

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 307 OF 2011**

**ANGELLA KATATUMBA}.....PLAINTIFF**

**VERSUS**

**THE ANTI-CORRUPTION COALITION OF UGANDA (ACCU).....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff, an adult female Ugandan and a resident of Kampala, commenced this action against the Defendant, a non-governmental organisation, for general and aggravated/exemplary/punitive damages for copyright infringement, and for interest and costs.

The Plaintiff's claim arises from the allegation that she carries on the business of an artist, composer, singer and performer in Uganda and all over the world since about the year 2005. She alleges that over the years she built up a clientele and fan base in East Africa, USA, Canada and the United Kingdom and elsewhere in the world over the years released a wide range of musical productions. Secondly it is averred that the Plaintiff in particular has been involved in the environmental movement as well as mobilising government and other stakeholders to care for the poor, especially refugees and internally displaced persons. In those programs, the Plaintiff relies heavily on cultivating good rapport and understanding with the authorities, to push her causes, as opposed to adopting confrontational activism and the strategy has been reasonably successful. Finally the Plaintiff is a composer, producer and copyright holder of a musical production entitled "Let's Go Green". The Plaintiff also reduced the production into a recorded audio and visual form. She has marketed the hardcopy as well as soft versions on the YouTube and other soft media. The Plaintiff alleges that she regularly performs the product in public for gain as well as advancing her environmental conservation agenda.

In or about April and May 2011, the Plaintiff discovered that a substantial portion of the lyrics and content of the above-mentioned production were incorporated into and released as part of an advertisement by the Defendant wherein her production prominently features. The advertisement was repeatedly aired on several FM stations in Uganda and was also received in neighbouring countries, through the Internet and worldwide. Incorporation of the lyrics and content into the advertisement was knowingly made by or on the instructions and for the benefit of the Defendant without the Plaintiff's knowledge or consent. The advertisement is a virulent castigation of a wide range of activities in Uganda, including those said to have been done with her tacit

approval of the government of Uganda and other stakeholders wherein the Defendant concludes with a call on members of the public to combat the practices and matters the advertisement complains about. The advertisement and publication amounts to infringement by the Defendant of the Plaintiffs copyright in the production "Let's Go Green". By reason of the foregoing the Plaintiff suffered embarrassment and humiliation in her dealings with the various stakeholders including governmental agencies and players whom she alleges view her as a traitor who had promised to peacefully engage with them for solutions to environmental challenges and in breach joined a different team with a different approach to environmental concerns . Secondly the Plaintiff claims to have lost income after her musical production was degraded by the Defendant to a mere advertising jingle in the eyes of the public. The Plaintiff claims business loss and professional injury for which she claims general damages. Secondly on account of the unconstitutional, high-handed and deliberate and calculated activities of the Defendant at the expense or in blatant disregard of the Plaintiff's interests, feelings and concerns, the Plaintiff claims punitive/aggravated/exemplary damages. She further seeks a declaration that the Defendant infringed upon her rights.

In reply the Defendant denies the Plaintiff's claims. The Defendant contends that a very unsubstantial portion of the Plaintiffs work was used.

The Plaintiff was represented by Benson Tumasirwe of Messieurs Tumasirwe and Company Advocates while the Defendant was represented by Paul Asiimwe of SIPI Law Advocates.

At the hearing of the suit certain facts and documentary exhibits were agreed to and would be referred to in due course. The Plaintiff testified as PW1 and closed her case and the Defendant also produced one witness namely it's Executive Director Ms Cissy Kagaba. The testimonies of the witnesses will be considered together with the written submissions of Counsels.

Three issues were agreed upon for trial namely:

1. Whether the Defendant infringed the Plaintiff's copyright?
2. Whether the Defendant's actions fall within the fair use exception?
3. Whether the Plaintiff is entitled to the remedies sought?

### **Written Submissions of Counsel**

#### **Whether the Defendant infringed the Plaintiff's copyright?**

The Plaintiff's Counsel submitted that it is an agreed fact that the Plaintiff is the copyright holder of the musical production/recording entitled "Let's Go Green". It was also an agreed fact that a portion of the song was used in the advertisement which was broadcast by the Defendant on FM stations in Uganda. The issue that is not agreed is whether it amounted to copyright infringement. Counsel submitted that the Defendant's case seems to be that the portion of the

song that was used was negligible that its use did not constitute copyright infringement. The question therefore was what amounted to copyright infringement.

Counsel submitted that the applicable law is the Copyright and Neighbouring Rights Act 2006 and the song falls within the ambit of section 3 thereof. The suit song is a work eligible for copyright under section 5 (1) (c) of the Copyright and Neighbouring Rights Act 2006. As a copyright holder, the Plaintiff had economic rights spelt out under section 9 of the Act and in particular the exclusive right to do or authorised other persons to publish, produce or reproduce the work; to broadcast the work; to communicate the work to the public by wire or wireless means and to make a derivative work out of it. Counsel relied on the Judgment of Honourable Justice Yorokamu Bamwine in the case of **Prof George W Kakoma versus Attorney General HCCS No 127 of 2008**.

The Plaintiff also has moral rights spelt out under section 10 of the Copyright and Neighbouring Rights Act and in particular the right to have her name mentioned or acknowledged each time the work is used. Any act of the Defendant that undermined the "exclusive rights" under section 9 and the moral rights under section 10 would amount to infringement of the copyright owner's rights. Section 46 of the Act defines what amounts to copyright infringement. Counsel submitted that the Defendant is guilty of all the stipulations in section 46 (1) and (2) of the Copyright and Neighbouring Rights Act. The Defendant reproduced, duplicated and extracted a portion of the Plaintiffs work for its own use in its campaign in the advertisement. It exhibited to the public the said portion of the work of the Plaintiff. While it did not amount to direct commercial purposes, DW1 admitted that the donations the Defendant receives and uses in its work depended inter alia on the success of its campaigns such as the one which forms the basis of this suit. The Defendant's contention was that its use of the portion of the song did not amount to infringement of the copyright owners rights. This is because only a small part of the song was used. Secondly it was used in good faith. Thirdly the Plaintiff suffered no harm as a result of the Defendant's use of the production and finally it fell within the meaning of "fair use" which was an exception.

The question of whether the portion of the Plaintiff's production that was used was negligible is one of fact. Authorities on the matter demonstrate that the Defendant state of mind is immaterial. In the textbook: '**the Modern Law of Copyright and Designs**', **Hugh Laddie, Peter Prescott and Mary Victoria** at page 81 discuss innocent intent. They write that guilty knowledge is not an essential ingredient of the wrong of primary infringement of the copyright. For instance a printer who executes a job for a customer infringes copyright if it turns out to be a pirated work. The consequences are mitigated to a limited extent if he did not know and did not suspect that the Plaintiffs work was the subject of a copyright but he must prove this.

In the instant case the Defendant does not assert that it did not know that the work was the subject of the Plaintiffs copyright. On the contrary the Defendant's witness admitted that they knew that the song was a production of the Plaintiff. They only thought that it was okay to use it. It was a plea of ignorance of law or ignorance of the legal consequences of helping themselves to

the Plaintiffs work without seeking her consent. That ignorance is immaterial and does not amount to a defence to the Plaintiff's case. Counsel further relied on a textbook by **Copinger and Skone James on COPYRIGHT** between pages 176 and 177 paragraphs 410 to 412. The gist of which is that ignorance that the work that is used directly or indirectly by the Defendant is that of the Plaintiff is not an excuse. Secondly the cause of action for infringement of copyright does not require proof of the damage since Copyright is a right of property and the Plaintiff is entitled to come to court for the protection of the property. Thirdly subconscious copying has been discussed as a possible infringement of Copyright.

The Defendant claims that its officers did not know that it was wrong to use the Plaintiffs work is not a defence. Secondly they cannot prove that they used the work subconsciously because DW1 admitted that they knew the copyright in the song belongs to the Plaintiff who is the holder thereof.

On the question of whether a substantial portion of the Plaintiff's song was used under section 46 any dealing with the copyright holders work without a licence, transfer, assignment or other authorisation amounts to copyright infringement so long as they use is contrary to the permitted free use of the work. Even the tiniest use of the Plaintiffs work without authorisation amounts to copyright infringement unless it falls within the exception of "fair use".

The Plaintiff's Counsel contends that even in jurisdictions such as the UK which only punishes use of the production or "any substantial portion thereof" under the U.K.'s Copyright, Designs and Patents Act 1988, the meaning of "any substantial part" was considered by **Hugh Laddie, Peter Prescott and Mary Victoria** (supra) at page 87. They write that what is "substantial" is a question of fact and degree and a matter for the jury. Sheer arithmetical quantity per se is not the test because a short extract may be a vital part of the work and the question is whether the Defendant has copied a substantial part and it depends more on the quality than the quantity of what he has taken. The underlying principle is that the Defendant is not at liberty to use or avail himself of the labour which the Plaintiff has been put to the purpose of producing his work and merely to take the benefit of another man's labour.

Consequently the use of a small but vital part of the work amounts to infringement. In the case of **Hawks and Sons Ltd versus Paramount Field Services Ltd [1934] CH 593** the use of only a little over 30 seconds out of a 4 min recording was found to amount to infringement. For instance the use of a single page out of a book may amount to infringement. However in this case, Counsel submitted that PW1 explained that this song is used very audibly without any other material for several seconds at the beginning of the advertisement and at the end. Most importantly it is used as the background music throughout the whole length of the advertisement. DW1 admitted that the song comes out for a total of 10 seconds out of the 1 min and 10 seconds of the advertisement. The recording of the advertisement was tendered in court as an exhibit. The audio brings out the chorus of the Plaintiff's song throughout the advertisement. The song is a 1 min and 30 seconds recording; the use thereof for 1 min and 10 seconds is substantial. The

chorus of the Plaintiff's song forms the very heart of the Defendant's advertisement. The Plaintiff's Counsel submitted that the use of this song was unauthorised and does not fall within the fair use exception and it followed that the Defendant infringed the Plaintiff's copyright.

In reply the Defendant's Counsel submitted that the Defendant is an NGO whose objectives include improving transparency and accountability in the management of forests and wildlife reserves in Uganda and exposing corruption and advocating for good governance. In the year 2011, the media widely publicised the impending de-gazetting of Namanve forest reserve. The Defendant as an advocacy organisation found it necessary and within their mandate to communicate to the public the intended giveaway of the forest at that time. One of their campaigns came up with the jingle that incorporated a portion of the song "Let's Go Green". The Defendant's use of the song was of a non-commercial nature and was justified in the public interest for saving Namanve forest at that time. The Defendant's case is that there was no infringement of the copyright in the audio sound recording "Let's Go Green". Secondly there was no reproduction or imitation of the audio and the portion of the song that was used were within the permissions of the Copyright and Neighbouring Rights Act 2006. Furthermore there was no loss suffered by the Plaintiff as the result of the Defendant's use of portions of the audio "let's go green" as the jingle was made for a non-commercial cause and in the public interest. On the issue of **whether the Defendant infringed the Plaintiff's copyright?**

The Defendants Counsel submitted that the evidence that emerged was that PW1 in cross examination testified that she was commissioned by the British Council produce the song "Let's Go Green". Section 2 of the Copyright and Neighbouring Rights Act 2006 defines an author as a physical person who creates the work or an authority commissioning work. Under section 8 (6) of the Copyright and Neighbouring Rights Act 2006 where a person creates a work on behalf of another person or body, then in the absence of a contract to the contrary, the copyright in respect of the work shall vest in the employer or person or body that commissioned the work.

PW 1 testified that she paid 3000 pounds in full for this work. Under section 8 the law implies a statutory assignment of the commissioned works and copyrights subsequently vested in the British Council. The normal assumption with commissioned works is that the rights to the works are assigned upon payment to the creator of the works. For the Plaintiff to assert any legal ownership of the works, PW1 had to adduce evidence of a transfer contract between the Commissioner of work, which is the British Council, and the Plaintiff stating that the copyright still vested in her. Section 14 (3) of the Copyright and Neighbouring Rights Act provides that a valid transfer shall be in writing between the owner of the right and the person to whom the right has been assigned. The function of the law in this case is to provide clarity of title in commercial transactions relating to the protected works or in contentious matters such as the Plaintiff's case.

The Defendants Counsel further submitted that the Plaintiff is not able to enforce a copyright that she had already signed away to the British Council. He suggested that this was why the Plaintiff refused to tender a contract to support her claim to the Copyright in issue. He further contended

that this honourable court is unable to reach a finding as to the rights of ownership that the British Council has in the works in issue because the Plaintiff did not adduce any documentary evidence to this effect, nor did she call any witnesses from the British Council to testify on the issue.

With regard to the case of **Prof G Kakoma versus Attorney General HCCS No 197 of 2008**, the case was wrongly decided because at page 4 of the judgement it was held that copyright in the commissioned work belongs to the author in the absence of an express or implied term to the contrary. Section 8 (1) (b) cited clearly provides that the Commissioner's right to the works can only be vitiated by a specific contract to this effect. A proper construction of the law on commissioned copyright works therefore renders the Plaintiff incapable of enforcing any rights over the song "let's go Green" and the suit should therefore be dismissed for failure to disclose a cause of action against the Defendant.

As far as proof of the audio works is concerned the Plaintiff testified that the song was sung by her and another person, Jocelyn Keko. She claims to be the sole copyright owner of the song in question and had paid Jocelyn off as far as her contribution to the song is concerned. Section 35 of the Copyright and Neighbouring Rights Act provides that any contract relating to the exploitation of the author's right shall be in writing and signed or marked by the parties to the contract. In the premises the Defendant's Counsel maintains that the Plaintiff was obliged to adduce documentary proof to support her claim to have undivided title to the copyright in the song "let's go Green". Counsel further contends that failure to adduce evidence means that the Plaintiff has no locus standi to bring this action. The co-author should have been joined as a co-Plaintiff. Failure to do so is prejudicial to the Defendant as any judgement against the Defendant does not prevent the co-owner from bringing another suit against the Defendant over the same alleged infringement. Furthermore if ownership in another owner to the copyright exists, she may have an interest in a different remedy i.e. payment of royalties, rather than damages. Based on this analysis the Defendants Counsel maintains that the Plaintiff has failed to prove her exclusive claim to ownership of the song "let's go Green".

The Defendants Counsel further wondered whether any judgement entered would be res judicata against other parties such as the British Council and the other author. There are two parties presented by PW1 who could potentially litigate similar issues against the Defendant because the Plaintiff's testimony is inconclusive on the question of title of ownership for the copyright. These are the British Council as well as the artist Jocelyn Keko.

Though the parties agreed to the fact that the Plaintiff is the owner of the copyright in the song "let's go Green", it would be a travesty of justice for PW1's testimony on oath seriously contradicting this position to be ignored. The purpose of agreeing to facts during scheduling does not of itself override the role of evidence voluntarily adduced during the trial. The function of evidence voluntarily adduced during the trial is to corroborate the facts as set out by the parties. To this extent Counsel prayed that the Plaintiff's claim should be dismissed with costs to the

Defendant. This is because the Plaintiff without a title to the copyright cannot sue. In the premises there was no infringement by the Defendant of the Plaintiff's rights to the song "let's go Green".

In rejoinder on the first issue the Plaintiff's Counsel submitted that as far as the facts are concerned the Plaintiff's Counsel maintains that the Defendant made a false argument that the use of the portion of the Plaintiff's song was justified in public interest of serving Namanve Forest at the material time. He contends that there is no law allowing a person or organisation to help itself or himself/herself to intellectual property in the public interest. The clauses/law that has ever allowed invasion of private property in the public interest is where property is compulsorily acquired by government. Under that arrangement the law requires the government to give adequate and prior compensation (See Art 26 of the Constitution). When it comes to other persons in matters of copyright, the only permissible exception is "fair use" and not public interest.

Whether the Defendant infringed the Plaintiff's copyright? The Plaintiff's Counsel submitted in rejoinder that the Defendant only pleaded in its written statement of defence that unsubstantial portion of the Plaintiffs work was used. Secondly in the joint scheduling memorandum filed in court on 21 October 2013 the agreed facts included the fact that the Plaintiff is the composer, producer and copyright holder of "let's go Green". Secondly the Plaintiff reduced the said production into a recorded form and has a business in it by way of audiovisual material. The Plaintiff also regularly performs the said product in public as well as advancing her environmental conservation agenda. Counsel further emphasised part "C" of the joint scheduling memorandum on the agreed disputed facts by the Plaintiff in which it is stated that unsubstantial portion of the Plaintiffs work was used (agreed fact in dispute). Secondly that it was used for teaching and educational purposes and therefore amounted to "fair use". Consequently the thrust of the Plaintiff's pleadings was the existence of a copyright which was admitted and secondly that the Defendant's contention that there was no infringement was based on the specific facts pleaded or at least asserted at the scheduling conference namely that only unsubstantial portion of the Plaintiff's work was used. Secondly that it was for teaching and educational purposes and amounted to "fair use". It was in the direction of the pleadings that the evidence of DW1 was directed. For that reason no issue was framed as to whether the Plaintiff was the copyright holder and the only question for trial was whether her copyright was infringed. All of a sudden the Defendant has come up with a competently different defence and issue.

The departure from the pleadings to the extent of asserting that the song in question was a commissioned work and secondly was composed together with another person and offends the law. Specifically it offends Order 6 rule 7 of the Civil Procedure Rules. Secondly general denials are not permissible and denial must be specific as required by Order 6 rule 8 of the Civil Procedure Rules. Where a party makes a general denial, he cannot be allowed to adduce specific evidence nor can he take a position that is at odds with the thrust of his denial. The effect of the Defendant's submissions in choosing at this stage of final submissions to reply on argument is

not founded on the facts in dispute. Secondly he has not responded to the Plaintiff's submissions on issue number one which therefore remains unchallenged.

On the issue that the Defendant chose to submit on, it is plainly and factually wrong because firstly it is not true that the song was a commissioned work. The Defendant has not adduced any evidence of commissioning. Secondly in dealing with subsequent issues he contradicts his position when he states that it is the written evidence of commissioning and that under section 14 (3) a valid transfer of a Copyright on a third party has to be in writing to be effective. The Defendant asserted that the song was produced as a commissioned work and therefore the copyright thereof belonged to the Commissioner namely the British Council.

The Copyright and Neighbouring Rights Act does not define commissioning. From the wording of section 8 (1) (b), the word "commission" is not used as a term of art or a legal term, but in its ordinary English meaning. According to the **Cambridge International Dictionary of English** to "commission" means to formally choose someone to do a special piece of work. The free dictionary which is an online dictionary defines commissioning as the act of granting certain powers or authority to carry out a particular task or duty. Counsel emphasises that commissioning cannot be assumed because it is a formal process of instructing a person to undertake a given task. The task is firstly undertaken in fulfilment or execution of the commissioner's instructions. The instructions precede the work. Secondly the product or its legal ownership would then be handed over to the Commissioner. It would therefore follow that, because of its characteristics, the product would belong to the Commissioner. It is the Commissioner's property, created upon his instructions and for his benefit. The wording of section 8 (1) (b) suggests it. It provides that "where a person creates a work on commission by another..." It means that the commission precedes the creation of the work. Any party alleging commissioning would have to prove the existence of a formal process. Mere payment as a token of appreciation does not amount to commissioning and that is all that existed in the Plaintiffs matter. The Plaintiff may have used the term during cross-examination but not much can be read into that because she is a lay person. She testified that she was paid £3000 by the British Council but that alone could not amount to "commission" because it is not anywhere claimed that the British Council initiated the process that gave rise to the song. Secondly it is not suggested that the British Council regarded itself as owner of the song and it cannot have commissioned it unconsciously. From the evidence of PW1, it is clear that the British Council did not initiate but only assisted in an ongoing process. Secondly, shortly after referring to the payment PW1 added "I know that they put money into producing my work. I expected to be paid for its use." The Plaintiff invested her own money into the production and that is clearly inconsistent with commissioning. Fourthly it was not even suggested that the British Council give any directive as to the content, name or particulars of the work. It only paid money and that was all. Even the existence of a commission would not completely take away the authors cause of action. This is because it will take away her economic rights under section 9 and her moral rights under section



10 would remain intact as stipulated by section 10 (3) of the Copyright and Neighbouring Rights Act.

The second argument about a co-author is absurd because one Jocelyn Keko participated in the production. Her participation does not mean that there was no copyright infringement as far as the Plaintiff is concerned. Under section 11 of the Copyright and Neighbouring Rights Act, co-authors would still have equal rights. Where one of them chooses to enforce her rights while another is happy to sit back it cannot take away the rights of the former. However this is not the case of co-authors because PW1 explained at the opening of cross-examination that she was the sole owner of the song. That there is another at least two features in the song. She paid her. Counsel emphasised that in the production of a song, film, literary work, art piece etc it is not necessary to restrict the efforts to one individual. There will always be helpers to handle specific tasks such as drummers, backup, drivers, stage managers, sound effects men etc. They are paid for their work. Consequently reference to section 35 of the Copyright and Neighbouring Rights Act is irrelevant because Jocelyn Keko is not a co-author. The argument that other claimants might emerge if the Defendant is liable is not tenable. On the basis of the above the first issue ought to be resolved in favour of the Plaintiff.

### **Whether the Defendant's actions fell within the fair use exception?**

The Plaintiff's Counsel concedes that if the court finds that the Defendant made a fair use of the Plaintiff's work, it is excused. He went on to define what "fair use" means. Counsel considered a printout exhibited by the Defendant exhibit D5 which is claimed to be a YouTube fair use policy. He attacked the printout on the ground that it does not claim to be a policy statement. It is a piece of advice to YouTube users advising them on what courts particularly in the USA use as a guide in determining whether or not fair use has been made of the work in question. Most importantly the print out actually cautions persons who make use of YouTube materials to ensure that they do not fall foul of the laws of his or her country.

"Factor" number three of the four factors of fair use set out in the printout reiterates the above submission that the use of a small portion which constitutes the "heart" of the work may fall outside the ambit of fair use. The Defendant did not clearly make proper use of the advice from YouTube.

Section 15 (1) of the Copyright and Neighbouring Rights Act lists 11 situations are considered to be fair use. Counsel submitted that the Defendants use did not fall within the 11 situations spelt out under the provision. Namely the adaptation of the Plaintiff song into an advertisement was not "for private use only" but was released to the public by mass media on at least two radio stations for five days as admitted by DW1. Secondly section 15 (1) (b) and (c) not assist the Defendants used because it did not acknowledge the Plaintiff as author in the advertisements or at all. Section 15 (1) (d) does not assist either because it only protects use in educational institutions and also requires acknowledgement of the source. In a like manner subsection (e)

requires acknowledgement. Section 15 (1) (f) is also irrelevant because it deals with situations where work is referred to in the course of "reporting on current events". Section 15 (1) (g) is totally irrelevant as it refers to situations where a copyrighted work is coincidentally captured in the background of a production, performance or broadcast, and not where it is deliberately integrated into the Defendant's production itself. The rest of section 15 (1) does not relate to the Defendant's scenario.

The Plaintiff's Counsel submitted that firstly the question of "fair use" is subject to the law of jurisdiction and secondly within the Copyright and Neighbouring Rights Act 2006, the Defendant does not fall within the ambit of "fair use". Section 15 (2) which repeats the four factors or criteria for determining fair use and none of them benefits the Defendant in the instant case.

The Plaintiff's Counsel contends that where the use of the song may not have been commercial, strictly speaking, it was not for "educational" purposes so that section 15 (2) (a) does not help the Defendant. This is because section 15 (1) limits "educational purposes" to a formal institutional education, not merely to "haranguing" the public on the media. Secondly regard has to be had to the amount and substantially equal proportion used which relates back to issue number one. Once it is proved that a substantial portion of the Plaintiff's work was used, qualitatively and quantitatively, the question of fair use does not arise. From the wording of section 15 (2), substantial use is inconsistent with fair use especially where there is no acknowledgement of the author.

Counsel further submitted that it would be debilitating and a drastic consequence would arise if the court found that it is all right for a non-governmental organisation to help itself to general portions of artists' musical works because they are doing a good job. In the premises the Plaintiff's Counsel prays that the court makes a finding that the Defendants used did not fall within the fair use exception.

In reply the Defendants Counsel submitted that there was no reproduction, imitation or duplication of the Plaintiff's song. The Defendant's jingle is not an exact copy of the "let's go Green" song as alleged. Secondly the song featured two different artists. It commences with a rap by one artist whom PW1 identified as Keko and later the Plaintiff. The entire song is 4 min and 30 seconds and was confirmed by PW1. The Defendant's jingle commences with an extract of lyrical verse of the let's go Green song, then female and male verbal voice reciting a stanza calling on the public to engage their members of Parliament to prevent the forest give away and ends with the lyrical verse. On the other hand PW1 testified that the entire Namanve jingle is 1 min and nine seconds. Counsel further contended that from the evidence of PW1 the song in question and the Defendant's jingle are significantly and noticeably different in content, style, structure and time and is not an exact copy of the song.

The extract of the verse in the song that was used in the Defendant's jingle was not substantial and therefore not actionable. The jingle substantially contains messages from the Defendants to the public in prose to engage their leaders in preventing the unlawful giveaway of Namanve Forest. The substantiality test must be applied to the lyrical content and length of time of the jingle in comparison with the song "Let's Go Green". To that extent the Defendant's jingle is in creative, transformative and entitled the corporate protection in its own right. No loss or harm was intended or occasioned by the unsubstantial use of portions of the song in the Defendant's jingle. The actions of the Defendant fall within the elements of fair use doctrine as set out under the Copyright and Neighbouring Rights Act. The use of the song was done to communicate to the public de-gazetting of Namanve Forest. The Defendant's rights are anchored on article 39 of the Constitution which gives every citizen a right to a clean and healthy environment. In the testimony of DW1 the Defendant considered the fair use statement on YouTube. The statement refers users to fair use provisions under local laws.

The applicable law in the case is section 15 (1) (f) and section 15 (2) of the Copyright and Neighbouring Rights Act. The provision under section 15 (1) (f) provides that the fair use of the protected work and cannot be an infringement of the right of the author and shall not require the consent of the owner of the copyright were under (F) any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audiovisual work or broadcast to the extent justified for the purpose when reporting current events. The Defendant's Counsel submitted that there was fair use of elements of the song in as far as the jingle was communicated through the broadcast to the extent justified for the purpose of reporting on current events relating to the impending destruction of Namanve Forest. The print media including the Monitor newspaper widely featured news about the intended giveaway of Namanve Forest. The Defendant adduced in evidence exhibit D1 to D4 showing that on various dates the news was reported. During the period the jingle dubbed "save Namanve campaign" was broadcast on some radios with the intention of reporting the Namanve Forest giveaway. The threatened destruction of the forest was a current event at that time.

In the case of **Ashdown versus Telegraph group (2001) EWCA Civ 142**, substantial passages of the appellant's dairies were published by the respondents without authorisation. At that time the appellant had not yet published them. The appellants sued for breach of confidence and Copyright and succeeded against the respondents. On appeal, in balancing the purpose of the Human Rights Act and the copyright, the court noted that there is no question but that restriction of the right of freedom of expression can be justified where necessary in order to protect copyright. The protection afforded to copyright is however subject to exceptions. Both the right to freedom of expression and copyright are qualified. They held that section 30 (2) of the UK Copyright Act which provides that fair dealing with the work for purposes of reporting current events does not infringe any copyright in the work was applicable. A defence to a claim for breach of copyright can be mounted on the basis of public interest which is not a statutory defence but one arising from common law. The rights to freedom of expression trumped the

private right to copyright but the court must look closely at the facts of individual cases. There are three key tests for the success of the fair use defence: firstly the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work. If it is not, then that is moderate taking, the defence is likely to succeed especially if the Defendant's additional purpose is to right a wrong, to ventilate an honest grievance etc. Secondly the most important factor is whether the work has already been published or otherwise exposed to the public. If it does not, and if the material has been obtained by a breach of confidence or other means or underhand dealing, the courts will be reluctant to say that this is fair. Lastly the most important factor is the amount and importance of the work that has been taken. Although it is permissible to take a substantial part of the work, in some circumstances the taking of an excessive amount or the taking of even a small amount if on a regular basis would negative fair dealing.

In the jingle and the purpose for which it is used the Defendant met the three tests set out by the above court. The purpose of the campaign was to ventilate an honest grievance i.e. the intended destruction of Namanve Forest. Secondly in the case of **Acode versus Attorney General High Court Miscellaneous Cause No 0100** of 2004 honourable Justice Rubby Aweri Opio applauded the Plaintiffs, an NGO for taking action to safeguard the environment. A significant part of the forest had been given to a private company to grow sugarcane. One of the grounds was that the government had issued the company a 50 year sugarcane growing permit in respect of the forest reserve in issue in contravention of the Constitution and the law. Secondly the action was taken amid protests from local communities who depend on the forest for their livelihood. Thirdly the award of the forest land violated the applicant and other Ugandan's rights to a clean and healthy environment as well as protection of the country's natural resources. The land in question was held by the government of Uganda in trust for the people of Uganda to be protected for the common good of citizens. Furthermore government may grant authority to alienate the property pursuant to authority from Parliament and consent of the local community in which area the land is situated. The applicant had a right to bring the action against the Attorney General. Consequently the Plaintiffs case involves a public issue of the Namanve Forest giveaway and improper destruction of the forest by the government and there was sufficient justification for the Defendant to use some elements of the "let's go Green Song" in line with section 15 (2) (f) of the Copyright and Neighbouring Rights Act 2006.

As far as the definition of fair use is concerned section 15 (2) sets out a four-part test. In determining whether the use of the work in any particular case is a fair use, the purpose of the character of the users including whether the user is of a commercial nature or is for non-profit educational purposes is considered. Secondly the nature of the protected work is taken into account; the amount and substantiality of the portion used in relation to the protected work as a whole; and the effect of the use upon the potential market for the value of the protected work may also be taken into account. In the case of **Hubbard versus Vosper [1972] 2 QB 84** Lord Denning held on the question of what amounts to fair use, that it is impossible to define "fair

dealing" but when considering what is fair, it was appropriate to take into account use made of the infringing work in extent and purpose.

The Plaintiff's evidence is that she produced the song on being commissioned by the British Council solely for the purpose of the campaign for protection of the environment. This purpose rhymes with the purpose for which the Defendant used elements of the song "Let's Go Green". The Defendant's use of portions of this song was intended to report on the current giveaway of Namanve Forest and safeguard the public interest by ensuring that the forest was protected from illegal giveaway. Secondly the use was a minimum use and in any case was intended to protect the environment and could not have depreciated the value of the song. There was no distribution by way of sale, hire, rental or any similar commercial purpose. Thirdly the exhibition of the work by broadcast to the public was not for commercial purposes. Because the jingle was made, the Forest giveaway did not take place. Additionally the Plaintiff did not adduce any evidence to prove that the Defendant gained from the project. It was presumptuous to assume that there was an increase in donations to the Defendant as a result of the campaign. The burden of proof is on the Plaintiff to prove that use of her work led to increased donations which burden was not discharged.

Secondly the ground advanced under section 46 (2) of the Copyright and Neighbouring Rights Act is bound to fail because no evidence was adduced by PW1 to prove how her interests had been prejudiced by use of the work by the Defendant. Furthermore there is no evidence adduced by way of witness testimonies that the Defendant's jingle set the Plaintiff on a coalition course when government officials because the officials never testified about this. The evidence adduced by the Plaintiff is not sufficient to prove prejudice to her reputation as an author. In the premises the Defendant's Counsel maintains that there was no infringement of the Plaintiff's copyright and the Plaintiff's suit should be dismissed.

In rejoinder the Plaintiff's Counsel reiterated submissions on the duration of the use of the Plaintiff's song at the beginning and at the end and also that it constitutes the background music throughout the jingle and is inextricably embedded in the advertisement.

The argument that the Defendant used the Plaintiff's song under article 39 of the constitution which entitles every citizen to a clean and healthy environment is a polite way for stealing intellectual property. The right to clean environment does not give the right to steal another person's intellectual property. The rest of the Defendant's analysis of issue two departs from the written statement of defence.

As far as the pleadings are concerned the Defendants defence is that a negligible portion of the song was used for teaching and educational purposes but in the submissions the Defendants Counsel instead submitted that it was for purposes of reporting current events and therefore fell within the ambit of section 15 (1) (f) of the Copyright and Neighbouring Rights Act.

The submission is fallacious because it is a departure from the pleadings and offends Order 6 rule 7 of the Civil Procedure Rules. Secondly the provisions of the law were misapplied. There was no reporting of current events by the Defendant. Consequently the case of **Ashdown** (supra) is irrelevant. The case dealt with freedom of expression. It does not hold that freedom of expression gives one the right to use another person's work without their consent or even without acknowledging the source.

The Defendants Counsel omitted to comment about the assertion that only a negligible portion of the song was used. The Plaintiff's Counsel therefore reiterated submissions that there was a substantial use of the Plaintiff's song.

### **Whether the Defendant is entitled to the remedies sought?**

The Plaintiff seeks declarations that the Defendant infringed copyright and the Plaintiff's Counsel contends that this is the natural outcome of deciding issues number 1 and 2 in favour of the Plaintiff.

Secondly general damages are at the discretion of the court and regard should be had to the circumstances of each case.

The Plaintiff testified that she suffered humiliation and embarrassment as a result of being set on a collision course with government offices and agencies including the Minister responsible for the environment. She was cast in a bad light by the advertisement. She testified that her song lost value when it was reduced to a mere advertising jingle in the eyes of the public. She testified that there was no way she would appear in public to perform an advertising jingle for pay. It would look awkward and childish. For over a year she stopped performing the song. Although the Plaintiff explained the usual frequency of her performances and her earnings there from, she does not perform one song on such shows. It would be impossible to quantify her losses arising from the Defendant's actions in exact terms and that is why the losses are claimed as general damages.

In **Prof Kakoma versus Attorney General** (supra) the court found that the claim for 5.2 billion Uganda shillings was excessive. The court considered two other factors namely that the Plaintiff was already paid the sum of Uganda shillings 2000/= in 1962 (which was a substantial sum then). Secondly the copyright in the national anthem the subject matter of this suit was jointly held by the Plaintiff and the government and so he had no exclusive right. Consequently the court awarded the Plaintiff a sum of Uganda shillings 50,000,000/=.

In the instant case the Plaintiff has exclusive rights to the Copyright. Secondly she has not received a penny from the Defendant. Thirdly she produced this song purely for business reasons unlike Prof Kakoma who did not set up to record a song for gain. Consequently damages recoverable in the instant case ought to be substantially higher than those awarded in the

Kakoma case. The Plaintiff's Counsel contended that in addition to general damages the Plaintiff also prayed for punitive/aggravated/exemplary damages.

The Plaintiff relies on the decision in **Rookes versus Barnard [1964] 1 All ER 367** and that the instant case qualifies for an award of exemplary damages. This is because the Defendant set out to benefit at the expense of and in disregard of the Plaintiffs rights. The Defendant's CEO admitted that she knew that the Plaintiff had copyright in the song but chose to overlook her rights. As the Plaintiff stated in her witness statement, even after this suit was commenced, the Defendant's offices remained unapologetic. It was therefore a proper case for an award of punitive/aggravated/exemplary damages which award will go a long way to protect the rights of artists in Uganda and help put talent and hard work where it deserves to be. Finally Counsel prayed that an award of **Uganda shillings 150,000,000/=** in both general and exemplary damages would be appropriate in the circumstances of the case. Finally the Counsel prayed for costs of the suit.

In reply the Defendant's Counsel reiterated submissions that the Plaintiff is not a legal owner as the works were commissioned by the British Council and she was not entitled to damages as a consequence. There was no evidence proving alleged infringement in accordance with section 46 (1) (a), (b), (c) and 46 (2) of the Copyright and Neighbouring Rights Act and the burden of proof under section 103 of the Evidence Act was not discharged.

Without prejudice the Defendants Counsel submitted that the law is that damages if awarded shall be limited to the loss, if any, incurred by reason of infringement of the author's right under section 45 (3) of the Copyright and Neighbouring Rights Act.

On the criteria for the measure of damages, the Defendants Counsel submitted that the Copyright and Neighbouring Rights Act is silent. He suggested that the court should consider case law. The measure of damages is the depreciation caused by the infringement to the value of the copyright as a chose of action. The value of the Copyright would be determined depending on how the author exploits his or her works. Measure of damages can be assessed on sales or lost royalties. Because the Plaintiff did not produce any evidence on lost sales or royalties, she is not entitled to damages.

On the question of suffering humiliation and embarrassment as the result of being set in a coalition course with the government officials and agencies including the Minister for the environment, the Plaintiff did not present the Minister or other government officials in court. Section 58 of the Evidence Act requires that all facts except the contents of documents should be proved by oral evidence. Secondly under section 59 of the Evidence Act, oral evidence must be direct and not hearsay. The absence of fans and government officials rendered the Plaintiff's testimony hearsay and inadmissible. Counsel relied on the case of **Frank Music Corporation versus Metro Goldwin- Mayer IMC (1985) American Casebook Series page 1137** the trial court declined to award damages because it was unconvinced that the market value of the

Plaintiffs work was in any way diminished by the Defendant's infringement. The appellate court upheld the decision and held that in a copyright action, a trial court is entitled to reject a proffered measure of damages if it is speculative.

As far as general damages are concerned, the law presumes that it flows from the type of wrong complained of. According to Lord Macnaughten in **Stroms versus Hutchinson [1905] AC 515** general damages under cited law is presumed to be the direct natural or probable consequence of the act complained of. This is in line with section 45 (3) of the Copyright and Neighbouring Rights Act. Consequently the general damages should be a result of the direct infringement if any of the Copyright in this song. They cannot follow from the Plaintiff's general performances as an artist but rather from the infringement of the "let's go Green song" specifically. The Defendants Counsel further submitted that the Plaintiff is not entitled to any damages for various reasons. Firstly the Plaintiff is unsure of her earnings and only gave estimates of earnings in a month but not annually. Secondly she did not provide the court with any specific evidence of her earnings from the song "let's go Green" and she did not adduce any evidence to show that her earnings had been affected since the launch of the Defendant's jingle. Secondly Counsel attacked the testimony of the Plaintiff on the ground that it is contradictory because she claims to produce this song for the protection of the environment and at the same time says it is for commercial purposes. This was the reason why she was supported and endorsed by the British Council. On the other hand the Defendant did not derive any commercial benefit from the use of the jingle and any loss suffered if any was too remote to cause damage to the Plaintiff (if any).

### **Punitive/exemplary damages**

The Defendants Counsel relies on black's law dictionary at page 448 for the definition of "punitive damages" as damages awarded in addition to actual damages when the Defendant acted with recklessness, malice, or deceit especially damages assessed by way of penalising the wrongdoer or making an example to others. The Defendant did not act with any malice or deceit and does not have any personal vendetta against the Plaintiff. The jingle was purposely made for the protection of Namanve Forest. Counsel relied on the text book by Richard Arnold "Performance Rights" at page 210 paragraph 6.28 thereof that intellectual property torts such as infringement does not usually fall within the three categories of cases in which an award for exemplary damages may be made namely: exemplary damages are awarded where there is oppressive, arbitrary or unconstitutional conduct by government servants; conduct with cynical disregard of the claimant's rights and calculated to make profit which would exceed the damages likely to be awarded and finally express authorisation of statute. When cases within the second category may occur, such cases are usually dealt with by an award of additional damages rather than by an award of exemplary damages. The nature of the evidence adduced by the defence is that the jingle was simply a non-commercial jingle intended to save Namanve Forest and to benefit Ugandans generally rather than enrich the Defendant.



Without prejudice on the question of interest the Defendant's Counsel prays that the court exercises its discretion against an award of interest in accordance with section 26 of the Civil Procedure Act. He further contends that the Defendant's actions were intended to protect the environment which is a cause intended to benefit all citizens. Secondly it is a cause that is consistent with article 39 of the constitution of the Republic of Uganda which entitles every citizen to a clean and healthy environment. In the premises of the Defendant's prayer is that the Plaintiffs action is dismissed with costs.

In rejoinder, the Plaintiff's Counsel contends that section 45 (3) of the Copyright and Neighbouring Rights Act does not prescribe the basis for assessment of damages. It does not deal with damages but with injunctions. He contends that it is not usual that loss suffered due to infringement of copyright will be quantifiable in monetary terms so as to be claimed as special damages. Consequently Counsel reiterated submissions that the claim should be in general damages.

As far as exemplary damages are concerned, the Defendant did not think that they needed to ask the Plaintiff for her consent though they knew that she was the copyright holder and therefore acted recklessly and in total disregard of her feeling or interests. Even after being served with a notice of intention to sue they acted dismissively of her claims. The Defendant has further gone on to insist that the Plaintiff has no copyright in the song even when DW1 testified that the Plaintiff did have copyright. The conduct amounted to aggravation for which the Plaintiff is entitled to punitive/aggravated damages. The second category for the award of general damages which is that the conduct of the Defendant was cynical disregard of the claimant's right and calculated to make profit which would exceed the damages likely to be awarded is applicable. The case of **Acode versus Attorney General Miscellaneous Cause No. 1 of 2004** is irrelevant because at page 14 it is held that courts should be hesitant to award costs in matters which involve parties who are ignorant, poor or marginalised members of society. The Defendant is a world-class NGO liberally funded by both the local and international community as readily admitted by DW1.

## **Judgment**

I have duly considered the pleadings of the Plaintiff and the Defendant as well as the agreed facts and documents together with the written submissions of Counsels and the applicable law. Pursuant to the procedural requirement to hold a mandatory scheduling conference in which the parties would inform the court on the points of agreement and disagreement, Counsels filed a joint scheduling memorandum agreeing to certain basic facts. Before making reference to the agreed facts and points of disagreement, the agreed facts and points of disagreement are arrived at under the provisions of Order 12 rule 1 of the Civil Procedure Rules. It provides that the court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement after closure of pleadings namely within seven days after the order on delivery of interrogatories and discoveries or where

no application for interrogatories and discoveries has been made within 21 days from the date of the last reply or rejoinder (at the close of pleadings). Pursuant to the Mediation Rules of this court, it is the practice to refer litigants to mandatory court annexed mediation after the closure of pleadings. Where mediation fails, the parties are then referred to the judge to conduct a scheduling conference and prepare the suit for trial where no alternative dispute resolution mechanism is further agreed upon. Because the scheduling conference is meant to sort out points of agreement and disagreement, Counsels reduced their conference into a joint scheduling memorandum informing the court on the points of agreement and disagreement. It is meant to be a binding agreement determining the course of the proceedings to some measure. In the joint scheduling agreement/memorandum the following facts are agreed namely:

1. That the Plaintiff carries on business as a musician, singer and performer.
2. The Plaintiff is the composer; producer and copyright holder of the musical production/recording (song) entitled "Let's Go Green".
3. The Plaintiff has reduced the said production into recorded form and has released the same by way of audiovisual material marketed in hardcopy as well as soft versions on YouTube as well as other soft media. The Plaintiff also regularly performs the said product in public for gain as well as advancing her environmental conservation agenda.
4. That in or around May/April 2011, in a campaign against the destruction of Namanve Forest, the Defendant caused to be made on various FM stations in Uganda advertisements in which a portion of the said production of the Plaintiff was used.
5. The Plaintiff's prior consent to the use of the said portion of her song was not sought or obtained.
6. The Defendant is in non-profit/governmental organisation.

Certain factual controversies were agreed upon for trial of the suit and particularly the facts contested by the Defendant are as follows:

Whether the Plaintiff has over the years built up a clientele and fan base in East Africa, USA, Canada, UK and elsewhere in the world and has over the years released a wide range of musical productions?

Whether the portion of the Plaintiff's song "Let's Go Green" which the Defendant used in its campaign was substantial, and the lyrics and content of the song prominently feature in the said advertisement?

Whether the said advertisement was repeatedly released on air on several FM stations in Uganda and which was also received in neighbouring countries and by Internet and worldwide? Whether the Defendant's use of the portion of the song degraded the song or the author? Whether by reason of the Defendant's actions the Plaintiff has suffered embarrassment and humiliation in her dealings with various stakeholders including governmental agencies and players? Whether the Plaintiff has lost anticipated income and suffered professional injury as a result of the

Defendant's use of a portion of the Plaintiff's production? Whether the acts of the Defendant were unconstitutional, high-handed and deliberate and calculated to benefit the Defendant's agenda at the expense or in blatant disregard of the Plaintiff's interests, feelings and concerns? Finally whether the Defendant's actions amounted to infringement of the Plaintiff's copyright?

As far as there are factual controversies asserted by the Defendant but contested by the Plaintiff is concerned, it was agreed as follows: whether unsubstantial portion of the Plaintiff's work was used? Whether the same was used for teaching and educational purposes and therefore amounted to fair use? Whether the use of the said work did not in any way prejudice the honour and reputation of the Plaintiff, but rather strengthens and reinforces her work?

Agreed issues for trial are as follows:

1. Whether the Defendant infringed the Plaintiff's copyright?
2. Whether the Defendant's actions fall within the fair use exception?
3. Whether the Plaintiff is entitled to the remedies sought?

Issue number one proceeds from the assumption that there is an identified work of the Plaintiff to which the Plaintiff enjoys copyright. Secondly issue number two also proceeds from the assumption that there is a work of the Plaintiff to which the Plaintiff enjoys copyright and the issue is whether the Defendant's use amounted to fair use. Thirdly there is an underlying assumption that the Defendant used the Plaintiff's works to which work the Plaintiff enjoys copyright. However as a preliminary point the Defendant's Counsel submitted that the Plaintiff did not have a copyright and secondly that it was commissioned work by the British Council. Thirdly the Plaintiff is the co-author of the works. The Plaintiff's Counsel strongly contested the Defendant's submissions on the ground that it is a departure from their written statement of defence and the scheduling memorandum under the hand of Counsels and offended Order 6 rule 7 of the Civil Procedure Rules. It is necessary to start with the preliminary point of law which is whether part of the Defendant's submissions in reply to the Plaintiff's submissions in support of the claim is a departure from the pleadings. Starting with the provisions of Order 6 rule 7 of the Civil Procedure Rules it provides as follows:

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleading of the party pleading that pleading."

The above provision is not strictly about evidence but about subsequent pleadings. It is however case law which is consistent with Order 6 generally that provides that a party cannot introduce evidence inconsistent with the previous pleading or defence. A pleading has been defined as a plan for an action or a defence and it provides notice to the other side of what the claim is or what the defence is going to be. There are several rules that support the contention that a pleading must contain the necessary averments to give sufficient notice to the other side as to the

case being brought against the person entitled to notice or as to the defence. Order 6 rule 1 (1) of the Civil Procedure Rules provides that:

"Every pleading shall contain a brief statement of the material facts on which the party pleading relies for a claim or defence, as the case may be."

Additionally it is a requirement to accompany the pleading whether the plaintiff or written statement of defence with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities according to Order 6 rule 2 of the Civil Procedure Rules. Particulars are supposed to be given where they are necessary in cases of misrepresentation, fraud, breaches of trust, wilful default or undue influence (Order 6 rule 3). Also very important is Order 6 rule 4 of the Civil Procedure Rules which requires that an order may be made for further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading. The underlying principle is that sufficient notice is to be given to the opposite side of the nature of the claim or defence. Particularly certain facts are mandatory to be pleaded under Order 6 rule 6 of the Civil Procedure Rules and it provides as follows:

"The Defendant or Plaintiff, as the case may be, shall raise by his or her pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Limitation Act, release, payment, performance, or facts, showing illegality either by statute or common law."

It is obligatory for the Defendant to aver by its or his or her pleadings that the action is not maintainable and all such grounds of defence as the case may be. Order 6 rule 6 of the Civil Procedure Rules is mandatory. According to **Odger's Principles of Pleadings and Practice in Civil Actions in the High Court of Justice 22nd edition London Stevens and Sons 1981 at page 88** thereof:

"The function of pleadings then is to ascertain with precision the matters on which the parties differ and the points on which they agree; and thus arrive at certain clear issues on which both parties desire a judicial decision."

The text makes reference to the speech of Lord **Radcliffe** in **Esso Petroleum Co Ltd versus Southport Corporation [1956] AC 418 at 241; [1955] 3 All ER 864**. In **Esso Petroleum Co Ltd and Another v Southport Corporation [1955] 3 All ER 864** Lord Radcliffe at page 871 held that parties should be confined to their pleadings when he said:

"My Lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the

respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since, in my view, they were entitled to conduct the case and confine their evidence in reliance on the further and better particulars of Para 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues, and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant, and how much irrelevant, to those issues.”

It is clear that Lord Radcliffe was of the opinion that issues arise from the pleadings to which the parties should be confined in the trial and this is consistent with Order 15 rule 1 of the Civil Procedure Rules. At page 873 he further held as follows:

“In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorised any such amendment. That being so, I am of opinion that the appellants called as much evidence as was required of them to defend themselves from the charges of negligence that were made in this case.”

Order 15 rule 1 of the Civil Procedure Rules is pertinent to the question of issues which are to be tried by the court. It provides that the issues arise when a material proposition of law or fact is affirmed by one party and denied by the other. Specifically it provides under Order 15 rule 1 (2) of the Civil Procedure Rules that:

"(2) Material propositions are those propositions of law or fact, which a Plaintiff must allege in order to show a right to sue or a Defendant must allege in order to constitute a defence."

The allegations are contained in the pleadings and the pleadings give notice of material propositions of law or fact which the opposite side is alleging either to show a right to sue or in order to constitute a defence. According to **Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice** (supra) at page 88 thereof the main purpose of the rules is to compel each party to state clearly and intelligibly the material facts on which he relies, omitting everything immaterial and to insist on his opponent frankly admitting or explicitly denying every material matter alleged against him and by that method they speedily arrive at an issue. It is therefore not permissible for a party to make allegations inconsistent with their pleadings because first of all it is contrary to the rules of pleading to give fair notice to the other side and allow them to make a reply or to apply for further and better particulars to be ambushed at the stage of submissions with a different defence or case.

I have carefully considered the defence as far as the written statement of defence is concerned and the submissions of the Defendant's Counsel. The submission of the Defendants Counsel is based on the testimony of PW1 in cross examination that she was commissioned by the British Council to produce the song "let's go green". On the basis of that contention it is submitted that the British Council is the one with the copyright and there was no evidence in writing of the assignment or transfer of the copyright to the Plaintiff. The Commissioner of the works is the copyright owner. On the basis of the submission that the copyright belongs to the Commissioner of the works, he contended that the Plaintiff's suit discloses no cause of action against the Defendant and that it ought to be dismissed on that basis. The Plaintiff's Counsel disagreed on the ground that this was a departure from the pleadings and secondly a departure from the scheduling memorandum. As far as the written statement of defence is concerned paragraph 5 thereof avers that the Plaintiffs claim is denied in total and the Defendant shall at the commencement of the trial raise a preliminary objection that the suit is misconceived and raises no cause of action. However not preliminary objection to the suit was raised at the commencement of the hearing. Apart from paragraph 6 of the written statement of defence the rest of the averments in the written statement of defence are denials. I will reproduce paragraph 6 of the defence which avers as follows:

"The contents of paragraph 4 (a – h) of the plaint are denied in toto and the Plaintiff shall be put to strict proof thereof.

- a) In specific response to paragraph 4 (e) of the plaint, the Defendant shall aver that an unsubstantial portion of the Plaintiffs work was used, evidence of which shall be provided at the trial.
- b) Paragraphs 4 (f, g and h) are denied in toto the Plaintiff shall be put to strict proof thereof."

Subsequently and in accordance with Order 12 rule 1 of the Civil Procedure Rules the parties filed a joint scheduling memorandum agreeing that the Plaintiff is the composer, producer and copyright holder of the musical production/recording (song) entitled "let's go green". In terms of Order 15 rule 1 (2) there is no material proposition of fact or law constituting a defence to the effect that the Plaintiff is not the copyright owner of the song in question. Quite to the contrary it is an agreed fact in the writing and under the hand of the Defendant's Counsel and the Plaintiff's Counsel. Being an admitted fact an interesting proposition of law arises. Can the Plaintiff disprove his/her own facts which have been admitted through his or her own testimony? Facts which are admitted need not be proved under section 57 of the Evidence Act. In fact under Order 12 rule 1 of the Civil Procedure Rules during the scheduling conference where that is a point of agreement on matters of fact, it is provided under Order 12 rule 1 (2) that orders shall immediately be made in accordance with rules 6 and 7 of Order 15. In other words agreements entered into during the scheduling conference have immediate ramifications. The agreements may influence the mode of trial and even how to deal with facts that may be in controversy and

facts that do not have to be proved in the trial. A fact which is not in controversy need not be tried.

In this case it is alleged that the Plaintiff testified that the British Council commissioned her work. In her testimony in cross examination she states that she is the sole owner of the musical production "let's go green". Secondly she testified that the other artist is Keko Jocelyn and she paid her for her role. Thirdly she testified that she was commissioned by the British Council in 2010. She was paid Uganda shillings 7,800,000/=. Counsel Benson Tusasirwe, Counsel for the Plaintiff submitted that the witness as a lay person did not use the word "commissioned" in its technical sense. I agree because the witness clearly testified that she is the owner of the song or composition "let's go green". She did this both in her testimony in chief which is in writing as well as during cross-examination. No details of the "commissioning" was elicited during cross-examination. In the re-examination she testified that she was paid by the British Council and made it clear that they were just endorsing and they did not purchase rights. In her testimony in chief she testified that: "so it was that in 2010, I produced this song "Let's Go Green", of which I am the copyright holder." She has also been performing the song onstage and distributed it by way of hard copies and soft copies. She performed the song as part of her public functions in Uganda and on FM radio stations and television stations in Uganda who would broadcast it with her consent and at the Global Climate Change Summit at Cancun, Mexico in 2010. She also performed it live at another international function in Trinidad and Tobago. She exhibited a recording of the song together with a recording of the Defendant's advertisement as exhibit P1. On the other hand the testimony of DW1 Cissy Kagaba in chief is that they used a portion of the audio sound recording "let's go green" to communicate to the public the impending giveaway of the Namanve forest reserve. During additional oral examination in chief, additional to her witness statement, she testified that the Plaintiff's song runs for about five seconds at the beginning and five seconds at the end. She testified during cross-examination that she knew the author of the song and knew that the Plaintiff was the author. She also knows another artist. She further testified that they did not seek the Plaintiff's consent because they thought it was okay not to.

The question of the ownership or copyright of the Plaintiff to the composition "let's go green" has been proved on the balance of probabilities and the objection of the Defendants Counsel on the ground that the song "let's go green" was commissioned by the British Council and therefore its ownership rights is in the British Council or another artist and that the suit discloses no cause of action against the Defendant cannot be sustained on the basis of the pleadings, the agreed scheduling memorandum and the evidence. The objection is overruled with costs to abide the final outcome of this suit. Consequently, I will deal with the issues as framed on the merits.

The first issue is **whether the Defendant infringed the Plaintiff's copyright?**

Starting with the question of ownership, it has been proved and it is an agreed fact that the Plaintiff is the composer and copyright owner of the composition "let's go green". I would further rely on the provisions of section 57 of the Evidence Act which provides that:

"57. Facts admitted need not be proved.

No fact need be proved in any proceeding which the parties to the proceeding or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings; except that the court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

The admission of the copyright ownership of the song "let's go green" was not only made through a scheduling memorandum endorsed by Counsels for both parties but also by DW1 the only witness the Plaintiff. The only variance in the testimony of DW1 is the testimony that there is another artist involved in the song namely Jocelyn Keko. That testimony was sufficiently answered by the Plaintiff when she testified that she paid that artist for the work she did and that she is the sole owner of the composition "let's go green".

Under section 2 of the Copyright and Neighbouring Rights Act, 2006, the term "author" means "the physical person who created or creates work protected under section 5 and includes the person or authority commissioning work or employing a person making the work in the course of employment." Under section 5 (1) (b) of the Copyright and Neighbouring Rights Act, dramatic, dramatic – musical and musical works are eligible for copyright. The Plaintiff's Counsel relied on sections 9 and 10 of the Copyright and Neighbouring Rights Act to assert the economic and moral rights of an author. As far as ownership rights are concerned, the owner of the protected work shall have in relation to that work the exclusive right to do or authorise other persons to publish, produce or reproduce the work or to distribute or make available to the public in the originals or copies of the work through sale or other means of transfer of ownership. They include the right to authorise broadcasting of the work and communicate the work by wire or wireless means. Economic rights include the right to rent or sell the originals or copies of the work. It is alleged that the Defendant's jingle in its campaign to protect Namanve forest reserve infringed the Plaintiff's economic rights under section 9.

Secondly it is alleged that the Defendant's jingle in the advertisement and in its campaign to protect Namanve forest reserve also infringe the Plaintiffs moral rights under section 10 of the Copyright and Neighbouring Rights Act. Moral rights include a right to claim authorship of the work except where the work is included incidentally or accidentally in reporting current events by means of media or other means. Secondly to have the owner's name or pseudonym mentioned or acknowledged each time the work is used or whenever any of the economic rights under section 9 are done in relation to the work except where it is not practical to do so and thirdly the right to object or seek relief in connection with any distortion, mutilation alteration or



modification of the work. Moral rights include the right to withdraw the work from circulation if it no longer reflects the author's convictions or intellectual concepts. Moral rights cannot be assigned to any person except for purposes of its enforcement.

The analysis of the defence by the Plaintiff's Counsel is that a negligible portion of the Plaintiff's work was used and secondly what was used was "fair use". The Defendant's Counsel dwelt a lot on the question of title to the works and did not adequately address the question of the negligible use of the Plaintiff's works in the Defendant's jingle or advertisement in the campaign against the giveaway of Namanve forest. This is specifically on the first issue as to whether the Defendant infringed the Plaintiff's copyright. The Defendant's defence on the first issue is that the Plaintiff has no title to the copyright and cannot sue and that she did not satisfy the court as to her title to the Copyright.

As far as the first issue is concerned the Defendant's Counsel prefaced the Defendant's defence with general remarks that the Defendant is an advocacy group and found it necessary within the mandate to communicate to the public the intended giveaway of the forest at the material time. In one of the campaigns they came up with a jingle that incorporated a portion of the song "let's go green". The Defendant's use of the song was of a non-commercial nature and was justified in the public interest for saving Namanve forest at the material time. Secondly there was no reproduction or imitation of the audio and portion of the song that was used was within the permissions of the Copyright and Neighbouring Rights Act 2006. Thirdly no loss was suffered by the Plaintiff as a result of the Defendant's use of the portions of the audio "let's go green" and the jingle was made for a non-commercial cause and in the public interest. The rest of the submissions do not address the first issue because it dealt with the question of legal ownership of the works.

In the premises I agree with the Plaintiff's Counsel that the Defendant's Counsel did not address the issue of whether the portion used by the Defendant is "unsubstantial". Whereas the first issue is intertwined with the second issue as to whether there was "fair use" by the Defendant, some findings on the first issue need to be attempted. I cannot conclude on the basis of the submissions of Counsel that the Defendant infringed the Plaintiff's Copyright without first making a finding on the second issue which is whether the Defendant's actions which are admitted fell within the fair use exception? As far as the first issue as to whether the Defendant infringed the copyright of the Plaintiff, the Plaintiff's Counsel submitted that the actions of the Defendant violated all the provisions of section 46 (1) and (2) of the Copyright and Neighbouring Rights Act, 2006. Section 46 of the Copyright and Neighbouring Rights Act specifically deals with the sub topic of infringements of Copyright. It provides that infringement of Copyright or neighbouring rights occurs where, without a valid transfer, licence, assignment or other authorisation under the Act a person deals with any work or performance contrary to the permitted free use and in particular where that person does or causes or permits another person to:

- "reproduce, fix, duplicate, extract, imitate or import into Uganda otherwise than for his or her own private use;
- distribute in Uganda by way of sale, hire, rental or like manner; or
- Exhibit to the public for commercial purposes by way of broadcast, public performance or otherwise.

Secondly, infringement occurs where the piece of work is used in a manner prejudicial to the honour or reputation of the author. Under section 47 (1) a person who without authorisation or a licence from the rights owner or his agent publishes, distributes or reproduces the work or performs the work in public broadcasts the works or imports any work and uses it in a manner which, were it work made in Uganda, would constitute an infringement of copyright commits an offence.

A careful analysis of sections 46 and 47 shows that a licence, assignment or other authorisation under the Copyright and Neighbouring Rights Act would not constitute infringement. Any permission by the Copyright and Neighbouring Rights Act would be permitted use and therefore "fair use" as prescribed by statute. Consequently where it is proved that there was fair use; there would be no infringement of copyright. In the premises issue number one cannot be concluded without first considering issue number two which is whether the Defendant's action was "fair use" of the Plaintiffs Copyright in the song "let's go green". In fact it may be a waste of time not to first consider the second issue. If it is fair use, there is no need to consider the first issue. If it is not fair use, then it would follow that the first issue can be considered fully. The conclusion on the first issue is therefore stayed until after resolution of the second issue as to whether the Defendant's actions fell within the fair use exception.

### **Whether the Defendant's actions fall within the fair use exception?**

On this issue the Plaintiff's Counsel has conceded that if the use of the Plaintiff's work amounted to fair use, then the Defendant is excused. The submission of the Plaintiff is that use by the Defendant does not fall within the 11 situations stipulated under section 15 (1) of the Copyright and Neighbouring Rights Act. I have duly considered the submissions of the Plaintiff's Counsel set out above. In the reply thereto the Defendants Counsel submitted that there was no reproduction, imitation or duplication of the Plaintiff's song. The song is not an exact copy of "let's go green" composition. Secondly the song featured two different artists. Thirdly the substantiality test must be applied to the lyrical content and length of time of the jingle. The Defendant's jingle is not an exact replica of the Plaintiff's song in content and style, structure and time. No loss or harm was intended or occasioned by the unsubstantial use of the Plaintiff's song. Consequently it fell within the elements of fair use doctrine under the Copyright and Neighbouring Rights Act 2006. Furthermore the song was used to communicate a public interest message on the conservation of the Namanve forest reserve. The Defendant's Counsel relied on article 39 of the Constitution which gives every citizen the right to a clean and healthy environment.

I will consider the provisions of section 15 of the Copyright and Neighbouring Rights Act as well as case law on what amounts to substantial use. Every statute has to be interpreted on the basis of its own language and unless there is doubt as to the meaning of a specific provision, it should be interpreted as it is. Contextual interpretation only comes in where the meaning in a particular section cannot be discerned from the wording used. However in this particular case no one has pointed out any controversy in the meaning of section 15 of the Copyright and Neighbouring Rights Act. I would therefore deal with the extensive subsections on the question of fair use of works protected by Copyright.

Section 15 (1) of the Act provides that fair use of the protected work in its original language or in a translation shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright in several situations which are listed under the subsection and which will be considered in turn.

In subsection (a) it is fair use where "the production, translation, adaptation, arrangement or other transformation of the work is for private personal use only;" in this case it has not been suggested that the use of the Plaintiffs work was for private personal use only since it was used in an advertisement for a public campaign section 15 (1) (a) of the Copyright and Neighbouring Rights Act does not apply to the Plaintiff's case or the Defendant's defence.

Subsection (b) of section 15 of the Act provides that "a quotation from the published work is used in another work, including a quotation from a newspaper or periodical in the form of press summary, where – (i) the quotation is compatible with fair practice; and (ii) the extent of the quotation does not exceed what is justified for the purpose of the work in which the quotation is used, and (iii) acknowledgement is given to the work from which the quotation is made."

In this particular case it cannot be concluded that there was any quotation from the published work. Under section 2 of the Copyright and Neighbouring Rights Act, 2006, the word "publication" means the lawful reproduction of all work or of an audiovisual or audiovisual sound recording, fixation or of sound recording for availability to the public; and includes public performances and making available of the work on the Internet. Whereas the music was part of an advertisement which may be defined as the publication, the word "published" means that the work is made available to the public in a reasonable quantity for sale, rental, public lending or for other transfer of ownership or possession of the copies. I do not agree that there was a quotation of the published work by playing the Plaintiff's song in the background of the advertisement jingle. The Plaintiff song was played in the background and comes out clearly at the beginning and at the end of the advertisement jingle. There was no quotation and therefore the provisions of section 15 (1) (b) of the Copyright and Neighbouring Rights Act does not apply to the Defendants defence of fair use.

As far as subsection (c) of section 15 (1) of the Act is concerned it provides that: "a published work is used for teaching purposes to the extent justified for the purpose by way of illustration in

a publication, broadcast or sound or visual recording in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author."

As far as the above provision is concerned, there is no published work which is used for teaching purposes. Secondly there was no acknowledgement of the author. Specifically the Defendant's case is that the Plaintiff does not own the copyright. In the premises section 15 (1) (c) considered above is inapplicable to the Defendant's defence.

Regarding the provisions of subsection (d) of section 15 (1) of the Act, it provides that: "the work is communicated to the public for teaching purposes for schools, colleges, universities or other educational institution for professional training or public education in so far as the use is compatible with fair practice and acknowledgement is given to the work and the author;". The Defendant's jingle was not communicated for teaching purposes for schools, colleges, universities or other educational institutions for professional training or public education. The above quoted provision is therefore inapplicable to the Defendant's defence of fair use.

Regarding section 15 (1) (e) of the Act it is provided that: "the work is reproduced, broadcast or communicated to the public with acknowledgement of the work, in any article printed in a newspaper, periodical or work broadcast on current economic, social, political or religious topic unless the article or work expressly prohibits its reproduction, broadcast or communication to the public;". There was no acknowledgement of the Plaintiff and therefore the above considered provision does not avail the Defendant the defence of fair use.

Section 15 (1) (f) of the Copyright and Neighbouring Rights Act provides that: "any work that can be seen or heard is reproduced or communicated to the public by means of photograph, audiovisual work or broadcast to the extent justified for the purpose when reporting on current events;" the above provision clearly applies to the communication of works where it is being performed that is where it can be seen or heard and where the same is communicated to the public for purposes of reporting on current events. It applies where the work is reported as part of a current event or incidentally as part of a current event. The Defendant's case is that the advertisement jingle is a deliberate rendering of the Plaintiff's song as part of the jingle and does not amount to reporting on current events. The fact that it is in relation to a campaign on conserving Namanve forest reserve does not amount to reporting on current events as far as the work is concerned in and the context of the provision. In fact the provision deals with the conveying of the work to the public where it is captured by photograph or audiovisual recording or broadcast. In such cases it would be an authorised performance which is captured by means of photograph or audiovisual recording or broadcast to the extent justifiable for the purpose when reporting on current events. The advertisement jingle did not capture an authorised use of the Plaintiff's work but deliberately used the work for conveying a different message in a campaign for conservation of Namanve forest. Consequently section 15 (1) (f) of the Copyright and Neighbouring Rights, 2006 is not available as a defence of fair use to the Defendant in the circumstances of the Plaintiff's case.

Section 15 (1) (g) deals with any work of art or architecture in a photograph or an audiovisual or television broadcast which is reproduced and communicated to the public where the work is permanently located in a public place or is included by way of background or is otherwise incidental to the main object presented in the photograph or audiovisual work or television works. The Plaintiff's work is not permanently located in a public place. The question is whether it is included by way of background or is otherwise incidental to the main object presented in the audiovisual work or television works. The submission of the Defendant's Counsel is that the work or a portion of the work was not similar to that of the Plaintiff. Secondly a small portion of the work was used at the beginning and end of the jingle. Thirdly the work was recreated and was no longer original. I do not agree that the Plaintiff's work was used as the background in the context of this case as that is contradicted by the Defendant's own submissions. When is a work included by way of "background"? Or is incidental to the main object? It is my finding that the advertisement jingle was part and parcel of the advertisement because it deals with environmental issues and was not included by way of the background or otherwise incidental to the main object. It was part of the campaign and was used by the Defendant to achieve that effect of bringing consciousness about environmental issues regarding Namanve forest reserve. In the premises I find that section 15 (1) (g) of the Copyright and Neighbouring Rights Act does not avail the Defendant the defence of fair use.

The subsequent provisions namely (h) deal with a political speech or speech delivered during any judicial proceedings or an address, lecture, sermon or other work of a similar nature delivered in public and is inapplicable. I have additionally considered section 15 (2) of the Copyright and Neighbouring Rights Act which deals with the principles in determining whether the use made of the work in any particular case is a fair use. Fourthly the use made of any particular work has to fall within the parameters set and section 15 (1). Where it does not fall under subsection 1 of section 15, it is doubtful whether the provisions of subsection 2 can be used. Subsection 2 of section 15 provides that in determining whether the use made of the work any particular case is a fair use certain factors are to be considered. These include (a) the purpose and character of the use, including whether the use is of a commercial nature or is for a non-profit educational purposes. It would appear from the evidence that the Defendant's case is that it was using the work for a non-profit educational purpose. Definitely there was education of the public in the advertisement jingle under consideration about giveaway of the forest reserve of Namanve. Secondly it was for a non-profit purpose because the Defendant is an NGO and is a non-profit making organisation. However the provision cannot be considered in isolation of subsection 1 of section 15 of the Copyright and Neighbouring Rights Act which give the particular instances of fair use. Specifically subsection 1 provides that it shall not be an infringement of the right of the author and shall not require the consent of the owner of the copyright in the instances that are set out under subsection 1. Subsection 2 only applies to considerations to be made in considering whether any case falling under subsection 1 of section 15 is "fair use". These include whether it was for a commercial purpose or is for non-profit educational purposes; and in (b) the nature of the protected work; (c) the amount and substantiality of the portion used in the relation to the

protected work as a whole; and (d) the effect of the use upon the potential market for value of the protected work. Subsection 2 of section 15 deals with the general principles.

The principles spelt out under section 15 (2) of the Copyright and Neighbouring Rights Act are similar to those under exhibit D5 on fair use that was printed from YouTube. The first principle in exhibit D5 is that the four factors to be considered include the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes. It is almost word for word with section 15 (2) (a) of the Copyright and Neighbouring Rights Act. Secondly the courts consider the nature of the copyrighted work. This is word for word with section 15 (2) (b) of the Copyright and Neighbouring Rights Act. The third principle in exhibit D5 is the amount and substantiality of the portion used in relation to the copyrighted work as a whole. The principle is word for word with section 15 (2) (c) of the Copyright and Neighbouring Rights Act. Lastly the last principle in exhibit D5 is the effect of the use upon the potential market for, or value of, the copyrighted work. Again the fourth principle is the same as that stipulated by section 15 (2) (d) of the Copyright and Neighbouring Rights Act. Exhibit D5 which the Defendant relies on primarily deals with the United States of America and how the judges have approached the issue. It is not authority for understanding the provisions of section 15 (2) of the Copyright and Neighbouring Rights Act. It is however useful for comparative purposes since the Defendant and the Plaintiff in the agreed facts agreed that the Plaintiff's work was also released through YouTube. It is written in the YouTube printout on use that in many countries, certain uses of copyright protected works do not infringe the copyright owner's rights. For example in the United States, copyright rights are limited by the doctrine of "fair use," under which certain users of copyright material for criticism, commentary, news reporting, teaching, scholarship, or research may be considered fair. It is further written in exhibit D5 that US judges determine whether a fair use defence is valid according to the four factors, which I have set out above and which are similar to section 15 (2) of the Copyright and Neighbouring Rights Act. The extract from YouTube is therefore consistent with the Ugandan section 15 (1) and (2) of the Copyright and Neighbouring Rights Act. It however does not add anything new because it also talks about criticism, commentary, news reporting, teaching, scholarship or research. It supports my finding that the four principles can only be considered when looking at the use to which the work was being put particularly in the criticism, commentary, news reporting, teaching, scholarship or research among others. In Uganda those parameters for fair use are spelt out by section 15 (1) of the Copyright and Neighbouring Rights Act. Therefore the four principles are used in determining whether the use as stipulated by section 15 (1) which spells out what amounts to fair use is indeed fair use according to the further principles for determining the question set out in subsection 2 of section 15 of the Act.

Before concluding the matter I was additionally referred to some judicial precedents from other countries on the question of fair use specifically on the principle of "substantial use" found under section 15 (c) of the Act. Furthermore I was referred to some precedents on the question of

whether the Defendant's advertisement jingle was excusable as something made in the public interest.

Starting with the question of public interest the Defendants Counsel relied on the case of **Advocates Coalition for Development and Environment versus Attorney General and another High Court Miscellaneous Cause No 0100 of 2004**. The applicant, a non-governmental organisation, filed an application under article 41 (1) and 15 (1) and (2) of the Constitution of the Republic of Uganda for orders and declarations that the granting of a permit to Kakira Sugar Works by the first respondent contravened article 39 and 237 of the Constitution the Republic of Uganda and section 43 of the Land Act. Secondly they sought declarations that the de-gazetting of the forest reserve was in violation of the applicant's right to a clean and healthy environment. Several other remedies/declarations were sought but I do not need to refer to them for purposes of considering the question of "public interest" raised by the Defendant's Counsel. The specific holding that the Defendant's Counsel relied upon was that the forest reserve in question was for the good of the people and was held in trust for the people of Uganda and had to be protected for the common good of citizens. Secondly that the government had no authority to lease out or otherwise alienate it. The court found that a permit was granted to Messieurs Kakira Sugar Works Ltd amid protests from local communities which depended on the reserve for their livelihood through Agro - forestry and, source of water, fuel and other forms of sustainability. The grant of the permit was therefore in breach of the "public doctrine". I do not clearly see how this authority is relevant to the Defendant's defence of "public interest". The way I understand it is that the Defendant asserts that it used the Plaintiff's song "let's go green" in the public interest efforts of conserving Namanve forest reserve.

It is not in dispute that efforts to conserve Namanve forest would be in the public interest as far as environmental conservation is concerned. However whether or not it is in the public interest has nothing to do with whether the Plaintiff's song "let's go green" could be used. The issue is whether a person who acts in public interest can use copyrighted works in a public interest drive. In the case of **Hon. Paddy Ashdown versus the Telegraph Group Limited Case No A3/2001/0213 cited as [2001] EWCA Civ 1142** being an appeal to the Supreme Court of Judicature Court of Appeal (Civil Division) from the Queen's Bench Division/Chancery Division, the issue concerned a suit brought against the publication of confidential information. The court attempted to balance between two conflicting rights namely the right to copyright as well as the right to freedom of expression. The court further considered restrictions on copyright including the fair dealing exception for the purpose of reporting current events and which does not infringe any copyright in the work. Particularly the court considered the fact that the defence for breach of copyright can be mounted on the basis of "public interest". First of all the court found that it was not a statutory defence but a common law defence. Specifically section 171 (3) of the Copyright Act of the UK provides that nothing in that part of the Act affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise. The Plaintiff was granted an injunction restraining any further infringement of the

copyright in his work. This is that there will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. Furthermore they reached the conclusion that in rare circumstances the right of freedom of expression would come into conflict with the protection afforded by the Copyright Act, notwithstanding the express exceptions to be found there under. In the circumstances they felt bound to apply the Copyright Act in a manner that accommodates the right to freedom of expression and considered the specific circumstances to see whether the defence of "public interest" would be availed to the Defendant.

Counsel further relied on a summary of the law by **Laddie, Prescott and Victoria**, "**The Modern Law of Copyright and Designs**". In the textbook there is a definition of what amounts to fair dealing. The first important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies. If it is, the fair dealing defence would fail. On the other hand if there is a moderate taking and there are no special adverse factors, the defence is likely to succeed especially if the Defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, where the material has been obtained by breach of confidence or other mean or underhand dealings, the court would be reluctant to say that this is fair. It may be fair for purposes of legitimate public controversy to make use of "leaked" information. Another important factor is the amount and importance of the work that has been taken. Although it is permissible to take a substantial part of the work, in some circumstances the taking of an excessive amount or the taking of even a small amount if on a regular basis would negative fair dealing.

I have carefully considered the principles and I have come to the conclusion that the cases are irrelevant in considering the defence of "public interest". This is because in the first place the public interest is considered in the context of the use of the copyright work. In other words where it is a criticism of the work, where it is an exposure of the work for other legitimate reasons, where the work is leaked in the public interest etc, it would be a defence to the use of the work by the Defendant. Secondly the case before the court does not involve conflicting interests between freedom of expression and the freedom of press against the right to copyright. In the **Ashdown case** information that was leaked was found to have violated the applicant's copyright. The Defendant is not a reporter or involved in the business of reporting news to the public and the question of freedom of press cannot be considered. As far as its campaign is concerned, there is no judicial precedent to the effect that the use of copyrighted work could be permitted for a campaign in the public interest without consent of the owner of the copyright.

I have duly considered public interest as discussed by **David Bainbridge on "Intellectual Property" 6<sup>th</sup> Edition** between pages 190 and 193. He writes that 'public interest' is a nebulous



concept which can in some cases provide a defence for copyright infringement. In the case of **Lion Laboratories Ltd versus Evans [1984] 2 All ER 417** the Defendant's newspaper editor intended to publish information concerning doubts about the reliability of a certain product. The product was used to test motorists suspected of being unfit to drive due to intoxication levels in their breath. An injunction was granted by the trial court and in an appeal against the injunction order; the appeal was allowed on the ground that the defence of public interest applied because it was in the public interest that the information about whether the product did what it was supposed to do should be published. A summary of the principles relevant to an application of the defence of public interest summarised by David Bainbridge in his textbook 'Intellectual Property' at page 191 is as follows:

- There was a difference between what was interesting to the public and what was in the public interest.
- It was the fact that the media, for example newspaper proprietors, had a private interest to increase circulation by publishing what appealed to the public;
- the public interest might be best served by giving the information to the police or some other responsible body rather than to the press;
- The public interest did not arise only when there was an iniquity to be disclosed, and the Defendant ought not to be restrained solely because what he wanted to publish was misconduct on the part of the claimant.

The above summary demonstrates that what should be published should amount to criticism of the work and not a use of the work for another collateral interest such as propagating a campaign for conserving forests as in the Defendant's case. This is because the Plaintiff's work is not in issue and it is not the purpose of the Defendant to inform the public about the Plaintiff's work. Illustrations of public interest cases include publication involving the disclosure of criminal conduct or misconduct generally of the copyright owner. It involves review or criticism of the work and how much of the work can be used fairly depends on the circumstances of each case. In the case of **Hubbard and another v Vosper and another [1972] 1 All ER 1023** Lord Denning MR at page 1027 considered the definition of "fair dealing" in the context of a defence to copyright infringement through publication of the work. He said:

"It is impossible to define what is 'fair dealing'. It must be a question of degree. You must consider first the number and extent of the quotations and extracts. Are they altogether too many and too long to be fair? Then you must consider the use made of them. If they are used as a basis for comment, criticism or review, that may be a fair dealing. If they are used to convey the same information as the author, for a rival purpose, that may be unfair. Next, you must consider the proportions. To take long extracts and attach short comments may be unfair. But, short extracts and long comments may be fair. Other considerations may come to mind also. But, after all is said and done, it must be a matter of impression. As with fair comment in the law of libel, so with fair

dealing in the law of copyright. The tribunal of fact must decide. In the present case, there is material on which the tribunal of fact could find this to be fair dealing.”

At page 1028 Lord Denning discusses quotations of large portions of the copy right owner’s work in the context of criticism and reporting:

“Although a literary work may not be published to the world at large, it may, however, be circulated to such a wide circle that it is ‘fair dealing’ to criticise it publicly in a newspaper, or elsewhere. His happens sometimes when a company sends a circular to the whole body of shareholders. It may be of such general interest that it is quite legitimate for a newspaper to make quotations from it, and to criticise them—or review them—without thereby being guilty of infringing copyright. The newspaper must, of course, be careful not to fall foul of the law of libel. So also here these bulletins and letters may have been so widely circulated that it was perfectly ‘fair dealing’ for Mr Vosper to take extracts from them and criticise them in his book. It seems to me, therefore, that Mr Vosper may have a good defence of ‘fair dealing’ to raise at the trial.”

It is quite clear from the above two passages that 'fair dealing' is considered in the context of criticism and newspaper reporting or news reporting. It is consistent with the general principle that interim injunctions would not be issued to restrain publication or news reporting or freedom of press of something in the public interest such as a political controversy. The Defendant was not making a criticism of the Plaintiff's song "let's go green". The Defendant was not making a reporting of the Plaintiff’s work in any context but was rather using it to foster a campaign albeit in the area of environmental protection.

According to David Bainbridge (supra) at page 195 the term "fair dealing" is approximate to the term "fair use" which is used in the USA legislation. It covers research, or private study, criticism, review and reporting current events. This conclusion seems to be consistent with section 15 (1) of the Copyright and Neighbouring Rights Act which gives the parameters of 'fair use'. According to **David Bainbridge** (supra) at page 198 quoting from the case of **Hyde Park Residence Ltd versus Yelland** one of the first principles to determine whether a Defendant could fall within the fair dealing exception requires a two-stage test. The first task was to ascertain whether the publication was for a purpose within the fair dealing permitted acts. In Uganda this is under section 15 (1) of the Copyright and Neighbouring Rights Act. The second question to be asked is subsidiary to the first task. Where it does not fall within permitted acts prescribed by the statute, there is no need to establish whether the dealing was fair i.e. to apply the principles under section 15 (2) of the Copyright and Neighbouring Rights Act.

In the premises issue number two of whether the Defendant's actions fell within the "fair use" exceptions is answered in the negative. From the facts and circumstances as well as the pleading and authorities considered in the submissions, the Defendants use of the Plaintiff’s song "let's go green" in the advertisement jingle does not fall within the fair use exception.

Secondly having determined the question of whether the Defendant's action fell within the 'fair use' exception, what remains to be concluded is whether the Defendant infringed the Plaintiff's copyright. Under section 46 of the Copyright and Neighbouring Rights Act it is stipulated that infringement of Copyright or neighbouring right occurs where without a valid transfer, licence, assignment or other authorisation under the Act, a person deals with any work or performance contrary to the permitted free use. In this case I have established that there was no permitted free use and that the Defendant's use does not fall within the fair use exception. There was no valid transfer, licence, assignment or authorisation of the Defendant by the Plaintiff.

I have duly listened to the exhibited CD containing both the song "let's go green" and the advertisement jingle. It is quite clear that the structure of the song is the same. It starts with the "let's go green" song and an appeal for people to take action on the environment. The theme of this song is about calling people to change so that wetlands, forests and grasslands etc are not destroyed by "going green". It is apparent that the Defendant selected this song because it was appropriate for its campaign to save Namanve Forest. The advertisement jingle begins with the same theme of "let's go green" as embodied in the song and continues with a jingle about the fact that the remaining part of Namanve Forest is being destroyed by politicians who are illegality demarcating it into plots at the pretext of resettling slum dwellers. It asked the public whether they were aware of what was happening and appeals to members of the public to reject the illegal takeover of public resources without following the right de-gazetting processes. The public is further informed that it was authorised by the Minister of Water and Environment but had not been approved by Parliament and alternative land to nurture an alternative Forest was not provided for. Finally the public is informed that it is their obligation to demand that the illegal giveaway of Namanve Forest is stopped. They call upon Parliament to investigate the matter and bring those responsible to book. Finally it is indicated in the advertisement jingle that the message was brought by the Anticorruption Coalition Uganda (the Defendant). It ends with the Plaintiff's song "let's go green". While the verbal messages are being given, the music keeps on playing in the background the whole time. What happened is that the volume was only tuned down to make the message audible and then increased again to end with the song "let's go green". The Plaintiff's song "let's go green" was used for the entire advertisement. It was not used accidentally or incidentally but deliberately because of its theme.

The Defendant just incorporated the Plaintiff's song "let's go green" as part of its advertisement jingle and thereby infringed the Copyright of the Plaintiff under section 46 (1) of the Copyright and Neighbouring Rights Act.

I have secondly considered section 46 (2) of the Copyright and Neighbouring Rights Act which provides that the use of the piece of work in a manner prejudicial to the honour or reputation of the author shall be deemed an infringement of the right of the author. It is the Plaintiff's case that the Defendant's use put her on a collision course with officials of government. The Defendant's Counsel attacked the testimony of the Plaintiff on the ground that there was insufficient evidence to support her contention that she suffered humiliation and embarrassment and the advertisement

jingle put her on a coalition course with government officials and agencies who viewed her as a traitor. The contention is that the Plaintiff did not prove her allegations because she did not adduce witness evidence from government agencies or the Minister. I have duly considered the Plaintiff's testimony on this point. She testified in her written testimony that she suffered much embarrassment and humiliation in her dealings with various stakeholders including governmental agencies and players who considered her a traitor for abandoning peaceful solutions to environmental degradation. Particularly she testified that honourable Maria Mutagamba, the Minister in charge of the environment who was close to her expressed her displeasure over the involvement in the campaign to save Namanve Forest.

I have duly considered this testimony and I find nothing offensive in the advertisement jingle because it was a call to the public to engage their Members of Parliament and take action against the Namanve Forest giveaway. It may be true that the Plaintiff was considered one of the campaigners against the intended giveaway of Namanve Forest. However there is insufficient evidence that the Plaintiff suffered humiliation and embarrassment in the face of other stakeholders including governmental agencies because of the song. It is possible that the advertisement jingle was unpopular with the governmental officials involved in the matter but that in itself is only a factor in the assessment of what remedies are available if any to the Plaintiff.

## **Remedies**

I have carefully considered the Plaintiff's prayers as reflected in the plaint and on the basis of submissions of Counsel. As far as the plaint is concerned the Plaintiff seeks a declaration that the Defendant infringed upon her Copyright. Secondly she seeks general damages. Thirdly she prays for punitive/aggravated/exemplary damages. Fourthly she prays for interest on the general damages and the punitive/aggravated/exemplary damages at court rate from the date of judgement until payment in full and finally she prays for costs of this suit.

As far as declarations are concerned, Order 2 rule 9 of the Civil Procedure Rules allows the court to make binding declarations of right whether any consequential relief is or could be claimed or not. The Plaintiff having succeeded in proving her case in the agreed issues numbers one and two agreed is entitled to the declarations sought in the plaint.

A declaration issues that the Defendant infringed the Plaintiff's Copyright in the song "Let's Go Green".

As far as the claim for general damages is concerned, the provisions of the Copyright and Neighbouring Rights Act 2006 envisages a claim for damages for copyright infringement. I will refer to 2 provisions of the Copyright and Neighbouring Rights Act 2006. Firstly section 4 (1) of the Copyright and Neighbouring Rights Act provides that the author of any work specified in section 5 shall have the right of protection of the work, where the work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which

it is created. One of the methods of protecting copyright is to discourage people from infringing copyright owner's rights with impunity. This may be done by an award of damages based on the common law principle of *restitutio in integrum*. I fully agree with the plaintiff's counsel that copyright is intellectual property and may have economic rights attached to it under section 9 of the Copyright and Neighbouring Rights Act as well as moral rights under section 10 of the Act. Secondly section 45 (3) provides that the grant of an injunction shall not affect the author's claim for damages in respect of loss sustained by him or her as a result of the infringement of a right under the Act. In other words the statutory provision envisages the protection of copyright through the grant of an injunction as well as the claim for damages for loss sustained by the copyright owner.

There was some contention about whether the Plaintiff had proved damages. The Defendant's Counsel submitted that the Plaintiff never proved any loss and never adduced any evidence to show how much loss she had likely suffered due to the use of the advertisement jingle incorporating this song "let's go green". On the other hand the Plaintiff's Counsel submitted that it was difficult to quantify the Plaintiff's loss because the Plaintiff continued performing her other works. The evidence is that the Plaintiff could not perform the song "let's go green" for over a year which evidence has not been rebutted by the Defendant. The Plaintiff testified that due to the negative publicity generated by the Defendant's campaign in the advertisement jingle and the Namanve Forest saga she was unable to perform the song.

The case law quoted by **David Bainbridge** in "**Intellectual Property**" is that the normal measure of damages for copyright infringement is the amount by which the value of the copyright as a chose in action has been depreciated. This was held in **Sutherland Publishing Company Limited v Caxton Publishing Company Limited [1936] 1 All ER 177** Lord Wright held at page 180:

"... the measure of damage is the depreciation caused by the infringement to the value of the copyright, as a chose in action."

David Bainbridge (supra) reviews several judicial precedents on the issue of damages, however the most relevant in the review of the principles to be applied can be found at page 171 considered in light of the submission of Counsel that the Plaintiff cannot prove damage in the circumstances of the case. According to Bainbridge (supra):

"Where it is not possible to prove any loss, the court may make an award of a reasonable sum for the use of the claimant's materials on the basis of the benefit accruing to the wrongdoer."

Reference is made to the case of **Experience Hendrix LLC versus PPX Enterprises Inc [2003] FSR 853** for the above principle but the case is no available. However the case of **Wrotham Park Estate Company v Parkside Homes Ltd and others Wrotham Park Estate Company v Parkside Homes Ltd [1974] 2 All ER 321** considers several judicial precedents in a situation

where the Plaintiff cannot prove actual damage and holds that the correct measure of damages is what the Plaintiff would have charged for the use of his or her property by the Defendant.

I am persuaded by the approach because where there is no evidence of how much loss the Plaintiff suffered, the court cannot presume that loss. The general rule is that the Plaintiff can only recover the actual loss suffered which is proved on the balance of probabilities. In the case of **Wrotham Park Estate Company v Parkside Homes Ltd and others Wrotham Park Estate Company v Parkside Homes Ltd [1974] 2 All ER 321** at page 340 Brightman J quotes Lord Denning on the principle:

“It will be sufficient to read these extracts from the judgment of Denning LJ ([1952] 1 All ER at 800, [1952] 2 QB at 253):

‘In assessing damages, whether for a breach of contract or for a tort, the general rule is that the Plaintiff recovers the loss he has suffered, no more and no less. This rule is, however, often departed from.’...”

In conclusion the question is how much the Plaintiff would have charged the Defendant for the use of the song. There is no evidence as to how much the Plaintiff would have earned. Secondly I will take into account the fact that the Plaintiff was unable to perform the song for a period of over a year. I have duly considered the fact that under section 47 of the Copyright and Neighbouring Rights Act it is an offence to publish, distribute or broadcast or communicate the work of the copyright owner to the public without a licence or authorisation. However no criminal proceedings were brought against the Defendant’s officials. Secondly section 50 of the Copyright and Neighbouring Rights Act prescribes penalties and compensation for copyright infringement upon conviction for an offence under the Act. The principles applied in addition to the prescribed punishment are relevant to the award of damages. One of the remedies is that all the sums of money arising out of the offence and received by the offender are to be accounted for by the offender and paid to the person entitled to economic rights under the Act. Secondly the infringing materials are to be forfeited and disposed of as the court may direct. Thirdly the use of the material in a manner prejudicial to the honour and reputation of the author shall be deemed to be an infringement of the right of the owner of the copyright owner under section 46 (2) of the Copyright and Neighbouring Rights Act.

The evidence is that the song was used at a time when riots took place on the issue of de-gazetting of Namanve Forest. DW1 in cross examination admitted that time there were “Mabira riots”. (“Mabira” is another forest reserve.) In those riots one person died. DW1 denied that their approach was confrontational and testified that they only called on members of Public to talk to their members of Parliament. PW1 on the other hand testified that the tone of the jingo was harsh and she objected to it. It was harsh and hard hitting. In her testimony in chief she described it as a clarion call to all and sundry to rise up and take action to combat the intended give away. PW1 was aggrieved that she was confronted by Hon. Maria Mutagamba the Minister for

Environmental Protection who expressed displeasure at the jingo and who otherwise had been close to her. Under section 10 of the Copyright and Neighbouring Rights Act, moral rights include the right to seek relief in respect of any distortion, alteration or modification of the work.

At the hearing the song was played and I also taken the opportunity to listen to it again when considering this judgment. It is surprising that the Defendant's Counsel submitted in the alternative that the advertisement jingle was a modification and was not original to the Plaintiff. At page 5 of his written submission and with reference to an analysis of the content of the advertisement jingle he submitted that:

“In light of the foregoing, it is the defence's submission that the song and the Defendants' jingle are significantly and noticeably different in content, style, structure and time... and the extract is not an exact copy of the song.”

Further on he submitted that:

“To this extent, the Defendant's jingle is creative, transformative and entitled to copyright protection on its own right.”

However the song was played throughout the jingle. Its volume was up at the beginning and end of the advertisement jingle and its thematic content was effectively used for appropriateness to the Defendant's message. Lastly in the middle the volume was turned down to allow the Defendant's verbal message to be heard while the Plaintiff's song played in the background. In the premises the Plaintiffs moral rights were infringed and the Plaintiff would be entitled to relief under section 10 (2) of the Copyright and Neighbouring Rights Act. Relief includes relief by way of compensation for injury to her style or intended use. The displeasure of Hon Maria Mutagamba who talked to the Plaintiff proves the Plaintiffs point and the fact that an author has the moral right to determine whether the work reflects her view and to withdraw it if not is also relevant. Where the work is distorted by another person's action the copyright owner is entitled to seek relief for the tort of infringement of her moral rights. The tort of infringement of property rights attracts damages.

In this case the Defendant is a non-profit making organisation and proved that it did not make any profit from the use of the Plaintiff's song "let's go green". The word "profit" should not be restricted to commercial gain. The defendant achieved its objectives of conveying the message effectively and thereby benefitted from the song. The benefit does not have to be in money kind. The song was broadcast in several FM stations and according to the Plaintiff it was played for a period of about two weeks. DW1 on cross examination and in her witness statement in chief did not rebut this evidence. The use of the song could have been paid for but the way it was used and presented was without the Plaintiff's consent.

The only evidence on how much the Plaintiff used to earn is that PW1 testified that she was paid £3000 by the British Council at the launch (commissioning) of the song. Furthermore, the

Plaintiff's testimony is that she used to be paid an average of **Uganda shillings 3,000,000/=** for each performance. The Plaintiff's Counsel prayed for an award of **Uganda shillings 50,000,000/=** as general damages while the Defendants Counsel submitted that damages were too remote and ought not to be awarded. He relied on the non commercial purpose of the jingle and the fact that it was used in a public interest campaign. Counsel did not suggest any figure in case his submissions for dismissal of the claim did not succeed.

Considering the fact that the Plaintiff is also involved in conservation of the environment, and to that extent the damage caused by the Defendant's use could be mitigated, an award of general damages in the sum of **Uganda shillings 25,000,000/=** would be just compensation for copyright infringement taking into account the circumstances discussed above.

#### Exemplary/punitive/aggravated damages

According to **Osborn's Concise Law Dictionary**, exemplary damages are damages awarded in relation to certain tortious acts (such as defamation, intimidation and trespass) but not for breach of contract. In contrast to aggravated damages which are compensatory in nature, such damages carry a punitive aim at both retribution and deterrence for the wrongdoer and others who might be considering the same or similar conduct. In the case of **Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91** the Court of Appeal sitting at Nairobi per Spry VP at page 94 considered the definition of exemplary damages and approved the case of **Rookes vs. Barnard [1964] A.C. 1129** and by way of summary Spry VP held:

“In the first place, it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and everything which aggravates or mitigates the Defendant's conduct is to be taken into account. It will be seen that the House took the firm view that exemplary damages are penal, not consolatory as had sometimes been suggested”.

Firstly, exemplary damages would be awarded for arbitrary or unconstitutional action by government officials. Secondly, it is awarded where the wrongful conduct of the Defendant is calculated to procure some benefit at the expense of the Plaintiff. Lastly the Plaintiff must have suffered as a result of the punishable behaviour. Furthermore the conduct of the Defendant may be criminal in nature. Consequently even in a claim for exemplary damages, the Plaintiff must prove that it has suffered from the acts of the Defendant.



Considering the above principles for an award of exemplary damages, and the circumstances of the Plaintiff's case which have been discussed above, the jingle was not used to commercially benefit the Defendant personally through infringement of copyright is an offence under section 47 of the Copyright and Neighbouring Rights Act. Considering the purpose to which the Defendant put the Plaintiff's work, though the use amounted to an offence, I find that an award of exemplary damages is inappropriate.

The question is whether aggravated damages may be awarded in the circumstances? According to **Halsbury's laws of England fourth edition volume 12 paragraph 811:**

"In certain circumstances the court may award more than nominal measure of damages, by taking into account the Defendant's motives or conduct and such damages may be either aggravated damages which are compensatory in that they compensate the victim of a wrong for mental distress, or injury to feelings, in circumstances in which the injury has been caused or increased by the manner in which the Defendant committed the wrong."

Furthermore under paragraph 1114, aggravated damages in tort are where damages are "at large". This means that they are not limited to the pecuniary loss that can be specifically proved. In such cases the court may take into account the Defendant's motives, conduct and manner of committing the tort, and where these have aggravated the Plaintiff's damages by injuring his or her feelings of dignity, and pride, aggravated damages may be awarded. The Defendant may have acted with malevolence or spite or behaved in a high-handed, malicious, insulting or aggressive manner.

The unimpeachable evidence in this case is that the Defendant's officials thought that they did not require the Plaintiff's consent for use of her song in the advertisement jingle in question. DW1 admitted that she knew that the Plaintiff was the copyright owner of the song "Let's go green". Secondly this is an agreed fact in the scheduling memorandum. Being aware of the copyright ownership of the plaintiff, they used the song with impunity. Subsequently at the proceedings the Defendant sought to justify their actions without apology. They presented the position that use of the song for a public purpose was justified. Yet the Plaintiff's consent was not sought. The action of the Defendant's officials for which the defendant is vicariously liable was done in blatant disregard of the Plaintiff's copyright. The use did not fall within any of the permitted uses under section 15 (1) of the Copyright and Neighbouring Rights Act 2006 and could not therefore be justified. It was not for private use. It was not part of a press summary or news and it was not used in the context of news reporting. The Plaintiff's song was not used for teaching purposes. There was no acknowledgement of the Plaintiff's work and an attempt was made to deny the Plaintiff's copyright during the proceedings. Such a blatant disregard of the Plaintiff's rights may attract aggravated damages at the discretion of the court. According to **David Bainbridge in Intellectual Property 6<sup>th</sup> Edition at page 175** additional damages are a form of "punitive damages". In the statutory provision under consideration (The UK Copyright, Designs and Patents Act 1988) in exercising its discretion the court considers the flagrancy of the

infringement and any benefit accruing to the Defendant by reason of the infringement. I agree with the above statutory grounds because they reflect the traditional grounds for award of aggravated damages. Firstly the Defendant acted in flagrant disregard of the Plaintiff's rights. Secondly the work was used for its thematic content and was made to blend richly with the Defendant's message. The word "benefit" cannot be used to mean pecuniary benefit only. The work was used to benefit the Defendant's cause or campaign because of its content and appropriateness to the Defendant's message. Using it in that fashion without acknowledgement or apology is a blatant disregard of the Plaintiff's Copyright which is protected by statute.

Furthermore it is in the interest of promoting property rights of artists guaranteed under the Copyright and Neighbouring Rights Act 2006 that effective interventions are made to protect artists so that their industry may thrive. The Plaintiff's Counsel thought that an award of **Uganda shillings 100,000,000/=** would be fair.

Taking into account the fact that the Defendant is a charity for public purposes, the Plaintiff is awarded additional (aggravated damages) of **Uganda shillings 30,000,000/=**.

The plaintiff's Counsel prayed for an award of interest at court rate from the date of judgment till payment in full. In the premises, interest is awarded at the rate of 8% per annum as prayed for on the above sums from the date of Judgment till payment in full and as enabled by section 26 of the Civil Procedure Act.

Lastly costs follow the event and the Plaintiff is awarded costs of this suit.

Judgment delivered in open court the 18<sup>th</sup> day of August 2014

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of

Benson Tusasirwe for the plaintiff

Paul Asiimwe for the defendant

Plaintiff in court

Defendant appears through by Abbas Kigozi Programme Officer of defendant

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

18/08/2014