

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 206 OF 2010**

**CLASSIC ART WORKS LTD}.....PLAINTIFF**

**VERSUS**

- 1. MR. VINCENT LUKENGE}  
2. CHILDREN OF GRACE}.....DEFENDANTS**

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

**JUDGMENT**

The Plaintiff filed this action against the Defendants jointly and severally for general damages for infringement of copyright in the literary works of the Plaintiff, an injunction restraining the Defendant's whether by themselves, jointly or otherwise, from reproducing or authorising the reproduction of the Plaintiffs literary works entitled "Facts and Myths about HIV/Aids, A Practical Guide for Prevention, Health and Life vide copyright number ISBN 9970 – 416 – 40 – X. In the alternative and without prejudice the Plaintiff seeks an account of profits made by the Defendants by the alleged infringement and payment of the amounts found due on the taking of such an account, an order for delivery to the Plaintiff of all copies of the said works in the Defendants possession and any other relief that the court may deem fit to grant and costs of the suit.

The facts disclosed in the plaint are that the Plaintiff is the author of a literary work entitled "Facts and Myths about HIV/Aids, a Practical Guide to Prevention, Health and Life" and the owner of copyright thereof. The Plaintiff alleges that the Defendants were found in possession of the Plaintiff's literary works and had reproduced and altered it in a substantial form without the licence of the Plaintiff. Secondly the Plaintiff alleges that the Defendants had in their possession a large number of copies of the book which were wrongfully printed or caused to be printed by the Defendants without the licence of the Plaintiff and the Plaintiff demanded their works from the Defendant by letter of 21<sup>st</sup> September 2009 and the Defendants wrongly detained and distributed the books/works. The Plaintiff further avers that it only granted a licence to Global Health Preventive Strategies Inc of the US to publish only 20,000 copies of the works and not to Global Strategies for HIV Prevention. Consequently the Plaintiff claims that as a result of the alleged acts, it suffered and continues to suffer tremendous loss due to a gradual decrease in the sale of the works.

In the written statement of defence, the Defendants jointly denied the claim in the plaint and admit that they only distributed approximately 1000 copies of the edition of the booklet, "Facts and Myths about HIV/AIDS" supplied and donated to them by Global Strategies for HIV Prevention who were duly licensed to publish it. They distributed the booklets for free to sponsored orphans and other children in schools purely for public education and sensitisation under express instructions and request of the licensee who donated and supplied them with the books. In those circumstances the Defendants averred that they lawfully distributed all the copies of the booklets long before the institution of the suit and no infringement was or is being done on their part at all of the Plaintiffs copyright.

In a joint scheduling memorandum endorsed by both Counsels of the parties the following are admitted facts:

1. Mutaryebwa Francis is the owner and creator of copyright in literary works titled "Facts and Myths about HIV/AIDS, A Practical Guide to Prevention, Health and Life."
2. A licence from the said copyright owner was granted to Global Health Preventive Strategies, to publish, print and distribute 20,000 copies of the works through a licence agreement signed by Arthur J Amman on behalf of the licensee.
3. The second Defendant possessed approximately 10,000 copies of the book donated by Arthur J Amman.

The basic facts asserted by the Defendant and contested by the Plaintiff were that the books were distributed free of charge to sponsored orphans and other children in schools purely for public education and sensitisation. On the other hand the fact asserted by the Plaintiff but contested by the Defendant is that the copies complained about were found in possession of the Defendants. Secondly that the Defendants have infringed copyright in works entitled "Facts and Myths about HIV/AIDS; A Practical Guide to Prevention, Health and Life. Thirdly the licence was granted to Global Health Preventive Strategies Inc of USA.

The following issues were agreed for trial and resolution of the dispute namely:

1. Whether the Plaintiff had a copyright over the suit book?
2. Whether the Defendants infringed the Plaintiff's copyright?
3. Whether the Plaintiff is entitled to the reliefs sought?

After both the Plaintiff and the Defendant adduced evidence, Counsels opted to address the court in written submissions.

On issue number 1 the Plaintiff submitted that evidence had been adduced which was unchallenged to show that the Plaintiff had a copyright over the suit property. Secondly the Plaintiff is a limited liability company in which PW1 is a shareholder and director. PW1 testified that he is the author and illustrator of the book in question exhibited as exhibit PE 1. The book was published by the Plaintiff Company. Commercial rights in respect of the copyright were

assigned to the Plaintiff Company by PW1 Mr Francis Mutaryebwa. The Plaintiff was supposed to pay royalties to the author/PW1 and do the entire publishing and distribution of the book.

Under the said assignment the Plaintiff Company entered into a licensing agreement with Global Health Preventive Strategies Inc on 5 February 2002 in which it granted a non-exclusive, non-transferable licence to publish the works up to and limited to only 20,000 copies thereof.

The Plaintiff is for all intents and purposes the owner of the copyright in the works and is entitled to exercise rights under section 14 of the Copyright and Neighbouring Rights Act 2006. Under the provision the copyright owner may assign his or her economic rights in the copyright to another person or assign to another person the economic rights in a copyright.

The Plaintiff's Counsel submitted that the works the subject matter of the suit has a copyright under section 5 of the Copyright and Neighbouring Rights Act and falls under section 5 (1) (a) which caters for articles, books, pamphlets and other works of a similar nature. Furthermore the Plaintiff is an author as defined by section 2 of the Copyright and Neighbouring Rights Act. In light of the above the Plaintiff's Counsel submitted that for purposes of this suit the Plaintiff is the owner of copyright complained about and has locus standi to bring the action against the Defendants.

In reply the Defendants Counsel submitted that the Plaintiff does not have a copyright. The ground for this submission is that the Plaintiff claims to be the author of the book in question and therefore the owner of the copyright under paragraph 4 (a) of the plaint. PW1 claimed to be the author and illustrator and this is also indicated in the cover of the book in question. PW1 claims that the Plaintiff obtained a mere licence for commercial rights. On the other hand in the submissions of the Plaintiff's Counsel it is claimed that the Plaintiff had an assignment of copyright. On that basis the Defendants Counsel submitted that the plaint discloses no cause of action against the Defendants because a party is bound by its pleadings and is not at liberty to depart from them.

Secondly PW1 testified that the book was his. PW2 testified that the book belonged to his father namely PW1. Under section 4 of the Copyright and Neighbouring Rights Act, 2006, only the author of works enjoys protection if the work is original and has been reduced in a material form. The Plaintiff is not the author of the book in question. Counsel relied on the case of **Macaora versus Northern Assurance Company Ltd [1925] AC 619** for the proposition that a corporation is a separate entity from its owners and even if a shareholder holds all the shares, the shareholder is not the corporation neither can he or any creditors of the company have any proprietary interest, legal or equitable in the assets of the corporation.

Thirdly the Plaintiff never adduced any evidence of the licence from the author of the book. No evidence was led to prove existence of the licence. PW1 testified that the licence was given to the Plaintiff for economic rights. Under section 9 and 14 (1) (b) of the Copyright and Neighbouring Rights Act, economic rights are only for usage and do not include the right to

bring an action for infringement of copyright. Under section 10 (1) of the Copyright and Neighbouring Rights Act, the right to seek relief in connection with any distortion, mutilation, alteration or modification of the work is a moral right that cannot be granted by licence. Last but not least the Plaintiff's Counsel submitted that the agreement was not a licence but an assignment but did not produce any written deed of assignment as required by section 14 (3) of the Copyright and Neighbouring Rights Act. Under section 35 of the Act, any contract to exploit the rights created under the Act must be reduced in writing. Section 35 is mandatory and no such contract was exhibited in evidence.

In conclusion the Defendant's Counsel maintained that the Plaintiff has no locus standi because it is not the author of the works in issue and therefore did not have the right to bring an action as it had no transfer/assignment of the licence of the author's rights. Secondly licence of economic rights cannot create a right to sue nor can the moral rights which include a right to bring an action for infringement be given by such unwritten licence if any. The Plaintiff has no locus standi or cause of action by which reason the Defendants Counsel prayed that the court be pleased to dismiss the suit with costs.

In rejoinder the Plaintiff's Counsel submitted that all the three ingredients that are necessary to disclose a cause of action are present in the Plaintiff's case. The three elements of a cause of action are as laid out in the case of **Auto Garage versus Motokov [1971] EA at page 514**. Counsel reiterated submissions that the Plaintiff enjoyed commercial rights over the copyright complained about which commercial rights had been vested in PW1. It did not matter whether the assignment was oral or in writing. The commercial right assignment is clearly evident from exhibit PE 3 which is a licensing agreement between the Plaintiff Company and Global Health Preventive Strategies Inc.

Secondly there is an infringement of the right enjoyed by the Plaintiff. The Defendant's witnesses admitted that they were not only in possession of the works complained of but also admitted to distributing it to various students in school.

Thirdly PW1 tendered in documents such as local purchase orders, photos and bank statements to demonstrate the state of sales during the period under question to demonstrate that the Plaintiff suffered damages out of infringement of its rights.

On the question of not possessing a written deed of assignment, section 14 (4) of the Copyright and Neighbouring Rights Act 2006, the assignment does not have to be in writing. It can be inferred from circumstances and in this case it is inferred from exhibit PE 3. Furthermore procedural rules of pleading cannot be used to defeat a cause of action. Counsel relied on the case of **Steel Wares Ltd versus CW Martyr & Co [1956] 23 EACA 175** at page 177 where it was held that "procedural rules are intended to serve as handmaidens of justice, not to defeat it." In the case of **Allen Nansange v. Nanyonga [1977] HCB 319** Justice Sekandi held that the rules of procedure are a guide to the orderly disposal of suits and the means of achieving justice

between the parties. They should never be used to deny justice to a party entitled to a remedy. The Plaintiff's Counsel submitted that in that respect the preliminary point of the Defendants Counsel on the first issue should be disregarded.

#### Resolution of points of law

The submissions of the Defendant's Counsel deals with a point of law which if sustained would have the effect of disposing of the suit. The question to be resolved in the submissions is whether the Plaintiff has locus standi to bring this action or in another perspective whether the Plaintiff has a cause of action against the Defendants. Resolution of the first issue primarily revolves around a perusal of the plaint and the provisions of the Copyright and Neighbouring Rights Act, 2006 though it requires an evaluation of the evidence on the question of who is the copyright owner and whether there was assignment of those rights as well. I will start with the point of law which requires a perusal of the plaint and a reading of the provisions of the Copyright and Neighbouring Rights Act, 2006.

On the first issue the Defendants Counsel relied on paragraph 4 (a) of the plaint to challenge the assertion of the Plaintiff that it is the owner of the book in question and therefore the owner of the copyright. Paragraph 4 (a) of the plaint avers as follows:

"(a) The Plaintiff is the author of a literacy work entitled "Facts and Myths about HIV/AIDS, A Practical Guide to Prevention, Health and Life" and owner of copyright therein."

In paragraph 5 of the plaint the Plaintiff avers that it only granted a licence to Global Health Preventive Strategies Inc of Street Half Moon Bay CA 94019 USA to publish and print 20,000 copies and not to Global Strategies for HIV Prevention. The licence agreement was attached "reflecting the copyright notice on the copyright page C and D". The licence was also admitted as PE 3.

Lastly paragraph 4 of the plaint which gives the Plaintiffs claim against the Defendants jointly and severally is for infringement of copyright in the literary works of the Plaintiff, an injunction restraining the Defendants whether by themselves, either jointly or otherwise, howsoever from reproducing or authorising the reproduction of the Plaintiffs literary works "Facts and Myths about HIV/AIDS, a Practical Guide to Prevention, Health and Life." The copyright is indicated as number ISBN 9970 – 416 – 40 – X.

On the question of ownership it is an agreed fact in the joint scheduling memorandum that Mr. Francis Mutaryebwa who testified as PW1 is the owner and creator of copyright in the literary works. Notwithstanding the agreement, the word "owner" is not defined under section 2 of the Copyright and Neighbouring Rights Act. The word "author" is however defined by section 2. "Author":

"means the physical person who created or creates work protected under section 5 and includes a person or authority commissioning work or employing a person making work in the course of employment;"

Section 4 of the Copyright and Neighbouring Rights Act provides that: "The author of any work specified in section 5 shall have a 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." Subsection 2 of section 4 of the Copyright and Neighbouring Rights Act provides that for purposes of the section a work is original if it is the product of the independent efforts of the author. The admitted fact puts the question beyond doubt. Mr Francis Mutaryebwa, PW1 is the creator and originator of the works and therefore the "author" of the works alleged in the plaint to have been infringed. The question is therefore whether the Plaintiff, a company in which PW1 is a director, is the owner of the literary works. Paragraph 4 (a) of the plaint is disproved on the averment that the Plaintiff is the author of the works. It is clearly averred in paragraph 1 of the plaint that the Plaintiff is a body corporate incorporated in Uganda under the Companies Act.

I have further considered paragraphs 5 of the plaint which avers that the Plaintiff granted a licence to Global Health Preventive Strategies Inc of the United States of America to publish 20,000 copies and not to Global Strategies for HIV Prevention. The Plaintiff attaches annexure "C" and "D" to paragraph 5 of the plaint indicating that it is the licence agreement and a copy of the book reflecting the copyright notice on the copyright page. Annexure "C" is a licence agreement between Classic Art Works Ltd and Global Health Preventive Strategies Inc. It is also exhibit PE 3. The licence agreement is signed by PW1 on 5 February 2002. It provides that the licensor is the assignee of a Copyright from PW1 in respect of authored works. Secondly the assignee has authority to licence the use of the works to others.

The agreement annexure "C" to the plaint stipulates that the "Assignee" or the Plaintiff granted to Global Health Preventive Strategies Inc in paragraph 2 thereof a non-exclusive, non-transferable licence to publish an edition of the works "Facts and Myths about HIV/AIDS, A Practical Guide to Prevention, Health and Life" anywhere in the world. Secondly the rights granted are limited to the publication of only 20,000 copies of the works. The agreement indicates that the copyright owner is PW1. The agreement stipulates that the Plaintiff is an assignee of the copyright owner. This by itself is at variance with the pleading to the extent that the plaint does not mention as a necessary fact that the Plaintiff is an assignee of the copyright in question. On the other hand the question would be whether the right of authorship of the works can be assigned to another person. This is a question that can be resolved without proving questions of fact.

It is a question of fact proven through admission that the Plaintiff is not the original author of the works complained about. The Plaintiff is an assignee of the author of the works. The question is whether the classification of the Plaintiff as the "author of a literary work" is fatal to the suit. On

the face of it, the assignee was granted the right as disclosed in annexure "C" or exhibit PE 3 to licence the distribution and publication of the work anywhere in the world. The assignment referred to in paragraph 1 of the citations in annexure "C" has however not been produced in evidence. The Defendants Counsel submitted that it is a requirement under the law for the assignment to be in writing. As a matter of proof, the Plaintiff's Counsel submitted to the contrary that such assignment need not be in writing and can be inferred from the circumstances of the case according to section 14 (4) of the Copyright and Neighbouring Rights Act 2006. The specific provision relied upon by the Plaintiff provides as follows:

*"A licence to do an act falling within a copyright may be oral, written or inferred from conduct or circumstances."*

I have carefully considered the submissions. The wording of section 14 (4) of the Copyright and Neighbouring Rights Act 2006 does not support the submission of the Plaintiff's Counsel. This is because it provides for licensing an act falling within a copyright. It does not provide for assignment of the copyright or transfer of the copyright. It provides for a licence to do an act falling within a copyright. The right to sue as the owner or author of works will be specifically addressed from the evidence. The preliminary question is whether a right to sue can be granted orally? That question can be partially answered by considering the rules of this court under Order 3 of the Civil Procedure Rules which deals with recognised agents. Order 3 rule 2 (a) and (b) of the Civil Procedure Rules defines "recognised agents" by whom appearances or acts in court may be done. In (a) it provides for persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of the parties and in (b) it provides for: "persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts." As far as (a) is concerned there is no evidence or allegation of the Plaintiff holding a power of attorney neither has any been attached. Secondly as far as (b) is concerned, the action has to be commenced on behalf of a party who is not resident within the local limits of the jurisdiction of the High Court where the suit has been filed. The author of the works however is a resident of Uganda within the local limits of the jurisdiction of the High Court. Order 3 rule 2 deals with the right to bring a representative action.

The Plaintiff's action however has been formulated as an original action with the Plaintiff having the right to bring the action and not as a representative action. For purposes of representative suits, it is always a requirement under Order 7 rule 4 of the Civil Procedure Rules that the plaintiff shall disclose the character in which the suit has been brought. Order 7 rule 4 of the Civil Procedure Rules provides as follows:

*"Where the Plaintiff sues in the representative character, the plaintiff shall show not only that he or she has an actual existing interest in the subject matter but that he or she has taken the steps, if any, necessary to enable him or her to Institute a suit concerning it."*

Such steps include obtaining a power of attorney or authority to sue on behalf of the parties. No such authority has been pleaded or attached to the plaintiff and the conclusion is that the Plaintiff brings this action in its own right and not as a representative of the author. Having concluded that the suit is not a representative suit, the remaining questions are whether the Plaintiff has locus standi or a right to bring this action and secondly whether it discloses any cause of action against the Defendants jointly or severally. In determining these questions, the court will not only have regard to the pleadings but also to the law and the evidence adduced. The question of cause of action is a point of law and not necessarily a matter to be determined from the pleadings only.

Assignment of licence or transfer of a copyright is provided for by section 14 of the Copyright and Neighbouring Rights Act. The head note of the Copyright and Neighbouring Rights Act under section 14 thereof gives a hint that licenses or transfer of copyright are alternatives. The head note reads as follows: "Assignment of licence or transfer of the copyright". Section 14 gives four categories of things which a copyright owner may do under section 14 (1) thereof. The first scenario is that the copyright owner may assign his or her economic rights in a copyright to another person. The second thing that a copyright owner may do is to licence another person to use the economic rights in a copyright. Thirdly the copyright owner may transfer to another person or bequeath the economic rights in a copyright in whole or in part. Lastly the owner may transfer to any Braille production unit in Uganda the economic rights in the Braille translation.

Submissions were made on the question of whether moral rights could be transferred and I will deal with that question together with the submission of whether any assignment or transfer has to be in writing. Under section 14 (2) of the Copyright and Neighbouring Rights Act, transfers of moral rights are expressly excluded and the subsection provides as follows:

*"The assignment, licence or transfer of the economic rights in whole or in part under subsection (1) shall not include or imply the assignment, licence or transfer of the moral right."*

Secondly subsection (3) provides that an assignment or transfer of economic rights under subsection (1) shall be in writing in the following words:

*"An assignment or transfer of the economic right under subsection (1) shall be in writing and signed by owner of the right or by the owner's agent and by the person to whom the rights are being assigned or transferred."*

Starting with economic rights, section 2 of the Copyright and Neighbouring Rights Act defines economic rights to mean rights specified under section 9. Section 9 provides as far as is relevant to the issue at hand that:



*"The owner of a protected work shall have, in relation to that work, the exclusive right to do or authorise persons to do the following:*

*(a) to publish, produce or reproduce the work;*

*(b) to distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership;"..."*

The right to publish, produce or reproduce the work or to distribute or make available to the public the original or copies of the work through sale or other means of transfer of ownership is an economic right. The licence agreement annexure "C" attached to the plaint assigns the rights to publish and distribute the book anywhere in the world. Paragraph 3 of the agreement clearly provides that the global health edition shall carry a copyright notice indicating that PW1 is the author and illustrator of the works. It also indicates that the book was prepared in 2001 and is published formally by Classic Art Works Ltd (the Plaintiff). The global health edition is to be published by Global Health Preventive Strategies Inc under a licence from Classic Art Works Ltd. Furthermore support for the printing and distribution of the booklet was provided by the "Global Strategies for HIV Prevention". Though there is no written document of assignment, it is apparent that the right which the Plaintiff has is a right to publish and distribute the works which rights it acquired from PW1. Such a right is an economic right.

An assignment, licence or transfer of economic rights in whole or in part shall be in writing under section 14 (3) of the Copyright and Neighbouring Rights Act. Annexure "C" or exhibit PE 3 in the citations in paragraph 1 clearly indicates that the Plaintiff is the assignee of the copyright from PW1. It purports to have acquired a copyright. On the other hand the rest of the agreement deals with the assignment of a right of publication of a particular work which is described therein to yet another entity. I agree with the Defendants Counsel that there is no evidence of a written assignment or transfer of copyright. There are two things to consider under section 14 (1) of the Copyright and Neighbouring Rights Act. Either the owner of the works transferred or assigned certain rights in a copy right. Secondly it has either to be an assignment of economic rights; licensing another person to use economic rights; transferring to another person the economic rights in copyright in whole or in part or transferring to any Braille production unit in Uganda the economic rights in the Braille translation. The assignment or transfer of economic rights in whole or in part does not imply the assignment, licence or transfer of the moral right to the works. Lastly the assignment of economic rights or the transfer of economic rights has to be in writing. It is only a licence which may be oral or inferred from conduct or the circumstances.

The Plaintiff's Counsel submitted on the question of whether the transfer or assignment had to be in writing. He submitted in answer thereof that it is provided that the assignment may be oral or inferred from the conduct or the circumstances. Under section 14 (4) of the Copyright and Neighbouring Rights Act, it is only a license to do an act falling within a copyright which may be oral, written or inferred from conduct or circumstances. In other words the submissions imply

that the Plaintiff was granted a licence to do an act within a copyright. I do not take this to be a concession in light of other submissions that the Plaintiff is a licensee of the copyright owner. I will limit the resolution of the issue to the question of whether any assignment or transfer of economic rights has to be in writing.

Annexure "C" to the plaint which we have reviewed above is the only written evidence that the copyright owner had assigned the Plaintiff a right to licence other persons to publish and distribute the works. A reading of section 14 (1) of the Copyright and Neighbouring Rights Act leads to the conclusion that any assignment of economic rights in a copyright to another person, any licenses of another person to use economic rights in a copyright, shall be in writing. Secondly the Defendants Counsel contended that the Plaintiff purported to exercise moral rights which rights cannot be assigned or transferred. Section 2 of the Copyright and Neighbouring Rights Act, 2006 defines "moral right" to mean the right to claim authorship or performance as is provided in sections 10 and 23. Section 10 of the Copyright and Neighbouring Rights Act defines the moral rights of an author. It provides as follows:

“10. Moral rights of author

(1) The author of any work protected by copyright shall have a moral right—

(a) to claim authorship of that work, except where the work is included incidentally or accidentally in reporting current events by means of media or other means;

(b) to have the author's name or pseudonym mentioned or acknowledged each time the work is used or whenever any of the acts under section 9 is done in relation to that work, except where it is not practicable to do so; and

(c) to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work.

(2) The author of a work has a right to withdraw the work from circulation if it no longer reflects the author's convictions or intellectual concepts; and if the author does so, shall indemnify any authorised user of that work who might, in any material way, be affected by the withdrawal.

(3) The moral right under subsection (1) is not assignable to any person, except for purposes of its enforcement.”

The rights in controversy in the suit are the rights of an author or publisher and not the rights of a performer. The moral rights of a performer are laid out under section 23 of the Copyright and Neighbouring Rights Act and we do not need to consider it here. Under section 10, moral rights of an author include the right to claim authorship of the work, the right to have the author's name or pseudonym mentioned or acknowledged each time the work is used or whenever any of the acts mentioned under section 9 is done in relation to that work except where it is not practicable

to do so. Thirdly a moral right includes the right to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work. Lastly the moral rights mentioned above are not assignable to any other person except for purposes of its enforcement. From the above statements of the law, several conclusions may be made.

The first conclusion concerns the cause of action of infringement by way of modification averred in paragraph 4 (b) of the plaint. That cause of action can only be pursued by the owner of the copyright unless otherwise assigned for purposes of enforcement of the moral right. In other words it is only possible where the assignee or transferee acts on the behalf of the owner for enforcement of the right. In the absence of any evidence of authority to enforce the authors moral rights, the right to object to, and seek relief in connection with any distortion, mutilation, alteration or modification of the work only rests with the author of the works and the Plaintiff has no cause of action against the Defendant with regard to the alleged alteration in the works.

With regard to the distribution of the works, the rights involved are economic rights of the author or publisher which may be assigned under section 14 of the Copyright and Neighbouring Rights Act. I agree with the Defendant's Counsel that assignment of economic rights has to be in writing and that no evidence has been adduced by any of the Plaintiff's witnesses of such an assignment to the Plaintiff. The evidence of exhibit PE 3 is of an assignment by the Plaintiff to another person not before the court. In the same breath I disagree with the Plaintiff's Counsel that assignment of economic rights in a copyright to another person or the licensing of another person to use economic rights in a copyright can be made orally, or inferred from conduct or circumstances. Section 14 (4) of the Copyright and Neighbouring Rights Act conclusively restricts any assignment or transfer to a licence to do an act falling within the copyright. The Plaintiff does not claim to be an assignee of a licence to do an act falling within a copyright.

The Plaintiff neither pleaded nor claimed that that it has a licence from the copyright owner or author of the works for the distribution of the works. Specifically paragraph 4 (a) of the plaint avers that the Plaintiff is the author of a literary work which averment is not true and has been disproved by the agreed facts that the author of the works is Mr Francis Mutaryebwa. This is also evident from annexure "C" to the plaint. In annexure "C" to the plaint the moral rights of the author PW1 and specifically acknowledged. Secondly paragraph 4 of the Plaintiff's plaint claims general damages for infringement of copyright in literary works of the Plaintiff. It does not claim damages for infringement of a publishers rights or the right of distribution. In any case such rights are economic rights and there is no evidence of a written assignment of the rights from the author. Such a written assignment or transfer in terms of section 14 of the Copyright and Neighbouring Rights Act would also fulfil the requirements of Order 7 rule 4 of the Civil Procedure Rules by assigning the right to bring an action to enforce the moral rights of the Plaintiff under section 10 of the Copyright and Neighbouring Rights Act as a representative. The enforcement of moral rights would therefore be brought in a representative capacity. In that regard the plaint does not show that the Plaintiff sues in a representative character as far as moral rights are concerned. Furthermore the plaint clearly avers that the Plaintiff is the author of a

literary work. However if the right to authorship or moral rights had been purportedly transferred to the Plaintiff, it would be in violation of section 10 (3) of the Copyright and Neighbouring Rights Act. In any case the plaint discloses that the Plaintiff sues in its own right and not as an assignee for purposes of enforcement of moral rights as envisaged by section 10 (3) of the Copyright and Neighbouring Rights Act.

Last but not least all the evidence adduced which remains unchallenged is that the Defendants had copies of the publication of the works. The right of the Plaintiff under the licence is in relation to any cause of action affecting its right to publish or to ensure that its published works are not affected adversely. However the works in possession of the second Defendant were donated to the Defendants and published by someone else. The parties who published or donated the works have not been made Defendants. No evidence has been led of any publication by any of the Defendants. The Defendants admitted having the works in their possession. The unchallenged evidence is that the works were donated by Global Strategies for HIV Prevention through its founder Arthur J Amman. It was intended for the sensitisation of children victims of HIV/AIDS. The evidence of Michael A McCoy the CF/director and co-founder of the "Children of Grace (Uganda) an NGO) that the second Defendant never printed, reproduced or distributed for sale or plagiarised or done anything to the original work or otherwise in a way that infringes the Plaintiff or anybody's right has never been rebutted. Secondly the first Defendant is a mere director of the second Defendant and always acted as such. The evidence of the first Defendant Mr Vincent Lukenge is that it never published or altered the works as alleged by the Plaintiff. The second Defendant is a charitable organisation and receives donations from well-wishers. The books were donated by Arthur J Amman of Global Strategies for HIV Prevention from America.

In the premises the points of law challenging the right of the Plaintiff to sue succeeds. Before concluding the matter it is proper to infer from the evidence that the action of the Plaintiff was spurred by the fact that the Defendants were found in possession of many copies of the works. The Defendant had admitted that they had 10,000 copies of the works as a donation by Global Strategies for HIV Prevention. Even if the suit is not resolved on a point of law, the evidence supports the contention that the Plaintiff has no cause of action against the Defendants.

The Plaintiff avers in paragraph 5 of the plaint that it only granted a licence to Global Health Preventive Strategies Inc of the United States of America to publish and print 20,000 copies and not to Global Strategies for HIV Prevention. However Global Strategies for HIV Prevention are not parties to the action. Paragraph 5 implies that the Plaintiff was aware that Global Strategies for HIV Prevention was somehow involved either in the publication or printing or distribution of the works. The Plaintiff attached annexure "C" to the plaint and subsequently exhibited as exhibit PE 3 as evidence that it granted a licence to Global Health Preventive Strategies Inc. In such a case, the Plaintiffs cause of action in so far they are responsible for granting a licence to publish the works would be against Global Strategies for HIV Prevention which is not a party. In any case the Plaintiff does not aver that the Defendants are sued in any capacity as the representatives of Global Strategies for HIV Prevention. Global Strategies for HIV Prevention would in the very

least have been a necessary party. Last but not least the books were donated to the second Defendant which is an NGO involved in charitable work. The second Defendant likewise distributed the books free of charge for a charitable purpose. The second Defendant is involved in sponsoring vulnerable children. They received the books by post from a donor. Particularly a founder of the donor organisation Dr Amman donated the books. DW 2 who is also the first Defendant specifically testified that the books were not for sale. The second Defendant to whom the books had been donated had no choice in the matter. The books were simply donated for charitable purposes to which they were applied. As to whether the books were published under a licence from the Plaintiff is a matter that can be properly considered in a suit between the Plaintiff and the donors. Had there been such a suit, the issue would be determined as to whether the donors had violated any of the Plaintiff's rights. The question of whether the donor had the right of distribution would also be resolved. Such issues cannot be resolved as between the Plaintiff and the Defendants in this suit. In the absence of clear evidence of violation of the publishers rights by either Global Strategies for HIV Prevention whose juridical capacity has not been disclosed in evidence (whether it is a Corporation or not) or Global Health Preventive Strategies Inc, with which the Plaintiff had a licence agreement, injunctions cannot be granted against the Defendants. In any case the averments in paragraph 5 that a licence was granted only to "Global Health Preventive Strategies Inc" and not to "Global Strategies for HIV Prevention" are matters to be addressed with those two parties and not the Defendants.

In the premises, the plaint and the evidence does not disclose any cause of action against the Defendants and the suit of the Defendant is accordingly dismissed with costs.

Judgment delivered this 11<sup>th</sup> day of April 2014

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Charles Okuni: Court Clerk

Moses Kuguminkiriza for the plaintiff

Plaintiffs MD Mr Mutaryebwa in court

Neither defendants nor counsel in court

**Christopher Madrama Izama**

**Judge**

**11<sup>th</sup> April 2014**