

UGANDA / JUDGMENT

Hesse v Senyonga (Civil Suit No. 612 of 2014) [2015] UGCommC 90 (25 June 2015)

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COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 612 of 2014

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THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 612 OF 2014

HESSE BRIAN (Through his Attorney) KWESIGA ROBERT}..... PLAINTIFF

VERSUS

1. SENYONGA PATRICK}
2. SENYONJO MECHAEL alias TATA ANNET}
3. KATO RICHARD alia HAKIM RICJARD alias GOEFRE MPANGA}
4. MARTIN MAKESA MBAZIRA}
5. MOSES KYEYUNE alias TATA MARTHA}
6. NANZIRI GRACE}
7. DANEILA IMAN NAKAWOYA alias SOPHIA IBRAHIM}
8. CHRISTINE NAGAWA}
9. SENYONGA JULIUS alias BURAH IBRAHIM}
10. KIRIIBWA TOURS & TRAVEL}
11. SSAJJABI GENERAL COMPANY LTD}
12. LWABENGE CHILD CARING COMMUNITY alias
COMMUNITY CHILD AND YOUTH CARE NETWORK

UGANDA ORGANISATION

1. ENHANCE AUTO COMPANY LTD}..... DEFENDANTS

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action on 2 September 2014 by virtue of powers of attorney granted to Kwesiga Robert in the state of Iowa in the United States of America granted by the Brian Hesse and Cowabunga Safaris, LLC. The power of attorney is annexure "A" to the plaint.

Secondly the plaint avers that the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 9th Defendants are all adult Ugandans presumed to be of sound mind who run an office located in Hotel Equatoria room 522 Kampala. Secondly the Defendants and 12 Defendants are Business entities engaged in business in Uganda with offices in Hotel Equatoria. It is averred that the 11th Defendant is a limited liability company duly registered under the laws of Uganda with offices in Hotel Equatoria too. Lastly it is averred that the claim against the Defendants is for recovery of US\$160,731, general damages, punitive damages, interests and costs of the suit.

The Plaintiff is represented by Mutambi – Mushega and Company Advocates.

The matter proceeded ex parte and the Plaintiff's witnesses relied on written witness statements which were adduced in court after they were severally sworn in as witnesses. PW1 who is the attorney of the Plaintiff filed a witness statement. His testimony is that he represents Prof Brian Hesse (an American citizen) and he works together with the Plaintiff in the business of tour and travel, offering and soliciting charitable funds/resources from some developed countries mainly America and Europe for developing countries especially in Africa and particularly and mostly in East Africa. They coordinate the business with Parrot Tours and safaris based in Tanzania – Arusha, and owned by Sofia Ibrahim Burah plus Yunina Company based in France owned by Pierre Boutonnet.

Cowabunga Safaris is fully registered and licensed in the United States of America since 2005 according to a copy of the certificate of registration exhibited as annexure "B". Parrot Tours and Safaris is also registered and licensed in Tanzania according to annexure "C" being a certificate of incorporation showing that it was registered on 9 October 1992 in Dar es Salaam Tanzania. Secondly it is also licensed under the Tourism Act No. 11 of 2008 of Tanzania.

His testimony is that the Plaintiff used to communicate using e-mail and sent e-mail to parrortours@yahoo.com while they would use Info@cowabungasafaris.com and Piereboutonnet@hotmail.com . The Plaintiff used to communicate with Sophia Ibrahim for about 10 years.

In May up to August 2013, the Plaintiff got to learn that Sofia Ibrahim had not received any funds totalling US\$50,443 which had been requested for by the Defendants in Uganda and not through Tanzanian banks as had been the case. The Ugandan bank accounts the Defendants set up are in KCB Oasis branch account number 22016895050 in the names of Sofia Ibrahim Burah with the 7th

Defendant as signatory. The account was opened on the recommendations of the 3rd Defendant. There was a DFCU bank account freedom city branch account number 01191110865692 in the names of the 12th Defendants. The first and sixth Defendants are signatories to this account. Defendants number five acted as secretary while Defendants number two acted as administrator and Defendants number eight as publicity secretary. Another account was with Global Trust Bank account number 1210100528 in the names of Burah Ibrahim S with the photos of a young man and not Sofia Ibrahim according to annexure "D".

Upon realising that the Plaintiff was sending money to fraudsters in May 2013, and in a bid to track and arrest the Defendants, the Plaintiff kept communicating normally with the defendants until the end of 2013 and the police got enough evidence and advised Sofia Ibrahim to allow her Internet service providers close the hacked e-mail account. In evidence are e-mails presented as sent by the Defendants to the Plaintiff relating to bank accounts which include banks in Japan annexure "E". The Plaintiff requested the Defendants to account for all funds they had received from the Plaintiff before the Plaintiff could offer more and the Defendants willingly accounted for up to US\$110,288 by attaching receipts, invoices and a handwritten letter on forged Parrot Tours and Safaris Letter heads annexure "F" attached proving a total of US\$160,731 stolen by the Defendants from the Plaintiff.

Because of the nature of the fraud, the Plaintiff solicited the help of the police to obtain evidence. The Uganda police force Investigative Directory case reference number is SD: 52/22/05/2013. Another case reference number is CRB: 1071/2013 at Central Police Station in Kampala but whose assistance was sought in obtaining evidence such as pictures of the Defendants used in the bank accounts as well as signatures and bank statements and proof of the monies the Defendants laundered from American and European banks to various Ugandan banks mainly from great Western bank in USA and France together with the locations the Defendants used to send e-mails from as introduced in evidence as annexure "G" to the statement.

The business of the Plaintiff as a duly registered company was to bring to Africa (East Africa) intern students who would tour African villages/committees and provide these villages with essentials like clothing, money, health education, NGO operations, entertainment etc. The interns did these as part of their education.

The worst part of the fraud was that in May 2013 funds which were specifically meant for interns were taken by the Defendants leading to embarrassment of Dr Brian. He was abused by the students, their parents and guardians and respective schools levelling the Plaintiff as a fraudulent person and collaborator with his African people to cheat his fellow statesmen. Accordingly the Plaintiff suffered irreparable damage, anguish and pain, loss of income totalling to US\$245,000 according to the audit report adduced in evidence.

The evidence of PW2 is that he is a Detective Assistant Inspector of Police assigned the task of recording a statement from the Plaintiff about e-mail hacking and theft of money swindled from both American and French banks and sent to Ugandan banks and investigating the complaint. He obtained the Plaintiffs e-mail address as well as that of Sofia Ibrahim and was provided with

photos of the two. The Plaintiff provided him with documents from great Western bank for the initial money the Defendants requested for to be wired to Ugandan banks and not Tanzanian banks as had previously been their practice. The Defendants were actively sending e-mails demanding for funds as usual and they kept the Defendants hoping by keeping in touch. The investigation established that the bank account number 22016895550 KCB Bank Kampala, Oasis Branch was involved in fraud by establishing that when beneficiary students arrived in Tanzania, it was realised that their money had been rerouted to Uganda where the real Sofia Ibrahim had no business. PW2 obtained a picture of the account holder, a young lady very much unlike the much older Sofia Ibrahim of Tanzania. This is the seventh Defendant. Additionally PW2 established an account opening document recommending the cardholder the third Defendants. Money had been withdrawn by the Defendants about Uganda shillings 20,000,000/= from the same account. Thereafter money was shifted from KCB account to DFCU account for Messieurs Lwabenge Child Caring Community account number 01191110865692 were signatories are the first and sixth Defendants according to a copy of the document attached to the statement.

PW2 failed to arrest the Defendants from the oasis branch of the KCB bank. The Plaintiff wired more "bait" money to the DFCU account and a trap was laid for the Defendants whereupon the first Defendants was arrested in the bank. The first Defendant received persistent calls from his teammates who were kept sending messages enquiring whether the deal had gone through before they knew that the first Defendants had been arrested. The persons who called the first Defendants upon his arrest were Defendants, number two and four and Defendants number five who are all brothers. Copies of the messages were annexed. Further evidence was obtained from the first Defendants. The first Defendants operated his father's company Defendants number 11 and had a forged letters from the local councils.

The Defendants also requested the Plaintiff to wire money into a Japanese company bank account for Enhance Auto the 13th Defendant Company.

Finally Sofia Ibrahim from Tanzanian was requested to block her e-mail account which had been hacked into. The Defendants were tracked through the e-mails to Uganda and tracked using Warid Telecom gadgets. The witness compiled his investigation into the report annexure "K" attached to his witness statement. Currently the Defendants are on bail after they had been charged.

The Plaintiff's Counsel Mutambi Mushega addressed the court finally in the written submissions. I have gone through the written submissions. As noted earlier the hearing of this suit proceeded ex parte and in default of filing a defence by the Defendants. Issues were framed on the basis of the Plaintiffs claim and the evidence by the Plaintiff's Counsel.

1. Whether the Plaintiff's money was embezzled by the Defendants?
2. Remedies available to the Plaintiff?

The Plaintiff's Counsel addressed the court on the evidence. He relied on the e-mails as well as the e-mail accounts of the Plaintiff, one Sofia Ibrahim and e-mails from the Defendants. He further relied on the bank accounts and KCB bank account number 2201689555 in the names of one Sofia Ibrahim (who impersonated the actual Sofia Ibrahim). These include photos for account opening and account opening instructions. Further evidence concerns accounts 0103494 Rezona Bank Izumiotsu branch in Osaka Japan. Account number 1210100528 of Global Trust Bank in Kampala. Monies wired by the Plaintiff to those accounts and how the Defendants were traced by PW2. Furthermore a trap was laid for the Defendants by the Plaintiff by wiring US\$24,785 from Great Western Bank of USA to DFCU bank Uganda whereupon the first Defendant was arrested while attempting to withdraw this sum. The first Defendant disclosed the identities of the rest of the Defendants and finally the Defendants voluntarily accounted for US\$110,288 at the request of the Plaintiff.

The Plaintiff's Counsel relies on the testimony of PW1 and PW2 which have been summarised above. He submitted that the evidence discloses that the Defendants are brothers and sisters namely Defendants number one, two, three, five, six, eight are brothers and sisters while Defendants number three and nine are their cousins. The Defendants number seven is the wife of the Defendants number four. Investigations were carried out by Face book investigators and cell phone book records revealed that the Defendants were linked with the transactions. He submitted that there was no doubt that the Defendants laundered money, impersonated Sofia Ibrahim, forged bank and Sofia's signatures, uttered false documents and forged bank stamps to convince the Plaintiff to believe in them. They illegally accessed a computer by hacking into e-mail of parrottours@Yahoo.com and were able to block the real Sofia Ibrahim from communicating with the Plaintiff.

On the question of remedies available to the Plaintiff submitted that the unchallenged evidence of PW1 was that the Defendants hacked into the e-mail addresses of his business partner and intercepted and embezzled money sent to Sofia Ibrahim by the Plaintiff in the sum of US\$160,731. It was established that Sofia Ibrahim in May 2013 had not received a sum of US\$50,443 which had been wired to her. Instead the money had been received in the Defendant's account number 22016895550 with KCB bank oasis branch in the names of Sofia Ibrahim Burah who in actual fact is the seventh Defendant. The Plaintiff established on the recommendation of the third Defendants account number 0119330865692 was opened with DFCU bank Freedom city branch in the names of Lwebanga Child caring community when the first, sixth and 12th Defendants as signatories. If it Defendants as secretary, second Defendants as administrator and eight Defendants as publicity secretary. The account number 1210100518 was opened with Global Trust Bank Kikuubo Branch in the names of Burah Ibrahim S, a young man. The Plaintiff discovered the fraud in May 2013 and in order to track the Defendants kept on communicating with them as if he was unaware that they were defrauding him. The Defendants were made to account to the Plaintiff and voluntarily accounted for US\$110,288. In addition US\$50,443 was established as being fraudulently received between May and August 2013 giving a total of US\$160,731 by the Defendants.

On the basis of the facts the Defendant's Counsel submitted that it is undisputed that the Defendants hacked into the e-mail by stealing a password from a computer, access to vital information and/or materials without any authorisation. The Defendant's actions were illegal and therefore an authorised and done with the intention to defraud. He relied on the case of **Uganda versus Guster Nsubuga, Farruk Mugere Ngobi, Owora Patrick and Byamukama Robinhood** where it was held that under section 20 of the Computer Misuse Act, the offence carries a sentence of life imprisonment. He further relied on an American case of **United States Court for Eastern District of Evans, Donnell, Young, Dole and Fruit, PC (Plaintiffs) vs. Crane, Poole and Schmidt LLC and Alan Shore (Defendants)** involving computer fraud by hacking. The Defendants were fined and given heavy deterrent pecuniary damages to pay. The law provides that whoever knowingly and with intent to defraud, accesses a protected computer (by password protection) without authorisation, or exceeds authorised access, and by means of such conduct furthers the intended the fraud and obtains anything of value, commits an economic offence and is heavily fined. He prayed that the court awards US\$160,731 in special damages.

Counsel further prayed that the court makes an order to restrain the Defendants from disposing of property which they purchased using the Plaintiff's money. He further prayed for heavy punitive damages as a deterrent measure against the Defendants which should serve as a warning to whoever may be contemplating to engage in similar acts. He further submitted that hacking is a growing business which is unlawful all over the world. He further prayed that the Plaintiff is awarded US\$245,000 per year according to the audit report on court record, for loss of income. He prayed for interest at the rate of 40% and from the time of filing the suit till payment in full.

Judgment

I have carefully considered the Plaintiff's suit as contained in the pleadings as well as the evidence adduced. Judgment in default was entered and this suit was set for formal proof. The Plaintiff called two witnesses and closed his case whereupon the court was addressed in written submissions. Formal proof requires proof on the balance of probabilities. The Plaintiff's Counsel seems to rely on penal provisions under the Computer Misuse Act, Act 2 2011 to pin liability on the Defendants.

In a letter dated 17th of December 2014 and filed on court record on 19 December 2014, the Plaintiff wrote to the registrar of the High Court, commercial division informing the court that the Defendants were effectively served on the 23rd 24th of October 2014 and acknowledged receipt of the summons. However the honourable registrar Vincent Emmy Mugabo wrote on the letter that efforts should be made to serve all the Defendants personally. This was on 19 December 2014. He accordingly issued fresh summons on 22 December 2014 for service on the Defendants.

The record shows that on 15 January 2015 one Oboth Lawrence, a process server of the High Court filed an affidavit of service sworn on the same day in which he deposes that on 12 January 2015 he once again received 13 court summons to file a written statement of defence for service on all the Defendants at their office situated at Hotel Equatoria shopping arcade room 522 opposite Kampala Central Division KCCA offices or wherever they could be found.

In paragraph 5 he deposes that on 14 January 2015, he rang Defendant number one Mr Patrick Ssenyonga who had earlier on received the same summons for delivery to his co-Defendants and they agreed to meet on 15 January 2015 at Speke hotel with all his co-Defendants. He deposes that on 15 January 2015 he waited for the first Defendants and after 40 min from 10:30 AM Patrick arrived accompanied by three ladies and 4 men whom he introduced as co-Defendants naming them one by one. In paragraph 8 deposes that all the Defendants signed acknowledging receipt of summons. I have carefully perused the attached summons and on the flipside is a list of names and signatures against the list of names corresponding to all the Defendants in the summons. What is puzzling is the fact that the process server was introduced to 3 ladies and four men by one of the Defendants making a total of eight Defendants. However service was acknowledged by all 13 Defendants according to the return on the summons.

In the absence of any forensic examination it is apparent from a perusal of the names and signatures of those who appended their signatures that one Christine Nagawa signed on her own behalf and also on behalf of Lwabenge N. G. O. secondly one Ssenyonga Patrick signed on his own behalf and on behalf of Ssajjabi Trading Company. Thirdly Michael Ssenyonjo signed on his own behalf and on behalf of Enhance Auto Company Ltd. Last but not least one Kato Richard signed on his own behalf and on behalf of Kiriibwa Tours & Travel. Consequently in addition to the eight Defendants, four of them signed on behalf of a business entity. Apparently this gives a total of 12 Defendants. Despite the fact that one signature is unaccounted for, the acknowledgement shows that all the Defendants acknowledged service.

The process server relied on the first Defendant to identify all the other Defendants. It is apparent from the affidavit of service that the process server made no other effort to identify the Defendants. This is apparent from paragraph 6, 7 and 8 of the affidavit of service. He was merely introduced to 4 men and three ladies some of whom signed on behalf of the other entities.

Order 5 rules 9 of the Civil Procedure Rules prescribes that where there are more Defendants than one, service of the summons shall be made on each Defendants. Secondly Order 5 rule 10 prescribes that whenever it is practicable, service shall be made on the Defendants in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient.

Order 29 of the Civil Procedure Rules and rule 2 thereof prescribes that service on a corporation of summons shall be on the secretary or any director or other principal officer of the corporation or leaving it or sending it by registered post addressed to the corporation at the registered office and if there is no registered office, at the place where the corporation carries on business.

There is no evidence of proper service on the 10th, 11th, 12th and 13th Defendants which are entities whose description leaves a lot to be desired. The 10th Defendants is simply Kiriibwa Tours and Travel. It is unknown whether it is a registered entity or not. Is it sole proprietorship or a partnership, who is the proprietor or are the proprietors on the face of the pleadings? Secondly the 11th Defendant Sajjabi General Company Ltd is described as a limited liability company. However there is no information as to who are the directors or principal officer or secretary of the corporation. Where is its registered office? Thirdly Lwabenge Child Caring Community alias Community Child and Youth Care Network Uganda Organisation is described as an NGO. Who are the directors? Who are the principal officers or secretary? Can the corporation have an alias? Last the 13th Defendants Enhance Auto Company Ltd is also a limited liability company.

On 5 February 2015 in a letter dated 5th of February 2015 the Plaintiff's Counsel wrote a letter to the registrar commercial division of the High Court praying for judgment to be entered in default of filing a defence. On 5 February 2015, judgment was entered as prayed against all the Defendants.

I have carefully considered the letter on which the honourable registrar Thaddeus Opesen entered judgment. The letter reads in part as follows:

"In the circumstances we humbly pray that a default judgment be entered in favour of the Plaintiff for recovery of US dollars 160,731 stolen from the Plaintiff, an order barring the sale or transfer of properties acquired by the Defendants/their agents using the Plaintiffs money, an order for attachment and sale of the properties that belong to the Defendants and or their agents, general damages for loss of income/business/mental torture/anguish and inconveniences suffered by the Plaintiffs as a result of the Defendants unlawful deeds, punitive damages as a deterrent measure/lesson against the Defendants/their agents for any would be offended, interest at the rate of 40% per annum as prayed for on some of the above from the time of filing till full payment, costs of the suit and any other relief this honourable court may deem fit."

The letter is signed for Counsel for the Plaintiff and on the same page are the words "JUDGMENT is entered as prayed this 5th day of February 2015, and the suit is hereby set down for formal proof on 2 March 2015." It was duly issued by the registrar with the seal of the court.

Default judgment is governed by Order 9 rule 6 of the Civil Procedure Rules which provides as follows:

"Where the plaint is drawn claiming a liquidated demand and the Defendants fails to file a defence, the court may, subject to rule 5 of this Order, pass judgment for any sum not exceeding the sum claimed in the plaint together with interest at the rate specified, if any, or if no rate is specified, at the rate of 8% per year to the date of judgment and costs."

Order 9 rule 6 of the Civil Procedure Rules however applies to one Defendant. Where there are several Defendants, the applicable rule is Order 9 rule 7 to the same effect.

The letter of the Plaintiff's Counsel does not specify whether the liquidated demand was awarded. The truth of the matter is that the letter contained a draft order with space for the registrar to issue judgment according to the wording in a letter of the Plaintiff's advocate. Consequently by issuing the order, the reading of the judgment of the court is specifically a reading of the drafting of the Plaintiff's letter through his advocates. Under those circumstances, judgment was drafted for the registrar to issue without specific reference to the Order or applicable rule of the Civil Procedure Rules. This leaves a lot to be desired because a judgment, even a judgment in default of appearance, speaks for itself. The judgment issued when read in context demonstrates that there was an award of a liquidated amount claimed in the plaint of US\$160,731.

Interlocutory judgment on the other hand is entered under Order 9 rule 8 of the Civil Procedure Rules. It provides that where a plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the Defendants or Defendants fail to file a defence on or before the day fixed in the summons, the Plaintiff may enter an interlocutory judgment against the Defendants or Defendants and set down the suit for assessment by the court of the value of the goods and damages.

The import of the above rules, namely Order 9 rules 5, 6, 7 and 8 of the Civil Procedure Rules, is that there is a judgment for the liquidated amount claimed in the plaint in default of filing a defence with interest at 40% per annum. Unless it is set aside, the order will stand and the mandate to the court is only to assess damages. Any other approach would have the effect of setting aside the award of the registrar issued in default of a defence by the Defendants.

I have carefully considered issue generated by the state of affairs. The Plaintiff indeed claimed 160,731 U. S. dollars together with interest 40% per annum from the time of filing the suit until payment in full.

I have carefully considered the power of attorney annexure "A" to the plaint. A power of attorney purports to be a power of attorney donated by Cowabunga Safaris, LLC/Brian J. Hesse of 2715 Q. Avenue, Clarinda, Iowa 51632, \USA, described as an aggrieved party to the claim wherein through Internet fraud (cyber crime); the Defendants were treated of business cash. The power of attorney is signed, sealed and delivered for and on behalf of Cowabunga Safaris LLC/Brian Hesse on the 26th of July, 2013. The power of attorney is also a registered in Uganda. Dr. Brian Hesse signed the power of attorney and is described therein as the "sole Owner/Sole Agent/Sole Director of Cowabunga Safaris LLC."

In paragraph 2 of the plaint, it is averred that the Plaintiff brought this action in his capacity as the holder of powers of attorney of Hesse Brian trading as Cowabunga Safaris. The status of Cowabunga safaris either as a company or a business name is not disclosed in the plaint.

The power of attorney is witnessed to by a Notary Public and sealed by the notarial seal in the state of Iowa in the United States of America. It is registered by the Registrar of documents in the Republic of Uganda. Under the Evidence Act Cap 6 laws of Uganda and particularly section 84 thereof, the court shall presumed that private documents purporting to be executed out of Uganda were so executed and were duly authenticated and that the instances stated in the

subsections (a) – (e). I have carefully considered the subsections to section 84 of the Evidence Act. Subsection (a) deals with the documents executed in the United Kingdom. Subsection (b) deals with documents executed elsewhere other than in the United Kingdom, when executed in the Republic of Ireland or in any country of the Commonwealth outside Africa. Subsection (c) deals with documents executed in any country of the common wealth in Africa. Subsection (d) deals with documents executed in any place outside the Commonwealth and the Republic of Ireland when it purports to be authenticated by the signature and seal of office of a foreign service officer of Uganda or of a British Consul or diplomatic agent in such foreign place; or of any secretary of state, under Secretary of State, Governor, colonial secretary, or any other person in that foreign place which shall be shown by the certificate of the consul or diplomatic agent of that foreign place in or for Uganda to be duly authorised under the law of that foreign place to authenticate the document.

The next subsection (e) is inapplicable to the facts of the Plaintiff's case. However subsection (d) applies to be United States of America because it is not part of the Commonwealth and the Republic of Ireland. In other words as a private document the power of attorney may be presented as a private document executed outside Uganda and outside the Commonwealth and the Republic of Ireland, required to be authenticated by the signature and seal of office of a foreign service officer of Uganda or of the British consul or diplomatic agent in such foreign place or by any secretary of state, under Secretary of State, Governor, colonial secretary, or any other person in that foreign place which shall be shown by the certificate of the consul or diplomatic agent of that foreign place in or for Uganda to be duly authorised under the law of that foreign place to authenticate the document.

Annexure "A" was not however authenticated according to the requirements of section 84 (d) of the Evidence Act is that was necessary. I have further considered section 85 of the Evidence Act which deals with the presumption as to powers of attorney. It provides as follows:

"The court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public, or any court, a judge, magistrate, or representative of any government of the Commonwealth, was so executed and authenticated".

Having perused the previous section 84 of the Evidence Act, the persons referred to under section 85 seems to refer to persons in the Commonwealth. The question is whether section 85 of the Evidence Act includes in its purview powers of attorney executed outside the Commonwealth? I have carefully considered section 85 of the Evidence Act and come to the conclusion that it is refers to every document purporting to be a power of attorney irrespective of the country of origin of the document. Secondly by using the words "or" in giving the category of persons who may authenticate a power of attorney, the conclusion is that it refers to a power of attorney authenticated by a Notary Public, or the court, a judge, magistrate, or representative of any government of the Commonwealth. It applies to "every document purporting to be a power of attorney."

It follows that the power of attorney having been authenticated by a Notary Public of the state of Iowa in the United States of America is presumed to have been so executed and authenticated and is acceptable under order 3 of the Civil procedure Rules as authorising the attorney bring an action on behalf of the donor of the power.

The last procedural hurdle considered was at my request as to whether any of the Defendants who are facing prosecution were in Jail at the time of service of the summons. With the leave of court the Plaintiff adduced in evidence by affidavit of D/AIP KASINGA GODWIN the police officer involved in investigating allegations of e-mail hacking and theft of money, the subject matter of this suit. He deposes that he fully investigated the matter and there was overwhelming evidence against the suspects who were apprehended and taken to a criminal court. In paragraph 3 of his affidavit he deposes that none of the suspects in Uganda or outside Uganda are in jail but are were moving about freely pending the outcome of the court proceedings.

I have carefully considered the effect of the order of the registrar entering judgment based on the drafting and the wording of the order in a written letter of the Plaintiff's Counsel quoted above. I considered whether to set it aside because it leaves a lot to be desired. Where judgment in default is prayed for, it is prudent for the registrar to enter judgment in his own handwriting or typescript specifying the particular rule under which the order is made and also indicating whether an award of the pleaded liquidated damage has been made and how much if necessary. When the drafting of the order is also part of the letter applying for the default judgment, there is a danger that the Plaintiff's Counsel will include unnecessary material in the drafted order below the letter applying for the order. This is apparent from the letter applying for default judgment considered in this suit.

Notwithstanding my conclusion that a judgment for the liquidated amount claimed in the plaint was entered on 5 February 2015 by the registrar of this division of the High Court, I would still consider whether the Plaintiff has proved its suit against the Defendants on the balance of probabilities. The judgment thereon shall abide the outcome of the finding of this court which will modify the default judgment according. The primary question in the written submissions is whether the Plaintiff's money was embezzled by the Defendants? The issue as framed by the Plaintiff's Counsel is inappropriate for a civil suit as embezzlement is a criminal law offence under the Penal Code Act and now the Anti Corruption Act 2009. Section 19 of the Anti Corruption Act 2009 defines the offence:

"19. Embezzlement.

A person who being—

- (a) an employee, a servant or an officer of the Government or a public body;
- (b) a director, an officer or an employee of a company or a corporation;
- (c) a clerk or servant employed by any person, association or religious or other organisation;

- (d) a member of an association or a religious organisation or other organisation, steals a chattel, money or valuable security—
- (i) being the property of his or her employer, association, company, corporation, person or religious organization or other organisation;
- (ii) received or taken into possession by him or her for or on account of his or her employer, association, company, corporation, person or religious organization or other organisation; or
- (iii) to which he or she has access by virtue of his or her office;

commits an offence and is liable on conviction to a term of imprisonment not exceeding fourteen years or a fine not exceeding three hundred and thirty six currency points or both.”

The accused person has to be an employee, a servant or an officer of the Government or a public body, a director, an officer or an employee of a company or a corporation; a clerk or servant employed by any person, association or religious or other organisation; a member of an association or a religious organisation or other organisation and who steals property of his or her employer or organization or association. The person may receive or take into possession such property by virtue of his or her office.

Paragraph 6 of the plaint claims against the Defendants the recovery of US\$160,731, general damages, punitive damages, interest and costs of the suit. The effect of the facts constituting the cause of action suggests that the Plaintiff's action is for money had and received through fraud by the Defendants based on misrepresentation of the Defendants. In paragraph 11 of the plaint it is clearly averred that on various occasions and under various identities the Defendants while impersonating the identity Sofia Ibrahim hacked into her e-mail address and blocked her from communicating with the Plaintiff. That the Defendants purported to be in Arusha Tanzania and sent e-mails from the account of Sofia Ibrahim to the Plaintiff and requesting him to wire monies to the purported Sofia Ibrahim. In those circumstances it is alleged that the Defendants impersonated somebody contrary to law and solicited for monies from the Plaintiff which they put to their own use using electronic date. So the issue is whether the Defendants misrepresented themselves to the Plaintiff and caused the Plaintiff to pay to them the amounts claimed in the plaint.

The evidence which has been canvassed by the Plaintiff's Counsel speaks for itself and I will not repeat the witness testimonies. I have additionally perused the various documents which were produced by the two witnesses. PW1 Mr Kwesiga Robert, and the legal representative of the Plaintiff by virtue of powers of attorney (the donee of the power of attorney) granted by the Plaintiff testified and adduced several documents which remained unchallenged. The documents show that the Plaintiff is a limited liability company wherein the sole director and shareholder is Brian Hesse who jointly with the company Cowabunga Safaris LLC granted the powers of attorney. Secondly the certificate of incorporation of Parrot Tours and Safaris, incorporated in Dar es Salaam on 9 October 1992 shows that it is a registered company under a certificate of incorporation number 21767 of the Republic of Tanzania. Secondly it was licensed to carry on

business in the year 2014.

As far as the identities of the Defendants are concerned the documents produced include the KCB bank account card for account number 2201689555 introducing one Sophia Ibrahim as the operations manager. However the account name is in the names of Sophia Ibrahim of Kiriibwa Tours and Travel, which is the 10th Defendants. The Plaintiffs also adduced in evidence a DFCU bank signature card, Entebbe road branch introducing one Ssenyonga Patrick and Nanziri Grace of Lwabenge Child Caring Community together with a company resolution dated 18th of May 2012 giving the authorised signatories of the account. The relevant account reads as 91110865692. Also in evidence is the Constitution of Lwabenge Child Caring Community. The signatories are the first and sixth Defendants.

The list of members in the constitution has the names of the first Defendant Mr Ssenyonga Patrick, Kyeyune Moses who is the fifth Defendant, Senyonjo Michael who is the second Defendant, Nagawa Christine, the eighth Defendant and Nanziri Grace the sixth Defendant. Also in evidence is the personal accounts signature card of one Burah Ibrahim S, a businessman by occupation with the photo of a young gentleman. PW1 produced in evidence and a counterstatement of DFCU bank of Lwabenge Child Caring community showing that on 24 June 2013 they received money from the Plaintiff amounting to Uganda shillings 64,317,075/=. On 4 July 2013 there was a cash back transfer to the Plaintiff of Uganda shillings 48,747,075/=.

I have also perused several scanned invoices purporting to be from Parrot Tours and Safaris Ltd of Arusha Tanzania dated 5th of February 2013, charging, Cowabunga safaris. In a letter dated 12th of July 2013 there is a statement to Mr Brian of Cowabunga safaris. The statement shows an ongoing relationship and past transactions relating to safaris in East Africa. Another document entitled wire transfer of funds was also adduced showing that Sofia Ibrahim account number 2201689555 of KCB bank Kampala Uganda was the beneficiary of US\$39,220 on the 2nd of May 2013. On the 3rd of May 2013 she is the beneficiary of US\$1573 KCB bank Kampala. On the 28th of May 2013 US\$530 was wired to the same account. On 3 June 2013 US\$5000 was wired. On 24 September 2013 one Burah Ibrahim S was credited US\$3000. The document is however in French and it was never translated and I cannot make any conclusion about it. Last but not least on 18 June 2013 US\$24,785 was wired to account number 01191110865692 to Lwabenge Child Caring Community at DFCU bank Entebbe road branch.

Documents attached for Cowabunga Safaris 2013 revenue and expenses audit report by Swanson Tax and Accounting shows in 2013 Cowabunga Safaris based in the United States collaborated with Parrot Tours and Safaris Ltd based in Arusha, Tanzania to conduct two programmes. The owners of each Company namely Cowabunga Safaris represented by Brian Hesse and Parrot tours and Travel represented by Sophia Ibrahim had worked on such programmes since 2008. Thieves hacked into the mail of Parrot Tours and Safaris to steal money required for these programmes. They wrote that in May 2013 a “Serengeti to Swahili Coast” Safari had 19 participants in the programme. During July to August in Tanzania there was an experiential learning Safari with 16 students participating in the programme. The Safari was conducted at US\$4475 per person in May 2013.

In August 2013 was conducted at US\$3455 per person and the students additionally paid not less than US\$ 1700 each for a round trip and international airfare. It is further written by Swanson Tax Accounting that the ability of the Plaintiff to conduct its December 2013 Safari was undermined when as a victim of fraud, its accounts and cash flow were jeopardised. They further show that the Plaintiff minimally generates about US\$95,000 per trip with the goal of conducting two or more trips every year.

As far as PW2 is concerned similar documents were adduced. Additionally the KCB account statement of Sophia Ibrahim was produced showing some cash deposits. Additionally it is shown that the Plaintiff on the sixth of May 2015 wired Uganda shillings 3,897,651/=. Again the Plaintiff wired Uganda shillings 98,821,800/=. Thereafter 100,000,000/= was withdrawn on the 7th of May 2013. I have tried to scrutinise the documents attached by Detective Assistant Inspector of Police Kasinga Godwin who testified as PW2. The Plaintiff provided him with documents from great Western Bank for the initial money the Defendants had requested to be wired to Ugandan banks and not Tanzanian banks. The Defendants continued to send e-mails normally and it was agreed that the Plaintiff would keep the Defendants hooked while investigations continued and attempts are made to track the Defendants. It was noticed on arrival in Tanzania that the student's money had been stolen via Ugandan banks and the real Sophia Ibrahim did not have any business in Uganda. The Defendant number one eventually was trapped when more money was wired onto the Ugandan DFCU account. I have carefully considered the documents used by PW2 in tracking the transaction to the Defendants. In paragraph 10 he refers to an American information technology specialist who tracked specific e-mails requesting for funds from the Plaintiff and it was discovered that the Defendants operated in Uganda at Kireka using Uganda Warid Telecom gadgets. In Mombasa Kenya the Defendants used the Kenya education network and in UK London according to the e-mail tracking annexure "H". The Defendants were requested to give an accountability and a copy of the e-mail marked "I" shows a total sum of US\$160,000 which is also revealed in the bank statements in May 2013 plus invoices and receipts got from Kiriibwa Tours and Travel obtained after the arrest of the 9th Defendants.

I have carefully considered the e-mail tracking document attached to the witness statement of PW2 as annexure "H". It purports to identify the location where the e-mail address parrottours@yahoo.com sent e-mails from Kireka, Kampala Uganda. It also shows that the Internet service provider is Warid Telecom Uganda. The first document in Annexure "H" shows that the e-mail address was used on 18 April 2013 at 21:45 hours. The second e-mail tracking document shows that it was sent from Mombasa Kenya by parrottours@Yahoo.com. The Internet service provider is indicated as Kenya education network. In both cases the sender is Sophia Ibrahim. The time is 4th of July 2013 at 6:44 hours. The third e-mail address document gives an IP address in Uganda Kampala. It shows that the organisation is Warid Telecom Uganda and the Internet service provider is Warid Telecom Uganda.

The document Annexure "I" purports to be an e-mail from Sophia Ibrahim dated 4th of May 2013 giving a summary of money wired by Brian J Hesse. It is also addressed to the Plaintiff. Among other things it purports to write that in June 2012 Brian wired to Sophie US\$17,000 to the

Tanzanian account. In July 2012 Brian wired to Sophie US\$3030 to the Tanzanian account. In August 2012 Brian wired to Sophie US\$49,465 to the Tanzanian account. In February 2013 Brian wired to Sophie US\$39,220 to the Kenyan account. On the 3rd of May 2013 Brian wired US\$1573 to the Kampala account. The total amounts wired and paid was US\$110,288. Subsequent amounts relate to a May Safari with an invoice of US\$59,612. Extra arrangements were noted on 5 February 2013. In May Zanzibar extension of 18 persons per e-mails amounted US\$3030. Of the student Safari of 16 persons the amount is US\$41,760. The August Kilimanjaro climb extension for Jonathan Rivera US\$2460. The total amount due to Sophia Ibrahim was US\$107,215.

I have carefully considered the e-mail correspondence together with the other attachments referred to above. E-mail correspondence attached indicates that there was communication between Brian Hesse and Sophia Ibrahim. The e-mail addresses have already been referred to above. The e-mail correspondence is annexure "E" to the testimony of PW1. I have perused the correspondence in April 2013 giving the account details of KCB bank Uganda account number 2201689555 in the names of Sophia Ibrahim. This was on 18 April 2013 at 21:45 hours. On 29 April 2013 the Plaintiff was advised to wire US\$44,220 to the Kampala account. The Plaintiff agreed on the 2nd of May 2013 to wire US\$44,220 being the student Safari money plus US\$1500 to be changed into Tanzanian shillings. The total amount was US\$45,720 to be wired to the account. Subsequent e-mails also make reference to the August (2013) Safari. Further e-mails in May 2013 dealt with the October Safari and the inclusion of other persons. E-mail correspondence continued up to July 2013.

There was no attempt by the two witnesses to authenticate the various e-mails as required by the law. The Electronic Transactions Act 2011 defines a data message to mean data generated, sent, received or stored by computer means and includes voice. Section 7 of the Electronic Transactions Act deals with authenticity of data messages. It provides that the integrity of the information from time to time when it was first generated in its final form as a data message or otherwise can be presented if it passes in terms of subsection 2. Subsection 2 provides that the information is complete and has not been altered. Under section 8 (2) a person seeking to introduce a data message or electronic record in legal proceedings has the burden of proving its authenticity by evidence capable of supporting a finding that the electronic record is what the person claims it to be. Secondly the best evidence rule is applicable in respect of electronic record and is fulfilled upon proof of the authenticity of the electronic records system in or by which the data was recorded or stored. The court has to take into account several matters relating to the reliability of the manner in which the data message was generated, stored or communicated. These are the reliability of the manner in which the authenticity of the data message was maintained. It takes into account the manner in which the originator of the data message or electronic record was identified.

No attempts were made to authenticate the data message by way of the e-mails generated so as to establish for purposes of the law that the emails are what they purport to be. It should be proved that the e-mails were generated by the Defendants by impersonating Sophia and that they originate from Kampala, Uganda. Further guidelines for authentication of e-mails are provided

for by the Electronic Transactions Regulations 2013 Statutory Instrument 2013 No. 42. Under regulation 3 authenticity of the data message has to be proved by evidence proving that the data message is self authenticating. That the data message has the hash mark or meta data (meta data is obtained by making the computer reveal what is hidden from the screen view in usual display and it has features which identify a data message); That the data message is a public record; or there is some factual specificity about the process by which the information is created, acquired, maintained and preserved including evidence which include: that the person uses the computer from which the message originates; that the computer is reliable; that the person has developed a procedure for inserting data into the computer; that the procedure has inbuilt safeguards to ensure accuracy and identify errors.

Self authenticating data messages mean that the method has the same, inscription, local, logo, tag or other unique features identifying it with a particular business, institution or person and that the origin of the message is not in dispute. It should be proved that the message can be attributed to the originator under section 19 of the Principal Act (Electronic Transactions Act) which gives the instances where a person is said to have originated the data message.

I have carefully considered the complaint as well as the evidence of PW1 and PW2 on the e-mail information. The first hurdle relates to the testimony that the e-mail of Sophia Ibrahim was hacked into by the Defendants. "Hacking" is not defined by the definition section of the Computer Misuse Act, Act 2 of 2011. Section 3 of the Computer Misuse Act provides that a person secures access to any program or data held in a computer if that person views, alters or erases the program or data. Or the person copies or moves it to any storage medium other than that in which it was held or to a different location in the storage medium in which it was held. The person uses or destroys it or causes it to be output from the computer which it is held whether by having it displayed or in any other manner. Section 5 of the Computer Misuse Act defines authorised access. There are several other definitions which I do not need to go into. For purposes of the definition of "hacking", there is no technical definition in the Computer Misuse Act. However various offences are created and may meet the definition of the ordinary use of the word "hacking".

In this case it is alleged that the Defendants hacked into the e-mail address of one Sophia Ibrahim. There is no clear evidence as to whether they had access to the computer of Parrot Tours Ltd or whether they hacked into an Internet account at www.yahoo.com which is managed by the Internet service provider. The Internet service provider was identified as Warid Telecom Uganda limited as well as Kenya education network. Where was the e-mail account located? Section 12 of the Computer Misuse Act prohibits intentional access or interception of any program or data without authority or permission. Presumably the e-mail address at yahoo.com of Parrot Tours and Travel was protected by a password and there was unauthorised access as submitted by the plaintiff's counsel. Secondly information was accessed from that account by the Defendants which information was used to defraud the Plaintiff. Section 13 of the Computer Misuse Act 2011 prohibits unauthorised access for purposes of facilitating the commission of an offence or committing an offence. It is further alleged that the Defendants blocked the real

Sophia Ibrahim from accessing her e-mail account. The conclusion is that the standard required by the law for authentication and proving hacking equivalent to commission of offences under the Computer Misuse Act were not met.

This being a new area of law, I have as well considered section 8 (7) of the Electronic Transactions Act which provides that the section on authentication does not modify the common law or statutory rule relating to the admissibility of records, except the rules relating to authentication and best evidence.

The above notwithstanding the e-mail messages are strongly corroborated by other extraneous evidence. The information in the e-mail messages is corroborated by the bank information showing the amounts of money received from the Plaintiff by the Defendants in the physical account statements and information from the various banks in Uganda. PW2 the Assistant Inspector of Police who carried out the investigation was able to prove this information on the balance of probabilities. One of the suspects and the first Defendant was arrested on the basis of the e-mail information from DFCU bank in Kampala. The Defendants did not file a defence to rebut the bank statement evidence. The hearing proceeded ex parte and in default of a defence by all the Defendants.

From a further assessment of the evidence, the monies which the Plaintiff was sending to the Defendants were meant for safaris. Part of the money was paid back to the Plaintiff and is corroborated by the e-mail evidence attached. Notwithstanding the rigorous requirements to authenticate electronic data messages in accordance with the Electronic Transactions Act 2011 as well as the Electronic Transactions Regulations 2013, I am satisfied that the Plaintiff has proved his suit on the balance of probabilities.

The Plaintiff has proved that various amounts of money were paid to the Defendants for purposes of conducting a safari in Arusha Tanzania for American students. This money was diverted to accounts in KCB Bank, as well as DFCU Bank in Kampala Uganda. However the monies voluntarily accounted for related to past transactions in 2012. The actual amount of money proved by the e-mail correspondence is far less than that claimed by the Plaintiff as special damages amounting to US\$160,731.

Doing the best I can by calculating the amounts of money reflected in the accounts in the bank statements adduced, the following are the payments to be taken into account.

The Plaintiff sent to Lwabenge Child Caring Community (the 12th Defendants NGO) money on 24 June 2013 which was received and reflected in **Uganda shillings of 64,317,075/=**. This money was transferred back to the Plaintiff soon thereafter. The Plaintiff received back 48,747,075 on 4 July 2013. This left a balance of **Uganda shillings 15,570,000/=** is hereby awarded to the Plaintiff in the dollar equivalent at the exchange rate applicable on 24 June 2013 as against the 12th Defendant.

Secondly the Plaintiff sent to KCB bank account which is in the names of Sophia Ibrahim, the seventh Defendant whose actual names are Daniela Iman Nakawoya US\$39,220 on the 2nd of May 2013. Secondly on the 3rd of May 2013 the Plaintiff sent to the same account US\$1573. On the 28th

of May 2013 the Plaintiff sent US\$530. On 3 June 2013 the Plaintiff sent US\$5000. Lastly on 18 June 2013 the Plaintiff sent US\$24,785. This information is reflected in the various documents attached to the witness statements which evidence is unchallenged. It follows that US\$71,180 was sent to DFCU account 2201689555 in the names of Sophia Ibrahim.

This amount of money (US\$71,180) is awarded against the first Defendant Mr Ssenyonga Patrick, the 7th Defendant Daniela Iman Nakawoya and Messrs Kiriibwa Tours and Travel Ltd.

There is no evidence or insufficient evidence with regard to the money wired to Lwabenge (the 12th Defendants) to implicate the second Defendants, the third Defendants, the 5th Defendants, the 8th Defendants as well as the 4th Defendants. Some of the Defendants namely Kyeyune Moses, Ssenyonjo Michael and Nagawa Christine are members of the Association and were not implicated personally in the affairs of the corporation. In the premises this suit against the said Defendants is dismissed with no order as to costs.

The suit against the rest of the Defendants not mentioned is dismissed with no order as to costs. These are Enhance Auto Company Ltd and Sajjabi General Company Ltd. There is further no evidence that they were properly served according to the rules for service on corporations.

I have further considered the claim for general damages as well as exemplary damages. Exemplary damages according to Osborn's Concise Law Dictionary are damages awarded in relation to certain tortious acts (such as defamation, intimidation and trespass). 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. The Court of Appeal sitting at Nairobi in the case of **Obongo and another v Municipal Council of Kisumu** [1971] 1 EA 91 per Spry VP at page 94 considered this head of damage by citing with approval the case of **Rookes vs. Barnard** [1964] A. C. 1129. He said:

“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”.

Exemplary damages can be awarded for criminal acts. It does not matter whether they are referred to as punitive damages. It is supposed to act as a deterrent and to punish criminal conduct among other things. It is awarded where the wrongful conduct of the Defendants is calculated to procure some benefit at the expense of the Plaintiff.

Secondly general damages are meant to compensate the Plaintiff by putting him in a position he would have been had the injury complained of not occurred. The Plaintiff can be compensated adequately by an award of interest from August 2013 up to the date of judgment according to the purpose of interest decided by this court in the case of **Esero Kasule vs. Attorney General HCMA No 0688 of 2014** arising from **HCCS No 508 of 2003**. In that case I referred to the decision in the case of **Tate & Lyle Food and Distribution Ltd v Greater London Council and another** [1981] 3 All

ER 716 Forbes J at page 722 said that :

“I do not think the modern law is that interest is awarded against the Defendants as a punitive measure for having kept the Plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the Defendants wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the Defendant’s financial position) but at the cost to the Plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld.”

I have taken into account the fact that the Plaintiff obtained the money from clients and was going to make a profit. The Plaintiff was deprived of the profit to be earned. The interest awarded would reflect the prospective profits as if the Defendants had borrowed the money.

In the premises the Plaintiff is awarded interest on the above sums awarded at the rate of 20% per annum from August 2013 up to the date of judgment.

As far as the criminal conduct of the Defendants are concerned, electronic fraud has to be strongly discouraged and the Plaintiff is awarded exemplary damages of US\$50,000.

The order for attachment or preventing the Defendants from selling certain properties cannot be granted as it can be handled in the execution process.

Interest is awarded at 20% per annum on the aggregate sum from the date of judgment till payment in full.

The Plaintiff is awarded costs of this suit.

Judgment delivered in open court 26 June 2015

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Sseguya Elias holding brief for Counsel Mutambi Abel for the Plaintiff

The Plaintiff’s Attorney Mr. Kwisiga Robert in attendance.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

25/6/2015

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