secondly PW1 and PW2 testified that it was in a gazetted swamp and therefore cannot be developed. If any of the land was worth US\$30,000 PW1 and PW2 testified that another organisation called "To Love Children had earlier on purchased it and the plaintiff has never occupied or utilised it. The plaintiff's organisation is also entitled to a refund of US\$30,000. The Gulu Land is in a gazetted swamp which is presented as a wetland under the

control of the National Environmental Management Authority making the agreement thereof void ab initio.

This applies to a land purchased at Kyankima for the poultry project according to the agreement between Every Child Ministries and Mwanga Justine. Although the agreement exists but as testified by both PW1 and PW2, the said land was sold off by the defendant and a church was constructed on it. PW1 and PW2 further testified that even when children under the care of the plaintiff's organisation go there, they are chased away. The said land is not in control of the plaintiff and it has never been utilised by the plaintiff as testified by PW1 and PW2. Money was sent to the defendant but he never purchased any equipment for the poultry project. He prayed that the court finds that this property was never purchased and that the plaintiff is entitled to a refund of both the purchase price of the land and money meant for the equipment both amounting to US\$25,000.

In respect of property purchased for the office space, the property was purchased at the cost of US\$25,000 as testified by PW1 and PW2 they instructed the defendant to purchase land at Kampala or nearby but instead the defendant purchased a small plot of kibanja which is not titled at Kyankima. Secondly as testified by PW2 the house he bought was not plastered had no fence or gate and had not been worked on as far as the finishing of toilets is concerned. The defendant even made attempts to sell off this only remaining property which led to a second order of maintaining the status quo issued by the registrar and it is on the court record.

The evidence of PW3 who is a consultant surveyor indicates that the correct value of the said property which is embedded the report admitted as exhibit P 11. Counsel invited the court to calculate the costs of this property less the developments made by the plaintiff which are also clearly demarcated at page 4 and costs of the gate, ablution block, sidewalks, fencing, levelling, branding and paving those developments which were added on by the plaintiff organisation as testified by PW2.

Counsel also prayed the court finds, first of all that the property is the plaintiffs property, secondly that its purchase price was inflated and finally that the plaintiff is entitled to any refund if applicable in respect of this property.

To conclude this issue, Counsel invited the court to note that the defendant in exhibit P1, exhibit P3, exhibit P4, and exhibit P7 admitted wrongdoing by intimating that the property he bought were less the agreed costs. He invited the court to treat the same as a confession from the defendant namely exhibit P4 which is a letter from the defendant's lawyers requesting to settle the matter. Coupled with the above facts counsel contended that forgery of the plaintiff's bank statement by the defendant is also an indication of the fact that the defendant wanted the plaintiff to believe that there was money on the account whereas not. The testimony of PW2 in adducing exhibit P5 and exhibit P6 prove this point. Counsel therefore prayed that the court finds in favour of the plaintiffs organisation on the above issues.

In respect of the final issue of whether the plaintiff organisation is entitled to recover its money being the difference and in excess of the costs, he submitted that the plaintiff is entitled to the same. The defendant was employed by the plaintiff and used his position to defraud a charitable organisation which had been established to help Ugandan children. The defendant deprived the underprivileged children of Uganda of the benefits that would have accrued from the said properties and projects.

In respect of the money received for the call land and poultry project at Kyankima at Kasangati, the plaintiff is entitled to recover the entire purchase price as the said property were never purchased for the benefit of the defendant and the plaintiff has never benefited from its use. Counsel submitted in the alternative and without prejudice to the argument above that in respect to only the poultry project at Kyankima the court issues an eviction order against whoever is there and confirms that the property belongs to the plaintiff. In conclusion, he prayed that the court enters judgment for the plaintiff on all the issues and orders the defendant to refund the above sums and also the court confirms that the office

premises at Kyankima LC 1 belongs to the plaintiff and awards costs of the suit to the plaintiff.

Judgment

I have carefully gone through the plaintiff's plaint, the defendant's written statement of defence, the testimony of PW1, PW2, PW3 and the documentary exhibits on record. On 30 June 2007 when the suit came for hearing, the International co-director of the plaintiff Mr John Rouster was in court but the defendants counsel was not in court. The plaintiff's counsel applied to proceed ex parte under order 9 rule 20 (1) (a) of the Civil Procedure Rules. The record was incomplete in that there was no affidavit of service of the hearing notice. However counsel contended that it was the defendant's counsel who had extracted a hearing notice and signed for it. The defendants counsel on record is Mr Kafuko - Ntuyo Robert. I stood over the hearing to 3.00 O'clock in the afternoon to enable the plaintiff's counsel file an affidavit of the facts of notice by the defendant's counsel of the hearing date on the record. I also directed the plaintiffs' counsel write to Messrs Kafuko - Ntuyo and inform him that the case was coming for hearing in the afternoon. By afternoon an affidavit of service had been sworn to by one Esther Nakamate who avers in paragraph 6 thereof that she called the defendants counsel to inform him that the case had been stood over until 3 o'clock in the afternoon. Counsel for the defendant informed Esther that he would be in the court at 3 PM. In addition Esther wrote to him a letter which was acknowledged. On the acknowledged copy of the letter, a copy of which is on the court record, counsel for the defendant writes in handwriting that he would not be able to come to court after all due to prior engagements with a board of directors.

In light of the fact that the plaintiffs witnesses came all the way from the United States of America and they were due to leave in a few days, and it was the defendants counsel who endorsed court papers fixing the hearing for 30 June 2011 at 9:30 AM, and to avoid undue expenditure on the part of the plaintiffs, I took into account the previous various adjournments of the hearing of the suit. On record is a hearing notice by consent duly endorsed by the defendants counsel

dated 16th June 2011 fixing the hearing of the suit for the 30th of June 2011. Though the plaintiff's counsel did not endorse the date, he and the plaintiffs representatives appeared for hearing and I therefore granted the plaintiffs prayer for hearing to proceed ex parte under order 9 rule 20 (1) (a) of the Civil Procedure Rules.

The plaintiffs claim against the defendant in the plaint is for recovery of a liquidated sum of **United States dollars 40,000**; a temporary injunction against the defendant; general damages interests and costs of the suit. It is averred in the plaint that in the year 2006, the plaintiff organisation appointed the defendant as its director for Uganda and Sudan. Between the year 2007 and 2008, the plaintiff advanced to the defendant a sum of United States dollars 80,000 for the purpose of purchasing a building, office space in Gulu and a bus respectively.

Out of the sum of United States dollars 80,000, United States dollars 30,000 was to purchase a bus, and United States dollars 25,000 was to buy property to develop a chicken project at Kampala, and United States dollars 25,000 was to purchase a building at Kampala while United States 10,000 was to purchase office space in Gulu. It is averred that the defendant never purchased the bus, neither the office space in Gulu while the land and building for the chicken project at Gayaza Kasangati, Kyankima LC1 Wakiso District he connived with another person to evict the plaintiff out of it. Several attempts made by the plaintiff to recover the sums from the defendant were in vain and hence the plaintiff decided to file this suit. It is averred in the plaint that the plaintiff suffered a lot of loss and damages on account of the defendant's actions.

The written statement of defence of the defendant avers inter alia that:

- a) "In 2007, he was appointed as director for the plaintiff organisation but was never at any point paid salary. The plaintiff organisation had promised to pay him US dollars 1000 per month which they never did.
- b) The defendant bought land for the plaintiff at Kyankima where the office is, chicken farmland and one half acre of land at Gulu. The documents are pending handover to the plaintiff organisation.

- c) The defendant is not responsible for any loss and damages suffered by the plaintiff if any and the plaintiff will be put to strict proof thereof.
- d) The defendant will aver that the plaintiff's suit is misconceived, bad in law and unmaintainable and ought to be dismissed with costs for lack of a cause of action and for being frivolous and vexatious."

In the written statement of defence the defendant does not deny that he was appointed a director for the plaintiff organisation. Secondly the defendant does not deny that he bought land on behalf of the plaintiff at Kyankima where the office is, chicken farmland and half acre of land at Gulu.

It must be noted that the plaintiff's suit was filed on the court record on 7 July 2009 and summons to file a defence issued on the same day. The defendant's defence is filed on the court record on 22 July 2009.

As noted earlier at the hearing of the suit the plaintiff was represented by Counsel Joseph Luzige who appeared together with Esther Nakamate. The hearing proceeded ex parte through counsel Kafuko Ntuyo initially represented the defendant in the matter. The defendant never at one time appeared in court.

When the suit came for hearing on the 30th of July 2011, counsel Joseph Luzige prayed for the suit to proceed ex parte under order 9 rule 20 of the Civil procedure Rules.

In his written submissions counsel for the plaintiff argued 4 issues. These are:

1. Whether or not the defendant received 90,000 from the plaintiff organisation.
2. Whether or not the properties purchased by the defendant on behalf of the plaintiff are worth the agreed cost and if not,
3. Whether the plaintiff is entitled to recover the money which is the difference of the agreed cost and money had and recovered by the defendant.
4. Remedies available

A perusal of the plaint shows that the main claim of the plaintiff was for refund of US\$ 40,000; a temporary injunction against the defendant; general damages interests and costs of the suit. I see the major issues to be whether the plaintiff is entitled to recover the money pleaded in the plaint and whether general damages, interests and costs should be awarded to the plaintiff.

The plaintiff called three witnesses namely PW1 Mr. John Rouster, PW2 Lorella Router Co-directors of the plaintiff and Daniel Ajena a valuation surveyor.

PW1 Mr. John Rouster testified that he is a 69 year old missionary ordinarily resident in Maryland, Indiana USA and that he is a missionary and the International co-director of the Every Child Ministries. The plaintiff runs a ministry to the forgotten children of Africa with offices/programmes in the Democratic Republic of Congo, Ghana in West Africa and Uganda in East Africa. The plaintiff ministers to the forgotten children of Africa. They are inspired by a proverb 31:8 which says "Speak out for those who cannot speak for themselves, for the rights of those who are destitute" (NIV Bible Translation) and that is the verse that Every Child Ministries uses to minister to the forgotten children of Africa. PW2 is the co director of PW1. She is also the wife of PW1 and as directors they oversee the overall work of the ministry in all 3 countries and basically they are administrators of the overall work of Every Child Ministries responsible to board of directors in the USA. The plaintiff was registered in the state of Indiana in December 1985 and at that time its home base was in Lake County Indiana. The plaintiff's certificate of registration shown to court is from the office of the Secretary of State for the State of Indiana and shows that the plaintiff was incorporated on the 4th December, 1985. The certificate of incorporation was exhibited as exhibit P1. The wife of PW1 met the defendant in October 2006 when she first came to Uganda. PW1 also met the defendant when he came for a week to Uganda in November, 2006 where he learnt that the defendant was working for the UN and he acted as a guide for PW1 and PW2 both in Kampala and Gulu Districts of Uganda. It was through the defendant that the plaintiff organisation was organized and registered in Uganda. David informed the co-directors of the plaintiff at that time that he had a contract to work with the UN until June 2007. The defendant agreed to direct the affairs of Every Child Ministries in Uganda after the expiry of his

contract. PW1 did not remember the salary of the defendant. In their discussions as a company with the defendant the directors of the plaintiff asked the defendant whether it was possible to buy property for an office building in Kampala City. The directors also required property with a clear title. The plaintiff's directors specifically requested the defendant that they wanted a building for use as office space and possibly for the co-directors who are husband and wife to stay in when they come to Uganda.

PW1 testified that his wife Lorella is famous in Ghana, Congo and Uganda for teaching Sunday school so they call her Mama Lorella and she actually does the majority of the administration work. After the defendant purchased the office property he presented the plaintiffs directors with a proposition that if he could purchase property and rear poultry the project could profit as a going venture and help support the plaintiff's children's projects in Uganda. The plaintiff in addition had people to go to Gulu and start working with the orphans from the war affected area and they required the defendant to purchase property in Gulu for both vocational courses and orphans projects in the Gulu area. The defendant further proposed to the plaintiff's directors that they could send funds to a bus which as a profit making venture would help support Every Child Ministries, the plaintiff. In conclusion and based on the defendants representations the plaintiff board decided to send through the defendant some money to embark on the projects/purchases. The board of directors sent the monies pleaded in the plaint. Through wire transfers which were exhibited.

The first transfer of money was made on October 31 2007 US\$ 14,320 to purchase a vehicle that we had raised the funds for and it was sent to Stanbic Bank City Branch. The second document shows transfer on 11th April 2008 of USD 29,700, part of which was for office expenses and USD 25,000 to purchase office property. The next document adduced is dated 15th of August for a sum of 45,050 USD meant for the purchase of chicken land and for working on the office building. PW1 further adduced other documents. One dated 8th October 2007 for USD 2,714 which could have gone for office expenses. The batches of confirmation wire transfers from Stanbic Bank were admitted in evidence as exhibit P2. After

the plaintiffs directors sent the monies, they relaxed in the belief that everything was going well.

Originally the defendant was a signatory to the account. As time went on Sophie who is a financial controller wrote to Lorella Rouster PW2 that she wanted to share some information. She stated that the bank account was low and later that it was empty. PW 2 the co-director then came to Uganda and questioned the defendant. One Pastor Francis who was privy to the account had never signed for any money when the accounts went low/empty.

The defendant had sent pictures of the Gulu land that he has purchased to the directors of the plaintiff in USA. PW1 and PW2 came to Uganda in the year 2009 and we saw the building which was just 20 metres from a swamp. Moreover the plaintiff has not received any original documents for every property the defendant had bought on behalf of the plaintiff. The plaintiff's board relied on the defendant's word. As far as the bus is concerned, the plaintiff has never seen a bus. The defendant had informed the plaintiff's directors that he had bought a bus but there is no bus anywhere. They confronted the defendant and he signed a promissory note that he would return the money. Mama Lorella sent PW1 a copy of the promissory note by email and it is dated 13th January 2009 and was exhibited in evidence as P3. Secondly the lawyers of the defendant Messrs Kafuko – Ntuyo wrote a letter to the plaintiffs advocates promising to pay. They also inform the plaintiff through that letter that the money for the bus was conned from the defendant. This letter is exhibited in evidence as exhibit P4. In the letter the defendant also proposes to buy another Mini Bus.

PW2 Lorella Rouster is a co – director of the plaintiff organisation aged 65 years and a resident of the US State of Indiana. She and her husband PW1 are co-directors of Every Child Ministries (ECM) the plaintiff, which is a Christian Organisation dedicated to African children and with special interest on those who are outcast in any way. ECM is based in Indiana Hebron in USA and was registered on the 4th of December 1985. PW2 knows the defendant Mr. David Lubaale who was introduced to her by Francis Makoha Aguti Pr. She confirms the testimony of PW1 about how they came to engage the defendant who had a

commitment with the UN until June 2007. The defendant became the National director of the plaintiff in June 2007.

The plaintiffs started experiencing problems with the affairs of the organisation. Firstly there was trouble getting any report from the defendant. To solve this problem they engaged Ms Sophie Okello to help with book keeping though the defendant did not cooperate. They appointed three signatories to manage the bank account and two of the three signatories had to sign. The account of the plaintiff was in Stanbic Bank city bank. These signatories were Okello Sophia, Pastor Francis Makoha and David Lubaale.

PW1 learnt that the plaintiff's staffs in Uganda were not receiving proper funding for the work though they had been sent funds and the defendant had kept the staff in the dark about the funds.

When the board chairperson of the plaintiff in Uganda Pastor Francis Makoha called the bank he was informed by the bank that the credit balance on the plaintiffs account was only Uganda shillings 400,000/= shillings. Money had been sent in dollars but was reflected in shillings on the plaintiffs account in Uganda. PW2 confirmed that the plaintiff maintained a bank account with Stanbic Bank City Branch account No. 012/10/114096701. When the PW1 and co-director PW2 realised the account had been pilfered she went with the Ugandan Board to the bank and obtained a complete statement of account for the plaintiffs bank account. Upon comparing the bank statement with statements they had hitherto received from the defendant they realised that the statements sent by the defendant were not the same.

The bank statement PW2 obtained from the bank was issued on the 19th of February 19th 2008 for the period beginning in May 2007 up to February 2008 and is exhibited as P5. This was compared with sketchy bank statements sent to PW2 by the defendant on various dates namely the 24th December 2008, 4th August 2007, 12th October 2007, 18th January 2008 and 5th May 2007 which statements are exhibited in a batch as exhibit P6. The comparison showed that the bank statements sent by David Lubaale to PW2 had by the 24th of December 2008

Uganda shillings 96,325,000/=. Other discrepancies were that the figures did not correspond and the account numbers were different.

PW2 together with Sophia, Okello, Pastor Makoha Aguti, Kansiime Jane (as a board) confronted the defendant and managed to elicit from him an explanation about the discrepancies they had discovered in the bank statements. The defendant confessed that he had taken money and used it for personal uses and had even forged the bank statement to hide his activities. He had misused the funds and forged statements to cover his personal misdeeds. The defendant made his confession in writing stating inter alia that he was sorry to have misallocated funds, deceived the plaintiff and misused ECM money for other purposes other than the designated projects. A photocopy of the written document signed by David Lubaale dated Jan 6 2009 was tendered in evidence as exhibit P7. The original document is in possession of the CID and photocopy admitted. The defendant also signed a promissory note dated 13th January 2009 undertaking to pay back some of the plaintiff's money that had been established at that point which document was tendered in evidence as exhibit P3.

In addition the defendant through his Attorneys Messrs Kafuko Ntuyo and Company Advocates wrote a letter dated 24th June 2009 tendered in evidence as exhibit P4 in which he undertook to refund some money. Out of the promise the defendant only refunded US\$ 2,100 though he claims to have refunded US\$ 2,600. Thereafter the plaintiffs lost contact with the defendant

The purpose of the monies sent to the plaintiff was to purchase office space as a National Ministry Centre in Kasangati for which two transfers were made. The office was supposed to cost 25,000 \$. However PW2 contends that though the defendant received this money, the property he purchased was not worth that much. The property purchased had an unfinished house and there was no fence.

The plaintiffs' international directors were aggrieved in that the defendant had got them a little insecure place on a muddy and inaccessible road. Moreover the property had no title though received a copy of the purchase agreement. These documents were already exhibit. The sale agreement is dated 23rd March 2007, between Sekabira Kasule James and Every Child Ministries Uganda. It was

executed on behalf of ECM by David Lubaale and drawn by Messrs Kafuko Ntuyo and Co. Advocates. It indicates that the purchase price is US \$ 25,000 USD which the plaintiff's board doubt. The sale agreement dated 23rd of March 2007 was admitted in evidence as exhibit P8.

PW2 further testified that they agreed that the defendant would purchase land for a poultry project in April 2008 and when he did this land too had no title. The sale agreement thereof is dated 22nd April 2008 between Muwanga Justine and Every Child Ministry Uganda. The agreement was also executed on behalf of the plaintiff by David Lubaale and drawn by Messrs Kafuuko Ntuyo and company Advocates. It shows that the property was purchased for a sum of Uganda shillings 13,500,000/=. The plaintiff's board from American sent money to build the chicken house and purchase the equipment together with the chicks to kick start the project but the plaintiff's board have neither seen the chicks nor the equipment. Moreover the land is occupied by someone else and when the children are sent to the property they get chased away. The sale agreement for the poultry project between Mrs Mwanga Justine and ECM dated 22nd April 2008 was tendered in evidence as Exhibit P9.

PW2 testified that in June 2008 they sent a first instalment for a baby's home project in Uganda and the defendant sent to them a sales agreement but there was no title. The plaintiff was contacted by another organisation called To Love Children who informed the plaintiff organisation that the defendant had first sold the property to them. PW2 and co director has first sent US\$ 35,000 to the defendant in two instalment of 15,000 USD each. The property in the agreement is in the Pece area of Gulu and is classified as a wetland. The agreement thereof is dated 13th June 2008 between Moses Kakaire and Every Child Ministries on whose behalf the defendant David Lubaale executed it. The agreement is for US\$ 30,000 and is drawn by Messrs Kafuko Ntuyo and Company Advocates and admitted in evidence as exhibit P10.

Last but not least PW2 testified that they sent money to purchase a bus for the plaintiff in August 2008. This was US\$ 30,000 and the defendant informed PW2

and co-director that some middleman had cheated him out of the bus deal. Up to the time of the testimony there was no bus.

As far as the signatories to the account were concerned they (PW2 and concerned persons) confronted the defendant and, Pastor Francis. However when they checked at the withdrawal forms the signature used was not that of Pastor Francis. The operating instructions on the account were that two out of the three signatories who were David Lubaale, Sophie Okello and Pastor Francis were to sign for a withdrawal of funds. It was established that David Lubaale signed on all material withdrawal forms and forged the signature of Pastor Francis. Sophie Okello never signed on any occasion.

In the suit they plaintiffs board was the defendant to regularise the purchase of land and produce land titles. As far as the poultry project is concerned they want a refund of money. For the Gulu land they want refund of money. For the bus they want a refund of money. They also prayed for costs of the suit.

The Plaintiff called PW3 Mr. Daniel Ajena 27 year old and a resident of Kirinya Kampala who is an Assistant Valuation Surveyor with East African Consulting Surveyors and Valuers. PW3 holds a Bachelor of Science Degree in land Management and Valuation from the RV University Tanzania. The firm valued the property at Kasangati, Kyankima zone. The valuation surveyors measured the land and the houses on the land and took notes concerning construction of the building and their condition and made a report which was signed by Mr. Mungati Edward. The findings are at page 24 and the report was tendered in evidence as exhibit P 11.

The valuation report shows that the property is customary tenure at Kasangati village, Kyankima LC 1 Wakiso district. It shows that the residential building is valued at shillings 58 million, the gate houses at shillings 500,000, the ambush block at Uganda shillings 700,000, the site works (fencing, levelling, branding, paving) was valued at 11,800,000 and market value of the land which is 0.099 echoes was valued at shillings 4 million. The total market value of the property is shillings 75 million being 40% of the private Mailo land value.

As far as documented proof is concerned, the plaintiffs adduced evidence of the purchase of various properties by the defendant on behalf of the plaintiff organisation. Exhibit P9 is a sale agreement dated 22nd of April 2008 between Mrs Mwanga Justine of Kyankima Lukoto zone Gayaza – Wakiso district and Every Child Ministries Uganda. It shows that the seller is the owner of a 100' x 100 square feet piece of land at Gayaza, Kasangati village, Kyankima, Lukoto zone LC 1 Wakiso district in the Republic of Uganda. In the agreement which was executed by Every Child Ministries through David Lubaale the agreed purchase price of the land was 13,500,000 Uganda shillings. The agreement also shows that on that day the seller transferred full ownership to Every Child Ministries. The agreement is signed by David Lubaale on behalf of Every Child Ministries.

The second agreement exhibit P8 was executed on 23 March 2007 between Sekabila Kasule James and Every Child Ministries Uganda. It was executed by David Lubaale on behalf of Every Child Ministries, the buyer. The agreement is for the sale of 60' x 100' square and developments comprised in Gayaza Kasangati village Kyankima zone LC one Wakiso district in the Republic of Uganda with one residential house with extensions thereto. The purchase price of the premises was US\$25,000 stated to be equivalent to 26,000,000 Uganda shillings. In the agreement to sell acknowledged the sum of US\$15,000 as part payment equivalent to 60% of the whole value. The balance of US\$10,000 was to be paid between March 2008 and April 2008.

The Agreement exhibit P 10 is the sale agreement dated 13th of June 2008 between Moses Kakaire of Pece – Cubo Gulu Municipality Gulu district as the seller of the property and Every Child Ministries Uganda for the sale of half an acre of land that is 100 x 100' with a building of 20 x 70'. They agreed purchase price of the property was US\$30,000 out of which the Seller acknowledged the sum of US\$15,000 being 50% of the purchase price. The balance was to be settled by August 15, 2008. The agreement was executed by David Lubaale on behalf of Every Child Ministries Uganda.

Exhibits on record confirm the testimonies of PW1 and PW2 that it was discovered that the defendant Mr David Lubaale had misappropriated various amounts of money sent to Uganda by PW1 and PW2 to the plaintiff organisation. The exhibits also corroborate the testimony of PW1 and PW2 that there were negotiations between the plaintiff and the defendant in which it was agreed that the defendant would refund some of the money. The exhibits show admission by the defendant of misappropriation of the plaintiffs funds meant for its projects. Exhibit P7 is a letter from the defendant to the board of the plaintiff in Uganda and in the USA. It is dated 6th of January 2009 and reads as follows:

"Dear ECM – USA and Uganda board, I am so grateful for the opportunity and confidence you granted me to serve with you.

However, I am very sorry and here convey my apologies for the Misallocation and deception in relation to my status as ECM director. The devil deceived me and I also lied. I misused ECM money to do other things which were not part of the ongoing projects or whatsoever. I went to the extent of allowing/involving myself into making forged bank statements to back up this ill-gesture.

Therefore, in your capacity as brothers, parents, sister and friends, I beg forgiveness and I promise not to again be involved in this matter of falsifying the funds of ECM.

I also promised to remain passive/indirectly involved in the financial matters of our beloved organisation.

I will also, by God's providence refund the money that I misused.

I call upon your prayers and intercession to see this coming to pass.

Sincerely, I have no right statement I can put on paper and in expression.

I will always be prepared for your counselling and spiritual lift from this sin.

Sincerely

David Lubaale"

Exhibit P3 is a document entitled promissory note dated 13th of January 2009 in which the Defendant promised to pay the plaintiff US\$13,974. On 24 June 2009 in exhibit P4 the lawyers of the defendant Messrs Kafuko Ntuyo and company advocates wrote to the plaintiff's advocates Messrs Luzige, Nakayi and Co. Advocates in which the defendant's lawyers put forward the following proposals:

"That David Lubaale wishes to settle his outstanding issues with Every Child Ministries amicably if they are agreeable.

In light of the above he is putting forward the following proposals:

"(1) shillings 22 million. Since he made a written undertaking to ECM to refund his money, he is still standing by his commitment. As a way forward, he is proposing to make a down payment of shillings 6 million within five days if he is allowed to get bond to be able to liaise with sources where he can get the money. Thereafter he promises to pay US\$1500 every three months until liquidating the debt. He has so far refunded US\$2600.

(2) Minibus: the money to buy this item was conned from David by a middleman. Nonetheless he is willing to purchase a minibus and hand it over to ECM within 6 months.

(3) Land for ECM: David is aware of the pieces of land which he bought for ECM and is available. These include: – (i) land with premises where ECM offices are at Kyankima Gayaza. (ii) Land where poultry farm at Kyankima Gayaza. (iii) Land in Gulu municipality with premises. David is ready to hand over all documentation in respect of these lands to ECM and regularise its ownership by ECM. He is ready to commit himself in writing on all these undertakings if you and your clients have no objection.

I therefore present these proposals to you and your client's consideration and await for your immediate response.

I believe pursuing this matter amicably is better than following a criminal process which may turn out to be long and tedious though inconvenient to David.

Your prompt response and Corporation shall be appreciated.

Yours faithfully

Kafuko Ntuyo and company advocates

C.C Director CID – Kibuli"

The testimonies of PW1 and PW2 and the exhibits on record prove that the defendant had been appointed the national director of the plaintiff organisation in Uganda and he had assisted in the formalisation of plaintiff organisation in Uganda and set up its operations in Uganda. Various amounts of money on various occasions were sent into Uganda by the International directors of the plaintiff organisation based in the United States of America. These funds were accessed by the defendant and the various agreements made for the purchase of property which agreements were forwarded to the American board of Every Child Ministries in Indiana USA.

US\$30,000 was sent to purchase property in Gulu, and the agreement thereof forwarded to PW1 and PW2, the international co-directors of Every Child Ministries, this property is not available to the plaintiff because it is on a wetland and was resold by the defendant to another organisation. Secondly, exhibit P9 in respect of land sold by Mrs Mwanga Justine, measuring 100' x 100' square in Gayaza Kasangati village Kyankima, Lukoto LC1 zone in Wakiso district is not available to the plaintiff or the children who were supposed to access the poultry project. Money for poultry equipment and for the chicks to kick start the project was misappropriated by the defendant.

US\$30,000 sent to purchase a minibus has not benefited the plaintiff organisation. Written documents from the defendant show that the money was conned out of him and he undertook nonetheless to buy a minibus for the plaintiff organisation. However, no bus has ever been purchased up to date as undertaken.

As far as the land measuring 60' x 100' square with one residential housing extensions thereto are concerned, this property is available to the plaintiff.

However, extensive improvements had been made on the property and testimony on record is that the property was not worth the amount of money sent by the plaintiffs to the defendant.

Exhibits P7, exhibit P4 and exhibit P3 are all acknowledgements by the defendant of the allegations in the plaint. All in all, the plaintiff has proved misappropriation of its resources by the defendant which resources were meant to run philanthropic projects for disadvantaged children in Uganda.

Whereas the international co-directors have prayed to this court for orders that the defendant refunds all the money for the poultry project, the Gulu property, and the bus, the plaint as currently framed cannot sustain the said prayers. The Plaintiffs' Plaint is for the recovery of **US\$40,000**, temporary injunction against the defendant, general damages, interest on the principal sum and general damages and costs of the suit. The plaintiff can only prove what is pleaded in the plaint. I am satisfied from the testimony of PW1 and PW2 that the plaintiff is entitled to a refund of money meant for the purchase of a bus in the amount of **US\$30,000**. In any case the defendant had undertaken to buy the bus in writing. In addition, on 13 January 2009 by promissory note exhibit P3 the defendant undertook to pay the plaintiff **US\$13,974** after which PW2 testified that the defendant has so far refunded only **US\$2100**. This leaves an outstanding amount of **US\$11,874** out of exhibit P3, a promissory note. There are other sums to which the plaintiffs could have been entitled. However, special damages have to be specifically pleaded and proved. In this case, not all the special damages sought by the plaintiffs were pleaded and therefore cannot be proved. Only US\$ 40,000 was pleaded. In the case of **Uganda Telecom Limited v Tanzanite Corporation [2005] 2 EA 331 (SCU)** Justice Oder of the Supreme Court of Uganda affirms the trite law that special damages have to be pleaded and strictly proved at page 341:

"It is evident from the respondent's pleadings that their claims for loss of unused materials and for the unpaid bank loan were special damages. According to "Atiyar's Sale of Goods Act" (supra), "Special damages" is that damage in fact caused by wrong. It is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved or

unless the best available particulars or details have before trial have been communicated to the party against whom it is claimed.” (Emphasis added)

Again in the case of **Siree v Lake Turkana El Molo Lodges Ltd [2000] 2 EA 521 (CAK)** the Court of Appeal of Kenya restates the principle that special damages not specifically pleaded cannot be proved. At 530 Omolo JA stated:

“As regards the special damages awarded, this Court has said time and time again that when damages can be calculated to a cent, then they cease to be general and must be claimed as special damages. *In this regard, loss of profits, which formed the bulk of the Respondent’s claim for damages, are in the nature of special damages and must be specifically pleaded before they can be strictly proved.* ... These are the principles to be found in this Court’s decisions such as *Sande v Kenya Co-operative Creameries Ltd [1992] LLR 314 (CAK)*, *Eldama Ravine Distributors Ltd and another v Samson Kipruto Chebon civil appeal number 22 of 1991 (unreported)*, *Coast Bus Services Ltd v Danyi and others [1992] LLR 318 (CAK)* and many more recent decisions on the same point. In *Sisco’s case (supra)* ...This Court has consistently followed these principles and for my part, I can find nothing in the circumstances of this case that would justify a departure from them.

... There was no such claim in the plaint and the Learned Judge was not entitled to award it to the Respondent without an amendment of the plaint.” (Emphasis added)

I am bound by the Supreme Court decision in **Uganda Telecom Limited v Tanzanite Corporation** (supra) and I follow the principle that special damages cannot be proved unless specifically pleaded. In the premises the plaintiff is awarded only the special damages pleaded in the amount of **US\$40,000**.

Taking into account the trouble that the defendant put the plaintiff through and that he was entrusted with the funds to run a charitable project to help disadvantaged children which trust he flagrantly abused, coupled with the fact that after making up with the plaintiffs he did not make good his word to refund the monies undertaken to be refunded to the plaintiff organisation, and his

misappropriation of other funds proved in this case, I award the plaintiff general damages of **US\$15,000**.

In respect to the office premises at Kyankima LC 1 which property was bought from Sekabila Kasule James an injunction is issued restraining the defendant, his agents, servants, assigns or anyone claiming through him from interfering with quiet possession of the plaintiff of the premises measuring 60' x 100' in Gayaza, Kasangati village, Kyankima zone LC 1 Wakiso district having thereon one residential houses and extensions thereto whose agreement is exhibit P8.

The defendant shall pay interest on the decreed amounts at the rate of 10% per annum from the date of judgment till full satisfaction of the decreed amount.

The rest of the prayers of the plaintiff's counsel are outside the plaintiff's pleadings and cannot be granted. For instance the court cannot evict people who are not parties to the suit. The plaintiff is awarded costs of the suit.

Judgement delivered in open court this 16th day of December 2011

Hon. Justice Christopher Madrama

Judgment delivered in the presence of:

Nakamate Esther holding brief for Counsel Joseph Luzige for the plaintiff

Ojambo Makoha Court clerk

Hon. Justice Christopher Madrama