

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

CIVIL APPEAL NO. 101 OF 2011

(Appeal from the judgment and orders of Her Worship Margaret Aanyu in Civil Suit 354 of 2010, Chief Magistrates Court of Mengo at Mengo) - 5

CELTEL (U) LTD :::::::::::::::::::::::::::::::::::APPELLANT

VERSUS

KARUNGI SUSAN :::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH MUSOKE - 1

JUDGMENT

On 06/03/2009, the Appellant was served with a court order stated to be under the Chief Magistrates Court of Buganda Road, and alleged to be procured by the Uganda Police and issued to the Company Secretary of Celtel Uganda Limited. The signature on the order was for the Magistrate Grade One and requesting the appellant company to provide subscriber details and subscriber call date records in respect of telephone No. 072 495067. - 15

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In compliance with the said order, the appellant released the call records for telephone No. 0752 495067 the period 31/12/2008 – 26/02/2009, to one Yusuf. The telephone No. 0752 495067 belonged to the respondent.

The respondent, unhappy with the said order and state of affairs, filed a suit against the appellant alleging breach of confidence and breach of trust. — 5
She sought special and general damages. The respondent alleged that the court order was false and that she suffered financial loss and was thrown out of her marital home as a result of the release of the call data.

The trial judge found for the respondent and awarded special her damages of Shs. 7,000,000= and general damages of Shs. 3,000,000= and — 10
exemplary/punitive damages of Shs. 1,000,000=, hence this appeal.

The grounds of appeal are as follows:

- 1) The learned Magistrate failed to evaluate the evidence on record and made an erroneous Judgment.
- 2) The learned Magistrate erred both in law and in fact by holding that — 15
the Court Order dated 5th March 2009 issued by Buganda Road Court for issuance of call records for telephone No. 0752 495067 was not genuine.
- 3) The learned Magistrate erred in law and in fact by holding that the appellant acted negligently in issuing call records for telephone No.

0752 495067 without cross checking with the Court that issued the Court Order

The parties filed written submissions as directed by court.

~~The duty of a first appellate court is to evaluate and scrutinize the evidence on record afresh to facilitate it to come up with its own independent decision. See *Kifamunte Henry Vs Uganda, Criminal Appeal No. 10 of 1997 (SCU)*.~~

Counsel for the appellant argued the 3 grounds of appeal together.

Counsel for the appellant relied on Section 66(b) which states:

"Any operator of a communications service or system, or employee of an operator of a communications service or system who-

a)

b) Discloses any information in relation to a communication of which that operator or employee is aware commits an offence, unless the Act is done in accordance with a court order, and is liable on conviction to a fine not exceeding twenty currency points or to a term imprisonment not exceeding six months or to both."

Counsel then submitted that Section 66 of the same Act empowers an operator such as the appellant in accordance with a court order to disclose any information in relation to a communication of which the operator is aware, and where the operator discloses that communications without a

court order, the operator would be liable to a fine not exceeding 20 (twenty) currency points.

The orders or warrants under the Act are generally provided for under Section 55 and the court therein is defined as Magistrate Grade I.

Counsel further submitted that although evidence was led by the respondent (then a plaintiff) indicating that the order in question was a forged one and that it was procured by the respondent's husband, a one Stephen Kusasira, as per the evidence of PW1, Karungi Susan, it was never shown that the said Kusasira was an employee of the appellant company, an agent of the appellant or was acting under the instructions, directions or control of the appellant company so as to hold the appellant company vicariously liable for his actions. The said Kusasira was never sued nor was he made a party or called to give evidence to know whether the allegations against him were true or false. It was therefore incumbent on the court to dismiss the matter as no cause of action had been shown against the appellant company. Similarly, there was no evidence whatsoever led by the plaintiff to implicate the appellant in the forgery of the court order or the process by which it was obtained.

Counsel contended further that a court order must be respected on the face of it by whoever it is served upon, and that it would be imposing an undue and unnecessary burden on a telecommunications service provider to go behind a court order presented to it by the Uganda Police and carry out an investigation as to its authenticity and interview perhaps the Magistrate Grade One granting it or perhaps the Police officers procuring it,

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meeting with the subscribers before the release of information to seek her consent. All these are not provided for by law.

Counsel relied on *Stanbic Bank & Anor Vs Commissioner General of URA, High Court Commercial Division – Miscellaneous Application No. 42/2010 at page 31-32*, where the Principle regarding respect of court orders was as pronounced in *Hadkinson Vs Hadkinson [1952] ALL ER 567* was reiterated that A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. -5

Further, no evidence was led from the issuing court to have denied the authenticity of the court order in the first place, even assuming it can be disobeyed, which it cannot. There was no evidence to suggest that the signature of the Magistrate Grade One was forged or that the seal was not valid. The same Magistrate, His Worship Wekesa John, who issued the court order, had certified the same as a true copy of the original order he had granted. It would therefore be grossly wrong in light of the evidence that was led before the court to visit upon an innocent telecommunications service provider not responsible under the Uganda Communications Act for the workings of the Uganda Police, a final responsibility for their actions – valid or invalid. -10 -15

It was the Counsel's submissions that no evidence was led to implicate the appellant company on the forgery of the court order. Fraud and forgery are a serious matter and no evidence was led to prove forgery; and whether or not the order was valid or forged, the appellant was duty bound to obey it on the face of it. Nor was the court order in question -20

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ever set aside, despite the certification obtained by the appellant and tendered in court. The appellant did not wish to be charged with contempt of court under S.117 of the Penal Code. It was Counsel's contention that by this alone, this appellate court should be pleased to set aside the judgment of Her Worship the learned trial Magistrate Grade One. - 5

On the question of whether the appellant was negligent or not, Counsel contended that it was not demonstrated that the appellant breached its duty of care; and as such negligence could not arise in the absence of a breach of a duty of care. Further the particulars of negligence in the plaint were not backed up by any evidence. The appellant did not falsify any - 10 court papers, it did not forge any signatures and it did not issue any telephone printouts to the respondent's husband; and most certainly, there was a court order. The findings therefore on negligence by the trial Magistrate while at the same time absolving the appellant of culpability were most absurd. - 15

On the question of damages, Counsel submitted that in cases of negligence, it must be proved that the damage suffered was caused by the appellant's breach of the duty of care. In other words, there must be a nexus between the alleged actions and the alleged loss. In the instant case, there was no demonstration of causation between the loss suffered - 20 and the actions of the appellant using the 'but for' test.

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Counsel relied on Section 73(1) of the Uganda Communications Act which provides:

"..... the right to sue for recovery of loss or damages arises only against the person who engaged in, directed, authorized, consented to and participated in the act or omission"

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He then stated that the trial Magistrate was oblivious of the above. He concluded that the trial Magistrate did not properly evaluate the evidence before her and thus erred in law in holding that the appellant was duty bound to verify the court order adequately; she erred to imposing the award of punitive damages and finding negligence against the appellant.

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In reply, Counsel for the respondent also argued the 3 grounds of appeal together. He submitted that ground one was not only vague but too general as the appellant did not specify the areas where the learned Magistrate failed to evaluate the evidence, thereby offending Order 43 rule 1(2) of the Civil Procedure Rules Cap 71-1.

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On the submission for the appellant that, according to evidence led by PW1, it was Kusasira Stephen, the respondent's partner who had procured the court order in question, and that since the said Kusasira Stephen was neither sued, nor made party to the proceedings, it was incumbent on court to dismiss the charges against the appellant company, Counsel for the respondent submitted that the plaintiff/respondent was at liberty to sue her partner jointly with the defendant/appellant or not to sue him at all. He relied on *Kalemera & Others Vs Unilever (U) Ltd & Another HCCS No. 1181 of 1997 (unreported)* for the proposition that the plaintiff is at liberty

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to sue anybody he thinks he has a claim against and cannot be forced to sue somebody...." It was therefore immaterial that Kusasira Stephen had not been sued or called as a witness.

Further, while Counsel concurred with the appellant's submission that a Court Order must be respected on the face of it by whoever it is served upon, it was his submission that this did not deter the person the court order is served upon to exercise due care and diligence before acting upon the same; neither did it stop the person from verifying the authenticity of the Court Order; nor would that person be held in contempt if he or she exercised due care and diligence before acting on the Order. - 5

Further still, the submission by the appellant that there was no evidence whatsoever led by the plaintiff to implicate the appellant in the forgery of the Court Order or the process by which it was procured was in line with the trial Magistrate findings on the issue and the appellant did not show, that part, of the finding in which the learned trial Magistrate erred or misdirected herself. The record did not also show that the evidence led by PW1 was to the effect that Kusasira Stephen procured the court Order in question. PW1 stated at page 34 of the record of appeal: - 10

"..... my partner, Kusasira Stephen obtained telephone printouts"

Counsel stated further that under Order 1 rule 10(2) & (3) of the Civil Procedure Rules, the appellant was at liberty if she so deemed the evidence of Kusasira Stephen necessary and or vital in determining the

issues at hand to apply to the trial Court to add the said Kusasira as a party and or move court to summon him as a witness.

On the appellant's argument that the respondent ought to have applied to set aside the court Order and that "..... it would be imposing an undue and unnecessary burden", Counsel submitted that whereas the law as it is in our statute books, does not provide for verification of Court Orders, the fiduciary relationship that exists between a Telecommunication Company and a subscriber imposes a duty of care on the service provider to protect and guard a subscriber's private confidential data and records cautiously from intrusion, and this duty did not stop only on presentation of a Court Order. - 5 - 10

On the argument by the appellant that the respondent ought to set aside the order, Counsel submitted that setting aside the Order after the call data records had already dominated the public domain, would not suffice as the same was already overtaken by events and the damage already done. - 15

Counsel also agreed with the principle in **Chuck Vs Cremer (1 Coop Temp Cott 342)**, as cited in Romer L's judgment in **Hadkinson Vs Hadkinson [supra]** and in **Stanbic Bank & Another Vs Commissioner General URA, (Supra)** that a party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it, Counsel argued that this did not discharge the appellant of the duty to exercise due care and diligence in the subsequent actions in respect of the Court Order, nor did it impose a - 20

duty on an innocent bystander not aware of the Order at all to apply to set it aside.

Further, the Court Order in question was directing the appellant to allow one Wancha Frank to inspect and take copies of subscriber details in respect of Telephone No. 072-495067, the appellant took it upon - 5 themselves to conclude that indeed it was the respondent's telephone number 0752/495067 that was referred to in the order without cross-checking further with the issuing court. The appellant then went ahead to issue the same not to Wancha Frank as directed by the order, but to a stranger. DW1, Ms. Diana Netuyingana, a front desk officer at the - 10 appellant company since October 2008 testified; "... **no Wancha did not come back in the afternoon, it is the gentleman he came with before who took the call records**" (See page 52 of the record of appeal). Had the records not been issued to this "stranger", perhaps the respondent's partner would not have obtained and/or got access to the same. DW2's - 15 evidence in cross-examination was that it was not the usual practice to have someone else apart from the person whose names the Order is made to pick the call records.

The appellant did not only fail to comply with the Court Order in question but negligently acted on the same, and the trial Magistrate rightly held so. - 2

Counsel then submitted that the purported "certified" copy of the Court Order from Buganda Road court was not tendered in court as an exhibit or at all and the circumstances under which the same was obtained are suspect.

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Further the appellant waited till after the respondent/plaintiff had filed submission and judgment date set for 30th November 2011, and then purported to certify the order and "smuggle" the purported certified copy in court.

He urged court to ignore the said order. In regard to the appellant's - 5
argument that it was the Uganda Police that was responsible, no evidence was produced by the appellant to substantiate this claim, more so when the person to whom the records were issued was not identified at the material time.

Regarding the issue of negligence, Counsel reiterated that the appellant - 10
acted negligently in issuing call data records to a stranger and on a forged court order. Counsel cited Black's Law Dictionary 8th Edition at page 1061 as follows:

"The failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm, except for conduct that is intentionally, wantonly, or willfully disregarding of others' rights. The term denotes culpable carelessness". - 15

It is stated under that definition that a tort grounded in this failure is - 20
usually expressed in terms of the following elements; duty, breach of duty, causation and damages.

Ms. Edna Kasozi, the appellant company's legal officer then, who claimed to have verified the impugned court order before the records were issued,

admitted to anomalies in cross-examination, anomalies so apparent and clear on the face of the Order in question.

Further, it was PW2's unchallenged evidence that he denied ever applying for the call record under the impugned court order, or signing on the affidavit upon which the contestant Court Order was procured.

Counsel for the respondent concluded that the learned trial Magistrate on the balance of probabilities could not have held otherwise and that all the evidence on record was properly evaluated and the trial court did not come to an erroneous decision. He urged court to uphold the trial court's decision and dismiss the appeal with costs.

I have examined the record of proceedings of the lower court, the pleadings and the laws and authorities relied on.

Counsel on both sides decided to tackle the 3 issues together. I will proceed likewise. The issues joined together will be whether the Magistrate failed to evaluate the evidence on record and also erred by holding that the impugned court order was not genuine; and she also erred by holding that the appellant acted negligently in issuing the call records of the respondent without cross-checking with the court that issued the order.

On reading the record and judgment, I found that after evaluating the evidence to that Magistrate concluded that although the defendant/appellant claimed to have issued the plaintiff/respondent's records in compliance with a Court Order as per Section 66 of the Uganda Communication Act, and mindful of Section 117 of the Penal Code Act on

disobedience of lawful orders, she had believed the evidence of PW2, Wancha Francis, the Police Officer, that he had applied and obtained call records for 0754/258394. He had never applied for or received call records for telephone No. 0752/495067, although his name was used on Court Order dated 5/3/2009.

The trial Magistrate found thus on page 66-67 of the record of appeal;

"So the simple question is which of the 2 sets of documents is genuine. PW2 told court that he does not know the 2nd set of documents that the defendant relied on to give call records for the plaintiff's phone number, he disowned the signature in the affidavit in support and also pointed out that his particulars were filled by pen and not typed as it were in the 2nd set of documents dated 5/3/2009. Both DW1 and DW2 gave evidence to the effect that PW2 was given call records based on the 2nd documents of Buganda Road Chief Magistrate's Court dated 5/3/2009.

I have no reason to doubt PW2 evidence that is contrite and have come to the conclusion that he indeed obtained call records from the defendant for 0754/258396, handset No. 35808201530314. DW2 admitted on cross-examination that there are flaws on the 2nd set of documents from Buganda Road Chief Magistrate's Court that they relied on. DW2 admitted that the 2nd Court Order does not indicate the number of the application, it is blank and that there is an alteration in the applicant's Police Force number which alteration is not counter-signed. She too admitted that the applicant, PW2 was from Wakiso Police Station and that there is no Chief Magistrate's Court in Wakiso. This points to the fact that the 2nd set of documents, the Court Order,

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application and affidavit in support of 5/3/09 are not genuine and were procured fraudulently by doctoring the 1st set of documents."

I fail to see how I can fault the trial Magistrate in her evaluation and findings above. It is very clear that the Court Order allegedly issued by Buganda Road Court for issuance of call records for telephone No. 0752/495067 was not a genuine one. PW2 clearly denied ever applying for the call records in issue.

The appellant, on the 15th November 2011 filed a purportedly certified copy of the impugned court order which they allege in their submissions was certified by His Worship Wekesa, who signed the original order. It is not clear why the "certified copy" was filed after the proceedings in court had been closed on the 4/11/2011 and judgment date ever set for 30/11/2011. The same therefore was not tendered in evidence and consequently has no evidential value. One even wonders how a Magistrate could issue or even certify an order without the number of the application with alterations which are not countersigned.

The appellant further submitted that a court order had to be obeyed and relied on ***Stanbic Bank and Anor Vs Commissioner General URA Misc. Appl. No. 42 of 2010.*** I am in total agreement with the principle enumerated therein that a party who knows of an order; whether null or valid, regular or irregular, cannot be permitted to disobey it; and that litigants cannot decide on their own which orders to respect and which to ignore. However, in the present case there were overwhelming pointers to the fact that the so called court order was not a genuine court order. Indeed DW2,

the appellant's legal officer in cross-examination stated at page 55-56 of the record of appeal;

"Cross-Examination of DW2:

My qualifications are I am an Advocate of the High Court of Uganda. Yes I know the law. I joined the defendant company in November 2006 and I left in early April 2010. Yes I did actually verify the said court order. Yes I read through the whole court order. Yes there was something attached to the court order, an affidavit. Yes I read the said affidavit. No, I did not realize any anomalies on reading this affidavit. No the court order does not indicate the number of the application. Yes it indicates when the Magistrate signed and sealed, it is 5/3/2009. At the top of this court order, it is indicated that the application was for 2008 but does not indicate the number. It is blank. No I do not know of any court known as the Magistrate's Court of Uganda. No I do not know of any court known as Magistrate's Court of Kampala at Buganda Road. The applicant was from Wakiso Police Station. No, to the best of my knowledge there is no Chief Magistrate's Court as Wakiso. Yes, I can see an alteration in the affidavit accompanying the court order, an alteration of the applicant's rank number in the police force. No, it is not counter signed by any one, the alteration is not counter signed."

The above anomalies pointed out by DW2 ought to have put the appellant on alert that something was wrong with the so called order and affidavit. She is an advocate of High Court equipped with sufficient knowledge and expertise, who ought to have been prudent enough to foresee the dangers of acting on such Order, a duty she failed.

The appellant also stated that it is Uganda Police responsible for the issuance of the Police order. I agree with the respondent's Counsel that indeed there was no evidence to substantiate that claim. There is evidence that the records were issued to one "Yusuf" who is not stated to be a Police Officer. Indeed he was not identified. The appellant cannot push the blame away to Police.

The appellant also contested the trial Magistrate's finding of negligence by the appellant arguing that they did not owe any duty of care to the plaintiff/respondent. DW2, Edina Kasozi, the legal officer of the appellant who is an advocate of the High Court, and therefore well equipped with sufficient legal expertise, who verified the order before issuance of the call record, admitted to anomalies very apparent on the face of the court order and affidavit. Furthermore, the appellant issued the respondent's call records to a stranger as per DW1, Diana Netuyingana's evidence.

I find that the appellant failed to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation. They were therefore negligent; as they failed to exercise the duty of care it owed the respondent as its customer/subscriber, with whom it had a fiduciary relationship by virtue of which the appellant had a duty to protect the respondent's call records from unwarranted intrusion.

On damages awarded by the learned trial Magistrate, the appellant submitted that there was no demonstration of causation between the loss suffered and the actions of the appellant, using the "but for" test. This is because the respondent had claimed that she had to pay for alternative

accommodation; she was thrown out of her matrimonial home by her husband, and there was a breakdown of her marriage.

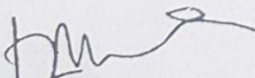
The trial Magistrate found that the collapse of the plaintiff/respondent's marriage was a consequence of the defendant's actions, so she allowed the claim for special damages of Shs. 7,000,000= spent by the respondent on alternative accommodation as proved by receipts. - 5

I also find that using the "but for" test, but for the actions of the appellant, plaintiff/respondent would not have been thrown out of her matrimonial home. I find the award of Shs. 7,000,000= therefore justified. So is the award of Shs. 3,000,000= which was to act as solace for the plaintiff/respondent who suffered a lot of inconvenience as a result of the negligence of the appellant. - 10

I however find no evidence to justify the award of punitive damages. The said award of Shs. 1,000,000= is, therefore, set aside.

In conclusion the appeal fails in the main, and is hereby dismissed with costs to the respondent, here and in the court below. The interest shall remain as awarded in the lower court. - 15

It is so ordered.


Elizabeth Musoke
JUDGE
02/04/2013

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