THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF APPEAL AT KAMPALA

CIVIL APPEAL NUMBER 0188 OF 2013

(An Appeal from the Judgment and decision of Hon. Mr. Justice Benjamin Kabiito dated 18th March 2013 in Civil Appeal No.105 of 2011)

BEN MUSHARI==========APPELLANT

VERSUS

DFCU BANK LIMITED

[By substitution]==========RESPONDENT

CORAM:

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

HON. LADY JUSTICE ELIZABETH MUSOKE, J.A.

HON. LADY JUSTICE IRENE MULYAGONJA, J.A.

JUDGMENT OF HON. MR. JUSTICE GEOFFREY KIRYABWIRE, J.A.

INTRODUCTION

This is a second Appeal. It arises from the Judgment of the Hon. Mr. Justice Benjamin Kabiito sitting as a first Appellate Court rendered on 18th March 2013. That first Appeal arose from Civil Suit No. 1634 of 2008 at the Chief Magistrates Court of Mengo at Mengo.

BACKGROUND

The Appellant was recruited to work in Iraq as a non-combat security guard by M/s Dreshack International Ltd in 2005. He opened up an account with the Respondent bank where his salary from Iraq would be electronically transmitted following an agreement entered into by the Appellant's Employer and the Respondent bank. The Appellant would also instruct the Respondent bank to pay out money from the same account. The parties agreed that in case the Appellant wanted to transfer money to another person, the Appellant would send a Standing Order for the transfer of his money from his account to third party accounts. It was further agreed that the Respondent would not honour any instructions from the Appellant unless the instructions were communicated through the Appellant's camp leader/security manager who was Mr. Doyle Daniel at the time. In August 2007, the Appellant discovered that the Respondent bank had transferred money to a one Tom Mugizi on 22nd June 2007 and 9th July 2007 without his consent and authorization. The Appellant informed the Respondent but the Respondent did not reply. The Appellant subsequently filed a suit in the Magistrates court for recovery of Ug Shs 8,020,000/= wrongly paid out from the Appellant's account.

The trial Magistrate found that the Respondent was negligent in transferring the Appellant's money to Mugizi Tom. Aggrieved by the trial Court decision, the Respondent then appealed that decision to the High Court (Civil Division). The first Appellate court reversed and set aside the decision of the trial court. Now dissatisfied with the Judgment of the first Appellate Court, the Appellant then lodged this second Appeal.

GROUNDS OF APPEAL

The Appellant raised four grounds of Appeal in the Memorandum of Appeal namely;

1. **Whether the Judge erred in law in finding that there was no payment instruction/ arrangement from the Respondent to the Appellant.**
2. **Whether the Judge erred in law and fact in finding that the Respondent paid money in accordance with the mandate.**
3. **Whether the Judge erred in law and fact in holding that the opinion of the handwriting expert was not a confident one.**
4. **Whether the Judge erred in law and fact in holding that the Respondent Bank was not negligent in the execution of the paying instructions.**

The Respondent raised one ground of Appeal in its Cross-Appeal: -

Whether the Judge erred in law and came to the wrong conclusion when he ordered that each party should bear its costs without giving reasons for ordering so

REPRESENTATION

The Appellant was represented by Mr. Patson Arinaitwe while the Respondent was represented by Mr. Peter Kawuma.

DUTY OF THE COURT

This is a second Appeal, and as such is governed by Section 72 of the Civil Procedure Act, Cap 71 which provides: -

"72. Second Appeal

A. 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;

a) The decision is contrary to law or to some usage having the force of law.

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..."

Section 72 is entrenched by Section 74 which provides that no Second Appeal shall lie except on the grounds mentioned in Section 72.

Under the Civil Procedure Act therefore, this Court is only required to consider errors of law made by the lower court. Rule 32(2) of the Judicature (Court of

Appeal Rules) Directions, SI 13-10 hereinafter referred to as the "Rules of this Court") further empowers this court in exercise of its jurisdiction as a second Appeal court, to appraise the inferences of fact drawn by the trial court.

Rule 32(2) of the Rules of this court provides that: -

"

On any Second Appeal from the decision of the High Court acting in the exercise of its Appellate jurisdiction, the court shall have the power to appraise the inferences of fact drawn from the trial court, but shall not have discretion to hear additional evidence...."

In the case of **Kifamunte Henry v Uganda** Criminal Appeal No. 10 of 1997 it was held that a second Appellate Court, except in the clearest of cases is not required to re-evaluate the evidence like a first Appellate court. However, where the first Appellate court has failed to do so or has applied wrong principles the second Appellate court must correct any errors committed.

In this Judgment I shall also resolve two other preliminary matters that came up when the Appeal was called for hearing as herein under.

PRELIMINARY OBJECTION

Counsel for the Respondent raised a Preliminary Objection on the grounds of Appeal. He argued that the grounds of Appeal that were raised were based on both mixed law and fact and yet grounds of Appeal in second Appeals must be only raised on matters of law. He relied on section 72(1) of the Civil Procedure Act.

He prayed that this Court dismisses this Appeal on ground that all four Grounds of Appeal were based on mixed law and fact. He referred us to the cases of **Mitwala**

Magyenge v Medadi Mutyaba SCCA No. 11/96 and **Kobusingye v Nyakana** SCCA No. 5 /04.

In response to the preliminary objection, counsel for the Appellant submitted that the first Appellate court had failed to discharge its duty to re-evaluate the factual evidence before it.

Counsel for the Appellant referred us to the case of **Kasoma Fred v Sembatya James** Civil Appeal No. 78 of 2011 for the proposition that whereas on second appeals this court does not have powers to subject evidence to fresh scrutiny, where it is clear that the first Appellate court failed to discharge this duty then it amounted to a failure at law as well.

COURT'S FINDINGS AND DECISION ON THE PRELIMINARY OBJECTION

The Respondent raised a preliminary objection that the Grounds of Appeal erroneously raised issues of mixed law and fact on second Appeal. In contrast, counsel for the Respondent submitted that there was an exception to the general Rule in section 72 if the first Appellate court failed to perform its duty of re-evaluation then a second Appellate court could do the re-evaluation.

In **Kifamunte Henry v Uganda (Supra),** the Supreme Court outlined the principles governing second Appeals as follows: -

"

On Second Appeals, the court is precluded from questioning the findings of fact of the trial court provided that there was evidence to support those findings though it may think it possible or even probable that it would not have itself come to the same

conclusion; it can only interfere where it considers that there was no evidence to support the findings of fact this being a question of law."

The Supreme Court has also had the occasion to state the duty of a second appellate court in **Ongom John Bosco v Uganda** Criminal Appeal No. 21 of 2007. It held as follows: -

"A second Appellate court is precluded from questioning the concurrent findings of facts by the trial and first Appellate courts, provided that there was evidence to support those findings though it may think it possible or even probable that it would not have come to the same conclusion. A second Appellate court can only interfere with such findings where there was no evidence to support the findings because this is a question of law. Inference legitimately drawn from proved facts by the trial and first appellate court must establish the guilt beyond all reasonable doubt. The above principles were echoed by the former court of Appeal for East Africa in ***Okeno v Republic*** *(1972) EA32 (where it held) it is appropriate on second Appeal only to decide whether a judgment can be supported on the facts as found by the trial and first Appellate court as this is purely a question of law.'*

In **Goustar Enterprises Ltd v Ouma** [2006] EA 77, court held that the second appellate court can only scrutinize the evidence on the record where it was clear that it had not been subjected to adequate scrutiny by either the trial court or the first appellate court.

I am also mindful of the finding of the Supreme Court in **Uganda Breweries Limited v Uganda Railways Corporation** Civil Appeal No. 6 of 2001 that;

"there is no set format to which the re-evaluation should conform. The extent and manner in which re-evaluation may be done depends on the circumstances of each case and the style used by the first appellate court".

Since the Appellant contests the manner of re-evaluation of the evidence by the first appellate Judge, it falls on this court to establish whether there was sufficient evidence to support the findings of fact, as this in itself is a question of law.

I will according over rule the preliminary objection and accordingly proceed to resolve the Appeal.

MISCELLANEOUS APPLICATION NO. 139 OF 2020

When this case came up for hearing, it was further established that the Appellant had filed Civil Application No. 139 of 2020 (Ben Mushari v DFCU Bank Ltd) seeking Orders that M/s DFCU Bank Limited (the successor in title to M/s Crane Bank) be substituted as the Respondent in this Appeal. This Court decided that the parties should first agree among themselves on whom the proper Respondent was before the Court made a decision. The Application was adjourned to 5th October 2020 when the counsel for the Respondent reported that he had consented to having DFCU Bank Limited substituted as the Respondent in this Appeal instead of Crane Bank Limited. They further agreed that costs of the application would be in the cause.

The Court found no reason not to accept this consent position and that resolved the matter.

The parties further agreed to adopt their conferencing notes and written submissions with the consent of Court. I shall now proceed to resolve the Grounds of Appeals.

GROUNDS 1 AND 2

Whether the learned Judge erred in law and in fact in finding that there was no payment instruction from the Respondent to the Appellant

And

Whether the learned Judge erred in law and fact in holding that the Respondent paid money in accordance with the mandate

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the Appellate Judge did not properly re-evaluate the evidence concerning the payment mandate in the standing Orders.

He submitted that the Appellate Judge erred in law and fact when he found that there was no payment instruction from the Appellant to the Respondent. It was submitted by counsel for the Appellant that the Appellate Judge overlooked the evidence on record when he found that the Respondent was to pay out money from the Appellant's account to anyone through any e-mail provided by the Appellant.

He submitted that the Appellant had been giving instructions for payment through the e-mail address of musharibenn@yahoo.com and yet the contested instructions were given from different e-mails namely benmushari@yahoo.com and benmushaari@yahoo.com. He argued that the Respondent ought to have obtained

confirmation from the Appellant on whether he had changed his e-mail address before making the payments to the said Mugizi Tom.

Secondly, counsel for the Appellant argued that the first Appellate Judge erred in law when he found that e-mails were not part of the standing Orders. However, it is the case for the Appellant that the medium of communication between the Appellant and the Respondent was through e-mails since the Appellant had been stationed in Iraq throughout the duration of his employment.

Thirdly, counsel for the Appellant submitted that the Appellate Judge erred in law and fact when he found that the Respondent Bank had paid money in accordance with the mandate.

He argued that the banking business is conducted through electronic media such as e-mail and online banking portals and as such bank mandates cannot only be taken to be a document and a passport or identification document.

RESPONDENT'S SUBMISSIONS

With regard to issue one, counsel for the Respondent submitted that the Respondent was consistent in honouring the mandate as communicated to it and cannot be faulted. He submitted that the findings by the first Appellate Court that Daniel Doyle, the Appellant's commanding officer was not part of the mandate as per the bank's instructions was correct.

He also submitted that the finding by the trial Court that the scanned copy of the passport had to be sent by Mr. Doyle was not an agreed fact and was not supported in evidence at the trial.

With regard to Ground two, counsel for the Respondent submitted that the mandate of payment agreed upon by the parties did not specify the e-mail address to be used in generating instructions. He submitted that the mandate to be followed was that the instructions to make a payment would be signed by the Appellant, accompanied by a copy of his passport. It is the case for the Respondent that this was the mandate that the Respondent followed when he made the two disputed payments.

Furthermore, counsel for the Respondent submitted that the Appellant delayed to make a complaint about the two disputed payments. He argued that the disputed payments were made on 22nd June 2007 and 9th July 2007 respectively while the Appellant made the complaint on 5th August 2007 weeks after the payments had been made and there was no way the Respondent would have reversed the transaction.

COURT'S FINDINGS AND DECISION

I have addressed myself to the record of Appeal, the submissions of both counsel and the authorities provided for which I am grateful. The point of contention here is around the Standing Orders (Exhibits S1 and S 2).

Counsel for the Appellant submitted that the first Appellate Judge did not correctly evaluate the evidence because he had that the Standing Orders did not require the Appellant to send payment instructions through his boss. On the other hand, counsel for the Respondent submitted that the first appellate Judge correctly re-evaluated the evidence since the content of the Standing Orders was an agreed fact between the parties.

The first Appellate Judge found on page 10 of the record of proceedings in regard to the standing Orders:

"

I have perused the record of proceedings and pleadings herein and find that there is no reference to any payment instruction arrangement from the Respondent to the Appellant to be forwarded to the Appellant through the Respondent's commanding officer as claimed.''

The first Appellate Judge relied on the agreed facts at the scheduling conference to find that the standing orders did not require the now Respondent bank to receive the paying instruction through the Appellant's boss's e-mail or through any e-mail.

He found as follows (at page 10 of the Record of Appeal): -

"With respect, the agreed facts at scheduling do not show that the mandate required the Appellant to receive the paying instructions through the Respondent's boss' email or through any particular e-mail. I do not appreciate where the learned trial magistrate based her holding that any particular arrangement had been agreed upon."

The Appellant in his testimony (at page 51 of the Record of Appeal) testified that the payment arrangement/mandate that was to be followed when he wanted money to be paid out to a third party was as follows: -

"

" My standing Orders were as pension from my S.I. the manager referred to as C.O. Commanding Officer. He would give me a photocopy form of standing order fill it and

return it to him, and would wait for others until we were about two or three to send the same. There was always accompanying document with the standing order a copy of passport kept by American Military Police. It was only the C.O. (site) manager who would get the same copies, and could scan the documents to the bank.

After the transaction the bank would e-mail to him to confirm that the transaction is done, and C.O. Commanding Officer would email you a copy...."

The Appellant also testified that he had no other way of sending money and that all his earnings were going to the account in crane bank.

On page 107 of the Record of Proceedings Daniel Doyle the site security manager officer where the Appellant worked sent an e-mail to the Operations Manager of the Respondent Bank complaining about the two transfers made to Mugizi Tom (This Email Correspondence was admitted as Annexture "C" dated 14th September 2007). He wrote: -

"It seems that this will continue to be a problem for those who have accounts with your bank. I was sure this would not happen again because your Bank had said that they would not take any more standing Orders unless they came from either myself or Mr. Danny Fowler. Not sure what happened here but it is very frustrating to see my employees losing their hard earned money in this manner"

This e-mail suggests that the following procedure was followed. That the Appellant would make a payment order, send it to his commanding officer for forwarding, then the commanding officer would after receiving several payment orders from several employees would then dispatch the said orders to the Respondent bank.

There is doubt if this procedure was no actually reduced in writing between the Appellant and the Respondent Bank. In this regard the Appellant testified as follows: -

"...The company called Drashke International forced all of us to open an account with Crane Bank. and I was told to use it for ease as I was going. I had an account with stanbic bank, a lady called Mantezi representing Drashke came to Iraq and took my photograph and passport copy, gave me a signature card which I signed and said in a few months I will be holding an account in Crane Bank as they preferred Crane bank was easier. She made a copy of my passport..."

The legal Principles which govern the relationship between a bank and its customer are well settled. The duty of a bank is to act in accordance with the lawful requests of its customer in the normal operation of its Customer's account. **See; Stanbic Bank v Uganda Crocs Limited** SCCA No.4 of 2004.

It is the case for the Appellant that in the two impugned transactions to one Mugizi Tom, the agreed instructions or process of making legal requests was not followed before the Respondent Bank paid out money to Mugizi Tom. In this regard, there was no approval from the commanding officer and when the Appellant inquired from the bank to know how the transactions had been approved he was advised to inquire from his site manager by the bank.

Furthermore, the Appellant testified (at page 52 of the Record of Appeal) that his e-mail address is MushariBen@yahoo.com. However the e-mail address where a request was made for payment of money to Mr. Mugizi Tom was the e-mail address of benmushaari@yahoo.com which has a different spelling of his name (see the e-mail exhibit at page 127 of the Record of Appeal).

The trial magistrate found: -

"So in summary, the undertaking was that in order for the defendant to release the plaintiff's money, he must see a filled standing order from the plaintiff with accompanying documents. A copy of his passport scanned by commanding officer forwarded to Defendant allowing the defendant to transfer any money from the plaintiff's account"

On first Appeal however, the Appellate Judge (at page 12 of the Record of Appeal) found: -

" ... I have perused the record and I find no evidence whatsoever that the Appellant admitted to the fact that the instructions came from the commanding officer; Mr. Doyle.

In any case, I have looked at two normal transactions that the Respondent verified as having been transacted with his authority and mandate. These are the following,

a) *The standing order instruction dated 22/04/2007 in favour of Boniface Mushare for Ug shs 5,000,000/= it is significant to note that these instructions have no endorsement that they were routed through the commanding officer or have any forwarding email address.*
b) *The request for one-time remittance dated 29/07/2007 in favour of Nyiramugisha Rahmat. It is significant to note again that there is no endorsement that this request was routed through the commanding officer. The request does, however, have an email address of the Respondent/plaintiff as mushariben@yahoo.com ..."*

I have looked for these two transfers which, the Appellate Judge refers to and are also pleaded in paragraph 4 (i) of the Plaint but unfortunately they are not part of the Record of Appeal.

I have further perused the Record of Appeal and have not seen any documentation between the parties that detailed Standing Instruction as alleged; in this dispute.

There is therefore no documentary evidence to support the oral testimony that the impugned payment mandate involved the Respondent bank first receiving a filled standing order form from the Appellant with accompanying documents including a copy of the Appellant's passport scanned by his commanding officer and forwarded to Respondent bank in order to transfer any money from the Appellant's account. The only banking document on record is a "Crane Bank signature card". In my view this does not support the standing order as alleged.

In this regard I am unable to find evidence to support the Appellant's contention that there did exist a specific mandate he gave the Respondent bank as to how to pay money from his account while he was away in Iraq.

These two grounds fail.

GROUND 3:

Whether the learned Judge erred in law and fact in holding that the opinion of the handwriting expert was not a confident one.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the Appellate Judge erred in law and fact when he found that the opinion of the handwriting expert was not a confident one.

He submitted that the handwriting expert had made his opinion after comparing two specimen documents; one had the Appellant's specimen signatures and the impugned signatures on the standing orders. Counsel for the Appellant submitted that a handwriting expert is expected to express without argument an opinion on whether two handwritings are the product of the same hand. He relied on the case of **Nguku v Republic** [2004]1 EA 188.

Counsel for the Appellant submitted that the Appellate Judge's finding that the handwriting expert's opinion was not categorical or unequivocal or certain enough for the Court to rely upon the said findings had the effect of raising the standard of proof beyond a balance of probabilities as legally required in civil matters.

He further argued that the evidence of the police detective (Pw3) corroborated the evidence of the handwriting expert (Pw2) in the sense that the Appellant did not sign the standing orders and this was not controverted in cross-examination.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent submitted that the Appellate Judge properly evaluated the evidence on record when he held that the opinion of the handwriting expert was not a confident one. He argued that there was no evidence to show that the instruction to pay the Ug Shs 6,010,000/= had not been signed by the Appellant.

In respect of the second payment of Ug Shs 2,000,000/=, counsel for the Respondent submitted that the Appellate Judge was correct to find that the opinion of the handwriting expert was not a confident one because of the use of the phrase "very

unlikely" in the handwriting expert's findings. He submitted that the evidence of the handwriting expert was not unequivocal or certain for any reliance to be placed on it for the questioned payment.

In this regard, counsel for the Respondent relied on the case of **Njuku v R** (Supra) for the proposition that if the opinion of an expert is a confident one and is unchallenged on cross-examination then the court is entitled to accept that opinion.

COURT'S FINDINGS AND DECISION

In this ground the question is whether the trial Judge erred when he found that the opinion of the expert was not a confident one and thus could not be relied on. Counsel for the Appellant submitted that this was an error in the law. On the other hand, counsel for the Respondent submitted that the Appellate Judge properly evaluated the evidence regarding the handwriting expert and was correct to find that the expert evidence was not a confident one.

The Exhibits that were examined by the handwriting expert were Exhibit S1 which was a photocopy of a Standing Order instruction allegedly from Mushari Ben dated 26th June 2007 to transfer Ug shs 2,000,000/= to Mugizi Tom and Exhibit S2 which was a photocopy of another document that was not readable. These were to be compared with exhibit D1 which was a photocopy of a Crane Bank signature card in the names of Mushari Ben and Exhibit D2 which was a specimen handwriting and signature of one Mushari Ben.

Nguku v Republic cited by both parties is good law as to what to consider in dealing with the evidence of a handwriting expert where it was held: -

"The most that an expert on handwriting can properly say in an appropriate case, is that he does not believe a particular writing was by a particular person, or positively, that two writings are so similar as to be indistinguishable; the handwriting expert should have pointed out the particular features of similarity or dissimilarity between the forged signature on the receipt and the specimen of the handwriting."

In this matter, the Appellate Judge relied heavily on the use of the words *"very unlikely"* in the handwriting Report to make his decision. The appellate Judge consequently found (at page 14 of the Record of Appeal) that the "Respondent" now Appellant failed to discharge the burden of proof that this payment was based on forged documentation. He further found (at page 15 of the Record of Appeal) that the handwriting opinion *was "not categorical or unequivocal or certain"* and therefore could not be relied upon. That part of the Report read: -

".... the alterations observed are such that in my opinion it is very unlikely that the author in the specimen signed the questioned documents...."

I have perused the Report and find that whereas there were some limitations in the documentation submitted to the handwriting expert, the expert further emphatically wrote (at page 117 of the Record of Appeal) that: -

"... There are ***fundamental differences*** *in the middle and ending formations. The middle crossing line in the questioned document is independent of the other characters while in the specimen this line is a linkage with the middle and ending characters..." (emphasis mine)*

Taking the above extract of the Report into consideration I am unable to find evidence to support the appellate Judge's finding that the handwriting expert report

was not categorical or unequivocal or certain. In this regard the first Appellate Judge erred in law.

I find therefore that the handwriting expert did in his Report point out particular features that showed that the signature in the exhibit was different from the specimen presented to him.

I, therefore, allow this ground.

GROUND 4: Whether the Judge erred in law and fact in holding that the Respondent Bank was not negligent in the execution of the paying instructions.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the Respondent bank was negligent when executing the payment instruction. He submitted that the first Appellate Judge erred in law when he held that the Appellant had not been negligent in executing the paying instruction.

He submitted that the banker had a fiduciary duty to act in good faith and had a duty to act without negligence. He submitted that the banker owed a duty of care to its customers to inquire about any payment so as to safeguard the client's money. He reiterated his earlier submission that the mandate of the bank was to pay when a standing order was made by the Appellant, with a validated signature and a copy of the passport attached. He argued that it was a fact that the Appellant had always been resident in Iraq when the said transactions took place.

He further submitted that the e-mail addresses used to send the contested standing orders made on 22nd June 2007 and 9th July 2007 were sent from e-mails different from the one which the Appellant used.

He relied on the case of **Barclays Bank of Uganda v Godfrey Mubiru** (SCCA No.1 of 1998) for the proposition that managers in the banking business have to be particularly careful and exercise a duty of care more diligent than managers of most businesses.

Counsel for the Appellant concluded his argument by submitting that the Respondent Bank owed a duty of care to the Appellant which they breached and the Appellant consequently suffered as a result of this breach.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent submitted that the Respondent was not negligent in the execution of the payment instructions.

He argued that the Respondent employed the necessary skill in executing the transactions as the signature on the transactions and the specimen were regular and similar.

He submitted that the Respondent had a mandate to pay upon a signed instruction from the Appellant accompanied by a copy of his passport and these two requirements were met on 22nd of June 2007 and 9th July 2007 respectively and all the different times that the Appellant transacted with the Respondent.

Counsel for the Respondent referred us to the case of **Joachimson v Swiss Bank Corporation** [1921] KB 110 for the proposition that the customer on his part

undertakes to exercise reasonable care in exercising his written instruction so as not to mislead the banker or to facilitate a forgery.

COURT'S FINDINGS AND DECISION.

This ground is inter –related to ground one where I have already found that standing orders were not established in evidence and it follows therefore that no finding as to negligence can be made on the basis of a banking mandate.

I therefore find that this Ground is not successful.

GROUND 5:

Whether the Learned Judge erred in law and fact in holding that the burden of proof remained wholly with the Appellant to prove that the Respondent acted without mandate, despite all the evidence that the Appellant produced at the Trial in the Chief Magistrate's court.

This ground was not contained in the Memorandum of Appeal. It was raised during conferencing. Counsel for the Appellant did not submit on it. I take it therefore that the Ground stands abandoned.

CROSS-APPEAL

Whether the learned Judge erred in law and came to the wrong conclusion when he ordered that each party should bear its costs without giving reasons for ordering so.

Given my findings in the main appeal so far, this Ground on costs in the cross appeal may not have much significance on the overall result of this appeal. However, since the Ground raises a point of law I nonetheless shall address the principle of law so raised.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent bank submitted that the Appellate Judge came to a wrong conclusion when he ordered each party to bear their own costs without giving reasons for ordering so. He argued that since the Respondent was the successful party it was entitled to the costs in the High Court and in the lower court.

He relied on section 27(2) of the Civil Procedure Act for this proposition. He referred us to the case of **Jennifer Behange v School Outfitters Limited** (Civil Appeal No. 33 of 1999) [2000] EA 20, for the proposition that successful party can only be deprived of his costs when it is shown that his conduct, either prior to or during the course of the suit, led to litigation which but for his conduct would have been averted. He prayed that the court makes a finding that the Appellant is liable to pay the Respondent's costs in the matter.

APPELLANT'S SUBMISSIONS

Counsel for the Appellant submitted that the Appellate Judge correctly ordered that each party to bear its costs since he had the discretion to do so. He relied on section 27(1) of the Civil Procedure Act.

He referred us to the case of **Donald Campbell v Pollak** [1927] A.C 732 where Lord Atkin held that: -

"

"...it is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the judge who tried

his case, that discretion is a judicial discretion and if it is to be so its exercise must be based on facts."

COURT'S FINDINGS AND DECISION

The complaint in this Cross-Appeal is that the Appellate Judge ordered each party to bear their own costs even though it was the Respondent bank which won the Appeal. The Respondent faults the Appellate Judge for not giving reasons for his decision.

Section 27(2) of the Civil Procedure Act provides that costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. This is to be read together with section 27(1) which gives Judges Discretion to award costs to any party.

In **Jennifer Behange and 2 others v School Outfitters (U) Ltd** CA No. 33 of 1999, it was held that where a trial court has exercised its discretion on costs an Appellate court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Court further held that where the trial court gives no reason for its decision the Appellate court will interfere where if it is satisfied that the order is wrong.

Here the Judge having dismissed the Appellant's Suit against the Respondent departed from the Rule that costs follow the event and did not award the costs of the Suit to the Respondent. This was a clear departure from the Rule for which no reason was given by the learned Judge.

Ordinarily, I would have allowed this Ground. However in light of my findings in Grounds 3 and 4 it would appear that such a finding would be moot in light of the

finding that the Respondent Bank breached its Banker/Customer relationship by making payments out of the Appellant's bank account contrary to the signature card.

FINAL RESULT

This Appeal substantially succeeds. I further Order that: -

1) The Judgment of the first Appellate Court is set aside. The Judgment of the Trial Court is hereby reinstated albeit for different reasons.
2) The Appellant is awarded 2/3 of the costs of this Appeal and equally so in the first Appellate Court.

I so Order.

Dated at Kampala this 9th **day of** April **2022.**

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

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0188 OF 2013

BEN MUSHARI::APPELLANT

VERSUS

CRANE BANK LIMITED::RESPONDENT

(Appeal from the decision of the High Court of Uganda at Kampala (Civil Division) before Kabiito, J. in Civil Appeal No. 105 of 2011)

CORAM: HON. MR. JUSTICE GEOFFREY KIRYABWIRE, JA
HON. LADY JUSTICE ELIZABETH MUSOKE, JA
HON. LADY JUSTICE IRENE MULYAGONJA, JA

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the advantage of reading in draft the judgment of my learned brother Kiryabwire, JA. For the reasons he gives, with which I agree, I too would allow the appeal and the cross appeal, and make the orders he proposes.

Dated at Kampala this 9th day of Aug 2022.

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Elizabeth Musoke

Justice of Appeal

IN THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: Kiryabwire, Musoke and Mulyagonja JJA

CIVIL appeal NO. 188 OF 2013

(Appeal from the decision of Kabiito, J dated 18th March 2013 in High Court Civil Appeal No 105 of 2011)

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VERSUS

DFCU BANK LIMITED :: RESPONDENT
[By substitution]

JUDGMENT OF IRENE MULYAGONJA, JA

I have had the benefit of reading in draft the judgment of my learned brother Geoffrey Kiryabwire, JA in this appeal. I agree that the appeal should succeed for the reasons that he has given and with the orders that he has proposed.

9/08/2022

Irene Mulyagonja
JUSTICE OF APPEAL