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THE REPUBLIC OF UGANDA

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IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

Civil Appeal No. 0073 of 2013

(Appeal from the Decision of the High Court of Uganda at Kampala (Civil Division) before Musoke, J. (as she then was) dated 2nd April, 2014 in Civil Appeal No. 101 of 2011, sitting on Appeal from the decision of the Chief Magistrate's Court of Mengo at Mengo in Civil Suit No. 354 of 2010)

CELTEL Uganda Limited t/a ZAIN Uganda ::::::::::: Appellant
Versus

Karungi Susan ::::::::::: Respondent

Coram: Hon. Mr Justice Geoffrey Kiryabwire, JA
Hon. Lady Justice Monica Mugenyi, JA
Hon. Mr. Remmy Kasule, Ag. JA

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Judgment of Remmy Kasule, Ag. JA

This Appeal was preferred against the decision of the High Court (Musoke, J. (as she then was) sitting on appeal from a decision of the Chief Magistrate's Court of Mengo at Mengo, in which the Court substantially dismissed the appeal.

Background:

35 The Appellant was at all material times, a telecom service provider in Uganda, and the Respondent its customer. In 2009, the Appellant issued a printout for the Respondent's mobile telephone and handset number, to a third party, on the authority of an alleged Court Order. The printout contained the Respondent's call activity for the period from 1st December, 2008 to March, 2009.

40 The Respondent was aggrieved with the act of issuing the said printout, and in 2010, she sued the Appellant alleging that the issuance was done in breach of confidence, trust and privacy. The Respondent's case was that the issuance of the printout was done on the authority of an unauthentic Court Order. Further, that, her
45 then husband, one Lt. Col. Kusasira Stephen had had access to the said printout and as a result had evicted her from their matrimonial home on grounds that her call activity to a certain number indicated on the printout, had convinced him that she was engaged in an extra-marital affair with the user of that number.
50 Due to the inconvenience suffered following the breakdown of her marriage, the Respondent prayed for special, general and exemplary/punitive damages with interest. She also prayed for the costs of the suit.

In its Written Statement of Defence, the Appellant denied the
55 allegations contained in the Plaint. The Appellant averred that it could not reasonably be held liable for the breakdown of the Respondent's marriage.

On conclusion of trial, the learned trial Chief Magistrate believed the Respondent's case and evidence. She found that the purported



60 Court Order based on to issue the Respondent's printout
information was unauthentic. This would have been discovered if
the Appellant had exercised better due diligence to verify the said
Order, but the Appellant had been negligent in its verification of
the Court Order. The learned trial Chief Magistrate further found
65 that the issuance of the printout information had led to the
breakdown of the Respondent's marriage. As to the remedies, the
learned trial Chief Magistrate awarded to the Plaintiff, special
damages of UGX. 7,000,000=, general damages of UGX.
3,000,000= and punitive damages of UGX. 1,000,000=. Each
70 respective damages award was to attract interest at Court rate
from the date of Judgment till payment in full.

The Appellant was dissatisfied with the decision of the learned trial
Chief Magistrate and appealed to the High Court. The learned first
appellate Judge substantially upheld the decision of the learned
75 trial Chief Magistrate except the decision to award UGX.
1,000,000= as punitive damages, which she set aside.

Being dissatisfied with the decision of the learned first appellate
Judge, the Appellant now appeals to this Court on the following
grounds:

- 80 **1. The learned appellate Judge failed to evaluate the
evidence on record and made an erroneous Judgment.**
- 2. The learned appellate Judge erred both in law and in fact
by holding that the Appellant acted negligently in
enforcing the Court Order.**
- 85 **3. The learned appellate Judge erred in law and in fact by
holding that the Appellant failed to exercise the standard**

of care a reasonable and prudent person would have exercised.

90 4. The learned appellate Judge erred in law and in fact by holding that the collapse of the Respondent's marriage was a consequence of the Appellant's actions when there was no marriage in the first place.

95 5. The learned appellate Judge erred in law and in fact in awarding special damages which were not specifically proved.

The Appellant prayed this Court to set aside the Judgments of the lower Courts with costs. The Respondent opposed the Appeal.

Representation:

100 At the hearing, Mr. Joseph Mwenye, learned Counsel, appeared for the Appellant. Mr. Chandia Alex and Mr. Mugabi Silas Kahima, learned Counsel, jointly appeared for the Respondent. Written submissions were filed for both sides, and have been considered in this Judgment.

105 **Preliminary Objection to the Appeal:**

In the written submissions, Counsel for the Respondent submitted that the appeal was incompetent in its entirety and ought to be struck out. Counsel submitted that ground 1 offends **Rule 86(1)** of this Court's Rules, given that contrary to that provision, the said ground is general and does not specify the error in the Judgment of the first appellate Court which it challenges. Thus, the ground should be rejected and struck out considering that compliance with the relevant provision is

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115 mandatory. Counsel relied on the decision in **Ranchobhai Shivbhai Patel Ltd and Another vs Wambuga and Others, Supreme Court Civil Appeal No. 6 of 2017** in support of his submissions.

120 The second objection to the Appeal is that grounds 2 to 5 offend the provisions of **Section 72(1) and 74 of the Civil Procedure Act, Cap. 71**, which are to the effect that the points that may be raised on a second appeal must be those of law. Counsel emphasized that appeals are creatures of statute and must comply with the enabling law. The points raised in grounds 2,3, 4 and 5 are of mixed law and fact, and as such, Counsel
125 submitted that they ought to be struck out, as was done in the decision of this Court in **Lubanga vs Ddumba, Court of Appeal Civil Appeal No. 10 of 2011**. In that decision, the Court struck out a second appeal as incompetent for raising matters of fact and of mixed law and fact. Counsel contended that grounds 2,
130 3, 4 and 5 are similar to those in the **Lubanga case** decision and therefore, should also be struck out.

In reply, in respect to the objection to ground 1, Counsel for the Appellant submitted that following amendment of the said ground, after leave was granted by this Court, the Memorandum
135 of Appeal became compliant with **Rule 86 (1) of the Rules of this Court**. Therefore, the objection raised by Counsel for the Respondent ought to be dismissed.

140 With regard to the objection to grounds 2 to 5, Counsel for the Appellant argued that the Appellant is alleging in this appeal that the first appellate Court failed in its duty to properly

reappraise the evidence, and is asking this Court to intervene. This Court may only intervene by scrutinizing grounds of mixed law and fact, so as to satisfy itself as to whether the first appellate Court properly carried out its duty. Counsel relied on the decision of this Court in **Kulabiraawo vs Nalubega, Civil Appeal No. 55 of 2002** in support of his submissions on this point, and prayed this Court to follow the course taken in that case. In respect to the authority of **Ranchobhai Shivabhai Patel Ltd vs Henry Wambuga (Supra)** cited by the respondent, Counsel for the Appellant submitted that the authority was distinguishable and is inapplicable to the circumstances of the present case. In conclusion, Counsel prayed this Court to dismiss the objections to grounds 1, 2, 3, 4 and 5.

I have carefully considered the submissions on the preliminary objections to the grounds set out in the Memorandum of Appeal. The law is as stated by Counsel for the Respondent, that second appeals are limited to points of law only; not points of fact or of mixed law and fact. This is the import of the provision of Section 72 read together with Section 74 of the Civil Procedure Act, Cap. 71. Section 72 provides as follows:

“Appeals from Appellate Decrees

72 Second Appeal:

(1) Except where otherwise expressly provided in this Act or by any other law for the time being in force, an appeal shall lie to the Court of Appeal from every Decree passed in Appeal by the High Court, on any of the following grounds, namely that:

- (a) *the decision is contrary to law or to some usage having the force of law;*
- 170 (b) *the decision has failed to determine some material issue of law or usage having the force of law;*
- (c) *a substantial error or defect in the procedure provided by this Act or by any other law for the time being in force, has occurred which may possibly have produced error or defect in the decision of the case upon the merits.*
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(2)

Section 74 provides as follows:

“74. Second Appeal on no other grounds:

180 **Subject to Section 73, no appeal to the Court of Appeal shall lie except on the grounds mentioned in Section 72”.**

In the decision in **Lubanga Jamada vs Dr. Ddumba Edward (2016) UGCA 11**, I discussed the implication of the above highlighted provisions, as being that grounds of appeal in a second civil appeal to this Court must be those of law and not grounds of fact or of mixed law and fact. On how to decide whether a point is one of law, I stated:

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“An appeal on a point of law arises when the Court, whose decision is being appealed against made a finding on the case before it, but got the relevant law wrong or applied it wrongly in arriving at that finding, [or if] the Court reached a conclusion on the facts which is outside the range that the said Court would have

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arrived at, had that Court properly directed itself as to the applicable law.

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The error must be as a result of misapplication or misapprehension of the law. A manifest disregard of the law is an error of law. A question of law is about what the correct legal test is, as contrasted with a question of fact, which is concerned with what actually took place between the parties to the dispute. When the issue is whether the facts satisfy the legal test, then a question of mixed law and fact arises.

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Where, on a second appeal in a Civil Cause, the grounds of appeal are not of law but are of findings of fact or mixed law and fact, such grounds are wrong in law and are either abandoned by the Appellant or are struck out by Court”.

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Grounds 2, 3, 4 and 5 in this appeal are explicitly drafted as points of mixed law and fact in the Judgment of the learned first appellate Judge, and therefore contravene the provisions of the **Civil Procedure Act, Cap. 71**, highlighted above. Such grounds should not be presented on second appeal and certainly cannot be considered by this Court if so presented. The learned Counsel for the Appellant had the opportunity to amend those grounds so that each one became a ground of appeal in law only. Counsel however did not do so. He only prayed for amending in each ground the term “trial Judge” to “appellate Judge”, which amendment was granted. I would there sustain Counsel for the Respondent’s

220 submissions and strike out those grounds 2, 3, 4 and 5 of the
appeal as being wrong in law.

With regards to ground 1, the Respondent contends that the
ground contravenes the provisions of **Rule 86 (1)** of the Rules of
this Court. The Rule provides:

225 **“86. Contents of Memorandum of Appeal:**

**(1). A Memorandum of Appeal shall set forth concisely
and under distinct heads without argument or narrative,
the grounds of objection to the decision appealed against,
specifying the points which are alleged to have been
230 wrongfully decided, and the nature of the order which it
is proposed to ask the Court to make”.**

Ground 1 of the Appeal as amended stated:

***“The learned appellate Judge failed to evaluate the evidence
on record and made an erroneous Judgment and erred in
235 law”.***

Counsel for the Respondent contended that **Rule 86(1)** of the
Rules of this Court contains a mandatory requirement with regard
to the nature of a ground of appeal. The ground must specify in
what way and in what specific aspect of the decision being
240 appealed against did the Court that made the decision go wrong.
He relied on the Supreme Court decision in **Ranchobhai
Shivabhai Patel Ltd and Another vs Henry Wambuga and
Another Civil Appeal No. 06 of 2017 (unreported)**, where the
Court considered the import of **Rule 82(1) of the Supreme Court
245 Rules**, which is similarly worded as **Rule 86(1)** of the Rules of this

Court. This impugned ground of appeal had been worded as follows:

250 ***“The learned Justices of the Court of Appeal erred in law and in fact when they failed to evaluate the evidence on record and thereby arrived at a wrong conclusion”.***

Mugamba, JSC who wrote the lead Judgment, with which other members of the Court concurred held as follows:

255 ***“This ground is too general and does not specify in what way and in which specific areas the learned Justices of Appeal failed to evaluate the evidence. It does not set out the particular wrong decision arrived at by the learned Justices of Appeal. Rule 82(1) of the Rules of this Court provides as follows:***

Contents of Memorandum of Appeal:

260 ***(1)A Memorandum of Appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature***

265 ***of the order it is proposed to as the Court to make. In my view Rule 82(1), which is mandatory is intended to ensure that the Court adjudicates on specific issues complained of in the appeal and to prevent abuse of Court process. The general nature of ground 2 as***

270 ***presented allows the Appellant to ambush the Respondents with issues the latter would not have contemplated”.***

The impugned ground was consequently struck out. In this appeal ground 1 of the appeal is framed as already set out above. It faults the appellate High Court Judge for failing to evaluate the evidence on record without specifying the subject matter of the case to which this evidence related. The ground does not also set out how the Honourable appellate Judge failed to evaluate such evidence.

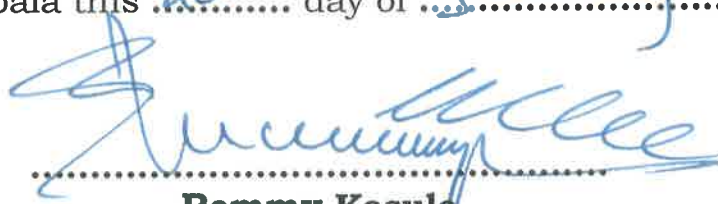
No instances of evidence, which the learned first appellate Judge is alleged to have wrongly evaluated are stated at all in this ground. Therefore on the principle articulated in the decision in the **Ranchobhai Shivabhai Patel Ltd case (Supra)**, the impugned ground contravenes the rules of this Court and is wrong in law. In the premises, ground 1 of the appeal has also to be struck out.

The final result is that ground 1 of the Appeal is struck out for contravening **Rule 86(1) of the Rules of this Court**. Grounds 2, 3, 4 and 5 of the Appeal are also themselves wrong in law. Each one of them is of both in law and fact, when, this being a second Appeal, each one of them ought to have been a ground of law only. They too stand struck out.

The whole Appeal is rendered incompetent and the same is struck out with costs to the Respondent. I uphold the decision of the first appellate Court.

Dated at Kampala this ^{20th}..... day of ^{July}..... 2021.

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Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0073 OF 2013

CELTEL UGANDA LTD T/A ZAIN UGANDA ===== APPELLANT

VERSUS

KARUNGI SUSAN ===== RESPONDENT

(An appeal from the decision of the High Court of Uganda at Kampala (Civil Division) before Musoke, J. (as she then was) dated 2nd April, 2014 in Civil Appeal No.101 of 2011)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

HON. LADY JUSTICE MONICA MUGENYI, J.A.

HON. MR. JUSTICE REMMY KASULE, Ag. J.A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA

I have had the opportunity of reading the draft Judgment of the Hon. Mr. Justice Remmy Kasule, Ag. J.A.

I agree with his Judgment and I have nothing to add. Since the Hon. Lady Justice Monica Mugenyi, J.A. also agrees, we hereby order that:-

1. The Appeal is hereby rendered incompetent and accordingly struck out.
2. The decision of the first Appellate Court is upheld.
3. Costs of this Appeal are awarded to the Respondent.

It is so ordered.

Dated at Kampala this^{23rd}..... day of ^{Sept}.....2021.


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HON. MR. JUSTICE GEOFFREY KIRYABWIRE
JUSTICE OF APPEAL



THE REPUBLIC OF UGANDA

**THE COURT OF APPEAL OF UGANDA
AT KAMPALA**

CORAM: KIRYABWIRE; MUGENYI, JJA AND KASULE, AG. JA

CIVIL APPEAL NO. 73 OF 2013

BETWEEN

CELTEL UGANDA LIMITED

T/ A ZAIN UGANDA APPELLANT

AND

SUSAN KARUNGI RESPONDENT

**(Appeal from the Judgment of the High Court of Uganda at Kampala (Musoke, J) in
Civil Appeal No. 101 of 2011, sitting on appeal from the decision of the Chief
Magistrates Court of Mengo in Civil Suit No. 354 of 2010)**

JUDGMENT OF MONICA K. MUGENYI, JA

I have had the benefit of reading in draft the lead Judgment of Hon. Justice Remmy Kasule, Ag. JA in this Appeal. I agree with the decision to strike out the Appeal, as well as the consequential orders outlined therein.

Dated and delivered at Kampala this ^{23rd} day of ^{Sept}....., 2021.



Hon. Lady Justice Monica K. Mugenyi
JUSTICE OF APPEAL