

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

HIGH COURT CIVIL SUIT NO 283 OF 2012

AL HAJJI NASSER NTEGE SEBAGALA}.....PLAINTIFF

VS

MTN UGANDA LTD}.....DEFENDANT

SMS MEDIA LTD}.....THIRD PARTY

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action is for declaration that the Defendant's use and/or sale of the Plaintiff's speeches/addresses as ring tones/caller tunes coded as numbers 504529, 504530, 504528 and 504531 constitute an infringement of his copyright. Secondly the Plaintiff seeks a permanent injunction restraining the Defendant from further violation of the said copyright. Secondly for an order of audit of all the proceeds received by the Defendant from the use of the Plaintiffs said copyright and delivery up of the same to the Plaintiff. Furthermore the Plaintiff seeks general damages, exemplary damages, and aggravated damages, costs of the suit and interest on the claims from the date of accrual at the rate of 20% per month and further interest at 20% per month from the date of judgement until payment in full.

The Defendant opposed the suit and denies liability to the Plaintiff. Furthermore the Defendant asserts that it does not own and did not acquire any copyright in the speeches the subject matter of the suit. The speeches were publicly broadcast in Uganda as current news of public and political events. Secondly the Plaintiff was an active participant as a Mayor of Kampala City Council and also ministerial nominee. Furthermore the Defendant asserts that the Plaintiff is not the author or physical person who created the works in the ring tones as described in the plaint. Alternatively the Defendant claimed indemnity from the third-party SMS Media Ltd in case the court finds that it is liable for copyright infringement.

The third-party Messieurs SMS Media Ltd also denies the claims of the Plaintiff and further contend that the Plaintiff is not the proprietor of the Copyright in the sound recordings which is the subject matter of the suit. To the contrary the Third Party avers that it is the owner of the recording by virtue of reducing it to material form and that it has the exclusive moral and economic rights to the recording.

Decision of Hon. Mr. Justice Christopher Madrama Izama

It is an admitted fact in the joint scheduling memorandum that the sound recordings contained in the contested ring tones have the voice recordings of the Plaintiff.

- 1. Whether the Plaintiff has any copyright in the caller tunes, which are the subject of the suit?**
- 2. Whether or not the Defendant and or third-party infringed the Plaintiff's copyright?**
- 3. Whether the Plaintiff's speeches are protected works under the Copyright and Neighbouring Rights Act 2006**
- 4. What remedies are available to the parties?**

As a matter of procedure, the Plaintiff's Counsel doubted whether the Defendant had taken out Third Party proceedings even though the third-party was allowed to participate in the proceedings. Third Party proceedings could be considered independently of the Plaintiff's suit against the Defendant. Order 1 rule 18 of the Civil Procedure Rules provides that where the Third Party has entered appearance pursuant to the Third Party notice, the Defendant giving the notice may apply to the court by chamber summons for directions. The matter is between the Defendant and the Third Party. Where the court is satisfied that there is the proper question to be tried as to the liability of the third-party to make contribution or indemnity claim, in whole or in part, it may order that the question of such liability as between the third-party and the Defendant should be tried in such manner at or after the trial of the suit as the court may direct.

*Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:*

and at page 537 Lord Denning MR considered Third Party proceedings as independent of the main action and which may continue even after a settlement between the Plaintiff and the Defendant. He held:

“I turn now to the point of procedure. It was said that in consequence of the settlement, the original action is dead, and being dead, there is nothing on which the Third Party proceedings can bite. I cannot agree with this contention. It is answered by reference to s 39(1)(b) and (2) of the Supreme Court of Judicature (Consolidation) Act 1925 and RSC Ord 16, r 4(3)(b). As I read those provisions, once the action itself is settled, the Third Party proceedings can proceed in just the selfsame way as if they had been started by a separate action. It is not necessary to bring a new action.”

Furthermore Salmon L.J at 539 is of the view that the proceedings between the Plaintiff and Defendant do not necessarily prejudice trial of proceedings between the Defendant and Third Party. He held:

“They will be fully entitled to raise in their defence to Third Party proceedings that the Defendants were not to blame at all. They can also raise the defence that they, the third parties, were not to blame.”

In this suit the Third Party was heard on the question of whether the Defendant is liable and the Plaintiff addressed this issue from that perspective as well. Notwithstanding the question of a right to indemnity if any is a matter between the Defendant and the Third Party and will abide the outcome of the question of whether the Defendant is liable. I will start with the matter between the Plaintiff and the Defendant with the participation of the Third Party. If the first issue of whether the Plaintiff enjoyed copy right is resolved the rest of the issue would more or less be determined.

Written Submissions:

The Plaintiff's Counsel submitted that this case is about those who seek to benefit from what is not theirs. He submitted that SMS Media Ltd was brought into this suit by the Defendant as a third-party and the Plaintiff is unaware of leave having been granted to the Defendant to add a third-party. Usually leave to issue Third Party notice is issued ex parte on the motion of the Defendant and before the Registrar. According to the amended plaint filed on 30 July, the Plaintiff's action is based on four pleaded ring tones even though there are at least three other Plaintiff's ring tones that surfaced during the course of the trial and Counsel proposed to stick to the ringtones as pleaded.

Whether or not the Plaintiff has any rights in the subject caller tunes/ringtones?

The Plaintiff's Counsel submitted that the primary claim against the Defendant is rooted in the infringement of his copyright under the Copyright and Neighbouring Rights Act 2006. The

The ring tones in controversy are coded as 504529, 504530, 504528 and 504531 and it is conceded by the Defendant and the third-party that the ringtones comprised of the Plaintiff's speeches even though somewhat distorted. The witnesses of the Defendant and the third-party testified in cross examination that the contents of the ring tones are the same.

Speeches are literary works and in the very least they are works in the language of the Act of a "similar nature" to either or all of literary works, addresses or sermons. The Defendants and the third-party in the pleadings does not dispute the right of free speech to enjoy copyright but only claimed that the copyright belongs to the person who reduced it into a tangible form. However the Plaintiff's Counsel disagrees with the argument and claims that it offends section 4 (1) of the Copyright and Neighbouring Rights Act, 2006. Legislature did not when it drafted section 4 intend that the person who reduces the work into tangible form should have the copyright. The copyright in the speeches in controversy accrued to the Plaintiff as soon as they were recorded or otherwise reduced into tangible form as the copyright accrues to the author of the work.

Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:

Counsel further relies on the case of **Walter vs. Lane (1900) AC 539** at pages 556 – 557 for the definition of the author of a speech by Lord Brampton. It means the author of the language orally uttered by the person. This suit was decided under the Copyright act 1842 which had no requirement of originality that is currently intertwined with authorship under the current Ugandan law. Furthermore the Plaintiff's Counsel submitted that it is now well settled that a secretary who takes notes in shorthand does not thereby gain copyright in that shorthand or in its transcript in the case of **Donoghue vs. Allied Newspapers Ltd [1938] Chancery 106 (109 – 110)**. Park Farwell LJ held that the author is the person responsible for the works expression and not the one responsible for the works reduction into tangible form.

As far as the originality test inherent under section 4 of the Copyright and Neighbouring Rights Act 2006 of Uganda is concerned, it was held in the case of **Walter versus Lane** (supra) that the work must express or reflect the author's personality, the internal turmoil of the author and labour itself is insufficient. There must be something in the work reflecting the personality of the author. Furthermore in **University of London press Ltd versus University tutorial Ltd (1916) to Chancery 61 at page 608** the court described the word "original" is not concerned with inventive thought as copyright laws are not concerned with originality of ideas which is in the realm of intellectual property laws but the expression of thought. The work must not be copied from another work as it should be original to the author.

Finally the Plaintiff's Counsel submitted that from the evidence adduced at the trial, the ringtones are reflective of the Plaintiff's and not the author's personality, his internal turmoil and they comprised solely of the original speeches of the Plaintiff. The Plaintiff did not imitate anyone and he polished his skill of addressing the public over many years. The exhibits demonstrate the Plaintiff's unique and confident style of addressing his audience, engaging them and even teasing them without attracting offence, affectionately, uniquely but thoughtfully, communicating his message and he passes the originality test. In the premises the Plaintiff is the author of the ringtones and the copyright in the suit ringtones vests in him.

In the alternative and without prejudice the Plaintiff's Counsel submitted that the Plaintiffs claim against the Defendant is for unjust enrichment. He relied on the case of **Nipun Norattam Bhatia vs. Crane Bank Ltd CACA 75/2006** wherein the court of appeal cited with approval the speech of Lord Wright in **Fibrosa Spolka vs. Fairbairn Lawson Combe Barbour Ltd (1943) AC 32** at page 61 as authority for the principle that the equitable remedy against unjust enrichment applies to prevent one from getting money off or some benefit derived from another which is against the conscience that he should keep it as money obtained through undue advantage. The unchallenged evidence adduced at the trial show not only unfairness of the Defendant but also manifest arrogance. Consequently the Plaintiff's Counsel prayed that in the event that the court does not rule in favour of the Plaintiff on the ground of having a copyright to the ringtones, the court should find him vested with rights in the subject matter on the strength of the equitable principle which bars the Defendant from unjustly enriching itself from the materials in question.

In reply the Defendant's Counsel relies on certain facts in evidence. Firstly the Plaintiff is and was at all material times a prominent politician and a national leader in Uganda. At the material time he was a former Mayor for Kampala city and had been nominated for appointment as a Cabinet Minister. Secondly the recording of the materials that was subsequently converted into ringtones was carried out by the employees of the third-party, at Parliament from an interview given to a group of assembled journalists and other persons on the occasion of the Plaintiffs vetting by the Parliament of Uganda. Thirdly the recording of the interview and the adaptation of the interview into the form of ring tones was carried out by the third-party.

As far as the first issue is concerned the Defendant's Counsel contends that the Plaintiff's Counsel submitted on a different issue which is **whether the Plaintiff has any rights in the subject caller tunes/ringtones?** Whereas the issue agreed upon in court was **whether the Plaintiff has any copyright in the caller tunes, which are the subject of this suit?**

As far as this issue is concerned it is the Defendant's submission that the Plaintiff does not have the copyright in the caller tunes, the subject matter of the suit. It is not in dispute and there is common ground that the caller tunes contain the Plaintiff's voice. However the Plaintiff was not the author thereof. The Defendants Counsel submitted that section 4 (1) of the Copyright and Neighbouring Rights Act, 2006 grants protection to the author of works specified in section 5 where such work is original and is reduced into material form. The list of works protected are provided for under section 5 and demonstrate that they include dramatic, dramatic – musical and musical works; audiovisual works and sound recording, including cinematographic works and any other works of a similar nature. They include works of drawing, painting, photography, typography, mosaic, architecture, sculpture, engraving, lithography and tapestry.

He submitted that an interview or speech such as the one which is the subject matter of this suit is not one of the works that are eligible for copyright under the provisions of section 5 of the Copyright and Neighbouring Rights Act. The list of works eligible for copyright demonstrates that an interview such as the one held by the Plaintiff, the subject matter of this suit is not eligible for copyright. Counsel submitted that legislature in its wisdom did not include speeches and interviews as works eligible for copyright. On that ground alone, the Defendants Counsel submitted that the Plaintiff's suit ought to be dismissed.

In any event the Defendants Counsel submitted that even if the court were to find that the interview held by the Plaintiff is a work that is eligible for copyright, the Plaintiff is not the author of the works and therefore not vested with the Copyright thereof. It relies on section 2 of the Copyright and neighbouring rights act for the definition of the term "author" as the person who created or creates work protected under section 5 and includes: "the person or authority commissioning work or employing a person making the work in the course of employment." The totality of the evidence demonstrates that the Plaintiff is not the author of the audiovisual recording which led to the caller tunes. Similarly the Defendant is not the author of the caller

tunes. The audiovisual recording is the work of the third-party. It is the third-party who commissioned its employees to record the interview of the Defendant. Similarly the works, the subject matter of the suit is the work of the third-party who commissioned its employees to adopt the interview, reduce its speed, made it catchy and interesting and reduced into the appropriate format for caller tunes.

The original audiovisual recording of the interview with the Plaintiff was adduced in evidence by the third-party and played in court. It demonstrates that the Plaintiff cannot be called the author of the works on the following grounds namely:

- The Plaintiff was answering questions put to him by various persons about the proceedings of the parliamentary vetting committee and other subjects and on the audiovisual recordings there are several voices and persons speaking and it is not exclusively the Plaintiff who was speaking.
- The Plaintiff did not give a speech of any kind but he merely answered questions that were asked by the assembled journalists and other present people.
- The Plaintiff did not refer to or consult any notes or prepared speech.
- The Plaintiff did not record or commission anyone to record the speech but rather it was recorded through the independent efforts of the third-party.

The caller tunes were adopted from the audiovisual recording adduced in evidence and the adaptation and conversion was carried out by the third-party. It had nothing to do with the Plaintiff save for the fact that it carried his voice, which does not ipso facto bestow upon the Plaintiff rights as an author. Furthermore the Defendants Counsel relies on the decision of this court in **HCCS No. 298 of 2012 Sikuku Agaitano vs. Uganda Baati** where the Defendant had used the image of the Plaintiff in photographs and videos for the advertisement of itself and its products. The court held that the persons who created and did the video shooting or the person who carried out the work of shooting the photos and video are the author or authors of the works.

The Defendant's Counsel contends that the basis of the Plaintiffs claim is the assertion that he is the author of the questioned works. However as demonstrated the Plaintiff is not the author of the works. Even if the court were to find that the Plaintiff was the author of the interview, the Defendant's Counsel contends that the Plaintiff would not be entitled to protection under the law and would have no copyright because the work was not original and the Plaintiff never made any arrangements to reduce the work into material form. Furthermore the Plaintiff answers to journalists were neither reduced to material form nor were they original. The Plaintiff never reduced the tunes into material form. The embodiment of the interview was that the Plaintiff was getting out of the precincts of Parliament when he was accosted by journalists and other persons and was interviewed as to the proceedings of the Appointments Committee of Parliament and other matters. It was a spontaneous interview and the Plaintiff admitted under cross examination and it is as well apparent from the audiovisual recording that was played in court as exhibit TP

D1. The Plaintiff could not have anticipated the interview and questions could not have been prepared and the text of the answers prepared and in any case none was produced in evidence.

As far as the submission that the works must pass the originality test is concerned, section 4 (3) of the Copyright and Neighbouring Rights Act 2006 stipulates that the work is only original if it is the product of the independent efforts of the author. The caller tunes in controversy are not the product of the independent efforts of the Plaintiff. Similarly the Plaintiff did not reduce the interview into material form in anyway. In those circumstances the Plaintiff did not acquire a copyright as envisaged under section 4 of the Copyright and Neighbouring Rights Act 2006. With regard to the case cited by the Plaintiff's Counsel of **The Estate of Martin Luther King Jr. Inc versus CBS Inc**, Counsel contended that the decision was based on the provisions of the Copyright Act 1909 of the United States and the Plaintiff's Counsel has not demonstrated whether the provisions of that law are similar to the Ugandan Copyright and Neighbouring Rights Act. Secondly in that case the copyright which was granted concerned the texts of a written and prepared speech of Dr King making the case distinguishable from the current controversy.

On the question of the alternative remedy of unjust enrichment, the Plaintiff is not entitled to seek a remedy in the alternative because at the scheduling conference there was no issue that was framed for the court's determination. The Defendants Counsel contends that the joint conferencing memorandum signed by both parties is binding and therefore the parties can only expect a decision of the court on the agreed issues as framed and not others. This is in accordance with Order 21 rule 5 of the Civil Procedure Rules.

Secondly the cause of action of unjust enrichment is pleaded in the amended plaint. The Plaintiff is not entitled to seek any alternative remedies in relation to the alleged unjust enrichment. Furthermore at the hearing no evidence was led by the Plaintiff to prove unjust enrichment. The evidence does not show any enrichment, what extent if any and how unjust it may have been. In any case the claim for unjust enrichment is not sustainable. The Plaintiff did not acquire any copyright in this suit caller tunes and does not permit copyright in the interview. Consequently the Defendant or the Third Party cannot be held to have unjustly enriched themselves at the expense of the Plaintiff in the absence of a legal right over the caller tunes. In the premises the Defendants Counsel maintains that the case of **Nipun Norattam Bhattia vs. Crane Bank Ltd** cited by the Plaintiff's Counsel supports the Defendants submission that the question of unjust enrichment does not arise in the circumstances of this case. In the case of **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour [1943] AC 32**, the ratio in the case is that it would be inequitable in the circumstances for the Defendant to keep the money obtained. Such an action is for money had and received. However in the circumstances of this case, the third-party is the one that recorded the caller tunes and made the necessary arrangements to reduce them into caller tunes. The Plaintiffs made no contribution at all. It would be equitable for the third-party who expended time and effort to keep the proceeds of the caller tunes. Furthermore

the Defendant cannot be liable to the Plaintiff for unjust enrichment which has not been proved. Counsel emphasised that the Plaintiff did not adduce evidence to substantiate the claim for unjust enrichment and the claim did not in any way form part of the proceedings of the court. Consequently the claim must fail and the first issue ought to be answered in the negative.

Counsel for the Third Party also submitted in defence of the action against the Defendant and their right to do so is established by the common law in **Stott versus West Yorkshire Road Car Company Ltd and Another (Home Bakeries Ltd and Another, Third Parties)** [1971] 3 all ER 534 as well as Order 1 rule 18 of the Civil Procedure Rules that the third-party and in their defence state that the Defendants are not to blame at all.

The Third Party's Counsel as far as the facts are concerned maintained that it is the author of the works. Secondly the Plaintiff enjoyed no copyright under the law because he is not the author of the works. Thirdly the ringtones arose from an interview held at the precincts of Parliament after the Plaintiff's vetting appearance. Furthermore Counsel relied on the case of **Gould Estate versus Stoddart Publishing Company (1996 8209 (ONSC))** being a judgement of the Ontario Supreme Court in Canada. In that case the Supreme Court considered whether the Plaintiff enjoyed copyright in oral conversations which the publishing company reduced into writing and published after the death of Gould. The court held that the conversation was not a literary work because it was not expressed in a material form. Secondly a person's oral statements in his speech, interview or conversation are not recognised in that form as literary creations and do not attract copyright protection. The claim that every utterance made by the Plaintiff is a valuable property right if upheld would have the courts inundated with claims from celebrities and public figures who would argue that their expressions should be afforded extraordinary protection of copyright. That result was never contemplated in the common law development of the copyright law. Furthermore the responses of the Plaintiff was spontaneous and proceeded in a question and answer format and there was not defined segregation, either by design or by implication of any of the Plaintiff's expressions of his thoughts and opinions on the subject discussed which would aid in identifying the purported copyrighted material. The Plaintiff had also willingly and freely participated in the interview and was aware that his offhand comments could find their way into the public domain. Consequently it was not the kind of discourse which the Copyright Act intended to protect.

Furthermore with reference to the case of Taggard vs. WMAO Channel 5 Chicago, 57 U.S.P.Q. 2d 1083 (S.D. Ill.2000) the court held that an inmate had no copyright ownership of his speech during an interview recorded and later broadcast by a television company. To the argument that the responses of the inmate were a "performance" the court disregarded the submission and held that his speech was only an idea and ideas are not protected by copyright law. Counsel further relied on section 6 of the Copyright and Neighbouring Rights Act, 2006 for the same proposition. In the premises the Third Party's Counsel contends that spoken words cannot be protected by virtue of section 6 of the Copyright and Neighbouring Rights Act, 2006. Any other

interpretation would mean that any spontaneous or impromptu recording done of a person and played back on radio or television would entitle such a person to sue and claim for any revenue earned by the radio or television station.

With reference to the case of **Sikuku Agaitano versus Uganda Baati HCCS No. 298 of 2012** this court held that the Plaintiff whose photograph had been used by the Defendant in a promotional magazine was not the author of the photo. The Third Party's Counsel further submitted that as far as sound recording is concerned, the author of the works is the producer according to a textbook Intellectual Property Law, second edition by Bentley and B. Sherman at page 118. Furthermore with reference to the case of **Walter versus Lane** (supra) cited by the Plaintiff's Counsel, the House of Lords held that the person who took notes of the speech delivered in public, transcribed them, and publishes in the newspaper a verbatim report of the speech is the author under the Copyright Act, 1842. The case of **Walter versus Lane** (supra) was approved in the Canadian case of **Gould Estates versus Stoddart Publishing Company** (supra).

As far as the evidence is concerned the third-party was the creator of the works.

In rejoinder the Plaintiff's Counsel submitted that the Defendant's Counsel departed from pleadings by submitting on an alleged fact that the Plaintiff is the then sitting mayor of Kampala city according to paragraph 5 (b) of the written statement of defence but in the submission is referred to as the former mayor.

Secondly the allegation of an extempore interview is not backed by any pleadings. The Plaintiff's argument is that there were various recordings and in fact different ringtones. Failure by the Defendant to respect an order of the court ensured that the evidence on the ringtones was unavailable. The Defendant by its pleadings considered that the Plaintiffs works are speeches under paragraph 5 (a), (b), (d), and (e) of the WSD. The submission that it was based on an interview is a departure from the pleadings and is illegal.

With regard to the submission on the first and second issues, the issues raised are resolved by the Defendants Counsel and not the issues endorsed by the court at the scheduling conference. It is unprecedented that a party raises and resolves issues differently from those ordered by the court on 3 February 2014 the court ordered how the issues are to be resolved.

In rejoinder on whether the Plaintiff has any rights in the subject caller tunes/ringtones? The Plaintiff's Counsel submitted that the starting point should be an inquiry into the proprietorship of the Copyright in the speeches from which the ringtones are produced.

The Plaintiff's Counsel further submitted that the Defendants Counsel extracted section 4 (1) of the Copyright and Neighbouring Rights Act in part only. But to complete the picture, the method, quality and purpose of creating the work is discounted in conferring authorship.

Furthermore Counsel maintained that a speech by its nature is a reduction into tangible form or material form without any further deed. He relied on Black's Law Dictionary 9th edition for the definition of the word "tangible" as a work capable of being understood by the mind. Secondly the definition of "tangible medium" which is an expression in copyright to mean any material form in which a work can be expressed and communicated either directly or through a machine. He further submitted that it is no wonder that the authorities recognise that a speech or address and sermons can enjoy copyright protection. He submitted that this would rest the controversy about copyright in speeches. The method of reduction of the speeches into material form is immaterial on the question of authorship of the material. Counsel submitted that the two tests for establishing authorship are originality and work having been reduced into a tangible form and not by whom.

What is meant to be original is the work that is capable of copyright protection. As far as the Plaintiff's case is concerned, the Plaintiff's Counsel submitted that speeches like works of literature are capable of protection. It is not the method of reduction into tangible form. Section 5 (1) (a) of the Copyright and Neighbouring Rights Act makes provision for works of a similar nature to addresses, someone is et cetera. Furthermore section 5 (1) (j) includes any other work in the field of literature in whatever manner delivered known or to be known in the future.

Secondly there has to be independent effort as envisaged in section 4 (3) of the Act. The independent work is not the recording but the creation of the work. Counsel submitted that at the trial the Plaintiff adduced unchallenged evidence of this independent effort. Secondly the Plaintiff led unchallenged evidence that he envisaged the attention of the media whom he had prepared to address in the particular incident at Parliament. He was not ambushed by the journalist and he expended his effort, skill and judgment arising from experience to address the media.

Even if the speeches were to be treated as interviews in spite of the departure from pleadings of the defence, it is settled law that an interviewee is possessed of copyright in his answers in the case of **Suid vs. Newsweek, 503 F. Supp 146 (D.D.C. 1980))** and in **Quinto versus Legal times, 506 F. Supp. 554 (D.D.C. 1981))** where it was held that in the interviewer and interviewee have ownership interests in their separate contributions.

With reference to the case of Target vs. WMAQ Channel S Chicago, 57.U.S.P.Q 2d 1083 (SD 111.2000), the case dealt with performance and not copyright. It also concerned common law and not statutory law. Thirdly the court considered the prisoners non-registration of copyright under applicable law whereas in Uganda copyright is not subject to any formality. The court further considered the prisoners expressive unprotected ideas unlike in this suit were the evidence of the Plaintiff's skill, effort was adduced and his expressions were unique, confident, affectionate yet respectful. Finally there were considerations of the right to free speech as the Defendant in that suit was a media house unlike the Defendants in this suit.

The Plaintiff's Counsel further submitted that the mode of presentation includes one's expression such as dressing and posture which was absent from the above suit concerning the prisoner Taggard.

As far as the argument with regard to the commissioning of work as conferring copyright under section 8 of the Copyright and Neighbouring Rights Act is concerned, the Plaintiff's Counsel maintains that the provision is inapplicable. He contends that the provision applies where the copyright work is created by a person in the employment of another.

As far as the argument that the third-party produced the works is concerned, during cross examination the Plaintiff's Counsel challenged the Defendant's testimony that they recorded the Plaintiff's speeches. The witness of the third-party Mr Kaheru could not remember or identify from the screen any member of its staff at the recording. He further admitted that the third-party is not a media house.

The Third Party could not be an author of the works and the best that they can claim is to be a producer with neighbouring rights and not copyright. If anything they were mere recorders and not even producers. A producer envisaged is one who lawfully put together works under direction and in an arrangement with the author. The Plaintiff's speeches were not produced and certainly not by the Defendants.

With regard to reliance by the third Defendant on the case of **Swatch Gorry Management Services versus Bloomberg**, the authority is inapplicable on the ground that there was a requirement for registration which is not a requirement in Uganda. Secondly the cases were decided on the basis of the common law of copyright as opposed to statutory provisions. Section 14 of the Judicature Act disallows reference to common law where written law makes provision. Furthermore both cases referred to were decided on the premise that holding otherwise would be derogating from the constitutional exercise of free speech.

In the case of **Sikuku Agaitano versus Uganda Baati** (supra), the decision is not binding and secondly it is distinguishable on the basis of the facts. The Plaintiff was an employee of the Defendant which is not the case in this current suit. Secondly the recordings had been made in the course of the Plaintiffs work. Thirdly the Plaintiff claimed performance and not copyright and reference in that suit to copyright was obiter dictum.

With regard to the case of **The Estate of Martin Luther king** (supra) that the copyright existed in the written text is not correct. What was copyrighted was the delivered/performed the speech. The Plaintiff's Counsel further reiterated submissions that this refers to the exercise of one's oral faculties and not to writings.

As far as the case of **Walter versus Lane (1900) AC 539** is concerned, it is an outdated authority with regard to what was known as the "reporters copyright". The case had been decided

Whether or not the Defendant/third-party infringed the Plaintiff's rights?

He submitted that the Plaintiff discerned the attempt at a defence of derivatives from the evidence to the effect that the third-party undertook certain transformational steps on the speeches to produce the ringtones. The Plaintiff's Counsel reiterated submissions that the Plaintiff is the author of the works. Under section 9 (f) of the Copyright and Neighbouring Rights Act, the Plaintiff as the author had the exclusive right to authorise other persons such as the Defendant or the third-party to make a derivative work, if any. However the evidence of the witnesses is that this consent was never obtained or received from the Plaintiff and therefore the defence is unavailable to the Defendant/third-party. The Plaintiff's Counsel further submitted that the ringtones do not constitute derivative works from the Plaintiff's speeches. Section 2 of the Copyright and Neighbouring Rights Act defines derivative works to mean works resulting from adaptation, transmission or other transformation of an original work but which constitutes an independent creation in itself. The exhibits produced in court by the third-party demonstrate that there was no transformation of the author's original work to constitute an independent creation of the ringtones. The ringtones played in court constituted solely of the Plaintiff's speech and no other. He further contended that the transformation, modification or adaptation of the work must be substantial and bears its authors personality to be original and therefore protected by copyright. The work must contain sufficient new expressions, and above those embodied in the

earlier work for the latter work to satisfy copyright law requirement of originality (see **Feist Publications, Inc versus Rural Telephone Service Company 499 US 340 (1991)**).

The Plaintiff's Counsel further maintains that section 10 (c) of the Copyright and Neighbouring Rights Act preserves the moral right of the author of the works including literary works to object to and seek relief in connection with any distortion, mutilation, alteration or modification of the work. In other words the author of the primary work must have consented to the derivative work to be created. In the absence of the Plaintiffs consent, the Defendant or the third-party do not have a defence and the ringtones remain the copyright of the Plaintiff.

As to the defence that the Plaintiff's speeches were already in the public domain, the Plaintiff's Counsel submitted that in the case of The Estate of Martin Luther King Jr. Inc (supra), the speech "I have a dream" had gone into the public domain and it was submitted that the copyright did not vest in the estate. The court found that a general obligation only occurs where tangible copies of the work are distributed to the general public in such manner as allows the public to exercise dominion and control of any work or where the work is exhibited or displayed in such manner as to permit unlimited copying by the general public. However in that case it was held that the speech was a limited publication. Furthermore Counsel submitted that there must be dedication of the work to the public which must be so expressly manifest but in the circumstances of this case there was no such dedication.

The defence of fair use for purposes of current information of the Plaintiff's political speeches.

The Plaintiff's Counsel relies on section 15 (1) (h) of the Copyright and Neighbouring Rights Act for the submission that even if all the ringtones were political speeches, the ringtones which were run for over two years do not pass the test of being either news or current information. They were anything but current news. Even if they were, they did not meet the mandatory requirement attached of "fair use" under section 15 (2) (a) of the Copyright and Neighbouring Rights Act which provides that fair use is inconsistent with commercial use. Furthermore the Plaintiff's Counsel submitted that the Defendant was selling the ringtones for a fee. The ringtones also failed the test of amount and substantiality of the portion used in relation to the protected work and the nature of the protected work. The ringtones manifested they were constituted singularly of the Plaintiff's speeches and nothing more. For that reason the test of fair use is absent from the Defendant or the third-party. In the absence of a valid defence pleaded and proved by the Defendant/third-party, the Plaintiff's Counsel submitted that the second issue should be resolved in the affirmative.

In reply the Defendants Counsel reiterated submissions on issue one that the Plaintiff's interview is not eligible for copyright and cannot as a consequence thereof be infringed. To constitute infringement of the copyright within the meaning of section 46 of the Copyright and Neighbouring Rights Act, the Plaintiff must demonstrate that the Defendant has duplicated or reproduced the copyright material for commercial purposes or for sale. In considering this matter

the court should also consider what constitutes the ringtones. The Defendants Counsel further submitted that it is the tunes that were offered to the Defendant subscribers and not the Plaintiff's interviews per se. The ringtones were made by the third-party and derived from an audiovisual recording also made by the third-party. Although the audiovisual recording was of the interview between the Plaintiff and the press, that cannot in any way give the Plaintiff copyright in the eventual recording and the ringtones derived from the recording.

The Defendant's Counsel further submitted that even if the Plaintiff had a copyright in the interview, the third-party would still have a copyright of the ringtones and the audiovisual recording as derivative work within the meaning of section 5 (2) of the Copyright and Neighbouring Rights Act and would be protected from liability. The ringtones were offered to the Defendant subscribers under contract from the third-party who is the copyright holder and consequently there was no infringement as alleged. In those circumstances the Defendants Counsel prays that the second issue should be answered in the negative.

In rejoinder the Plaintiff's Counsel submitted that in the end the Defendant appears to have made its defence on derivatives a deduction from the earlier clamour of news of the day, which it is not and of general publication which it too is not. He submitted that the Defendant's position is a stubborn position devoid of merit under section 9 (1) of the Copyright and Neighbouring Rights Act to the effect that the author of primary work such as his speeches is the one who can permit the creation of derivative works. In the absence of such consent, the derivatives infringed the Plaintiff's rights and the law. By basing their defences on derivatives for the caller tunes, and the fact that caller tunes are premised on the alteration of a pre-existing copyright work, the Defendants in essence made the judicial admission of a pre-existing copyright which is in the Plaintiff's speeches and which copyright evidently belongs to the Plaintiff. In the premises the Defendant has put forth no lawful statutory defence against the Plaintiffs claim.

Resolution of issues number 1 and 2.

I have carefully considered the above written submissions as well as the authorities and the evidence on record. As far as the basic facts are concerned, there are certain basic facts which are not in dispute.

I will start with the submission of the Plaintiff with regard to the caller tunes or ringtones, the subject matter of the dispute as to copyright. Paragraph 3 (a) of the amended plaint restricts the Plaintiffs claim against the Defendant for the use or sale of the Plaintiffs speeches/addresses to the ringtones/caller tunes coded as numbers 504529, 504530, 504528, and 504531. The Plaintiff seeks declarations that the use/sale of the Plaintiff's speeches/address as the ringtones/caller tunes constitutes an infringement of his copyright. Other remedies sought are consequential to the basic remedy based on the averred infringement of copyright. So the first basic facts agreed are that the caller tunes comprised mainly of the Plaintiff's oral voice recording which were recorded in the form of audio recordings. The caller tunes were stored electronically and were

capable of being reproduced. The caller tunes were marketed to the subscribers of the Defendant. The Defendant obtained the caller tunes from the third-party.

Both parties through their Counsel endorsed a joint scheduling memorandum which was filed on court record on 31 January 2014. At the scheduling conference the following issues were agreed after some slight amendment to the issues agreed to in the joint scheduling memorandum namely:

1. Whether the Plaintiff has copyright in the caller tunes, which are the subject of the suit?
2. Whether or not the Defendant and/or third-party infringed the Plaintiff's copyright?
3. Whether the Plaintiff's speeches are protected works under the Copyright and Neighbouring Rights Act? (Not agreed to).
4. What remedies are available to the parties?

At the course of the hearing it has become apparent that the first two issues and the third issue are intertwined. The first issue is specific to whether the Plaintiff has copyright in the caller tunes, the subject matter of the suit. I do not see much prejudice in the fact that the issues were framed differently by both Counsels. In the main submissions, the Plaintiff's Counsel framed the issue number one as: Whether or not the Plaintiff has any rights in the subject, tunes/ringtones? On the other hand the Defendant's Counsel framed the issue as: Whether the Plaintiff has any copyright in the caller tunes, which are the subject of the suit?

There is no substantial difference between the two framing of the issue and none of the parties are prejudiced as the subject matter discussed addresses the same controversy. The issue as framed in the court after an amendment to the agreed issues in the presence of both Counsel is as follows:

1. **Whether the Plaintiff has copyright in the caller tunes, which are the subject of the suit?**

To be more specific the subject matter of this suit according to the Plaintiff's plaint has been further narrowed down in the submissions of the Plaintiff's Counsel to the caller tunes specified in paragraph 3 (a) of the amended plaint and not to other caller tunes also having the Plaintiff's voice. Secondly, paragraph 3 (a) avers the cause of action of infringement of copyright. Thirdly the Plaintiff's Counsel submitted on the right of copyright based on authorship of the works which is the subject matter of the suit. Further submissions were made on an alternative cause of action based on unjust enrichment.

I further agree with the approach of the Plaintiff's Counsel in the sense that the controversy about whether the Plaintiff has copyright in the caller tunes is substantially a matter of interpretation and not evidence though some evidence may be relevant as to how the caller tunes were generated by the Third Party. However for purposes of considering the first central issue, it is an

agreed fact that the caller tunes bear the voice of the Plaintiff when he was recorded outside the precincts of Parliament having emerged from an interview with the Parliamentary Appointments Committee. The Defendant concedes in the written submissions that the recording of the material was subsequently converted into ringtones by the third-party. The talk was given to a group of assembled persons on the occasion of the Plaintiff's vetting by the Parliament of Uganda. There is controversy as to whether the Plaintiff's voice which comprises the ringtones arose as a consequence of interviews by journalists who were waiting outside (the precincts of Parliament). The consequences of whether it was an interview by journalists which elicited the Plaintiff's answers which were eventually converted into ringtones or whether it was a speech will be considered after reviewing the evidence.

As a preliminary consideration some matters of interpretation may be attempted. The question is whether in the circumstances, the Plaintiff can be considered the author of the works, the subject matter of this suit.

As far as section 2 of the Copyright and Neighbouring Rights Act, 2006 is concerned; the word "author" is defined as follows:

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

The key words which are used are the "physical person who created or creates work protected under section 5. We will subsequently consider the words "created or creates" as well as "work". The quoted words are critical in establishing the meaning of the word "author" under section 2 of the Copyright and Neighbouring Rights Act, 2006. Section 5 (1) of the Copyright and Neighbouring Rights Act, 2006 makes a list of literary, scientific and artistic works which are eligible for copyright. As far as the Plaintiff is concerned, the protected works listed under section 5 (1) (a) include articles, books, pamphlets, lectures, addresses, sermons and other works of a similar nature. With reference to the immediately preceding subsection, the Plaintiff's Counsel seems to rely on the provision made for "addresses" or sermons and works of a similar nature. Secondly the Plaintiff's Counsel addressed the court on the inclusive nature of this subsection to the extent that it includes under its ambit lectures, addresses, sermons and other works of a similar nature in which he submitted that speeches fall under works of a similar nature.

On the other hand the Defendant's main line of defence can be juxtaposed against other subsections. The first is section 5 (1) (c) of the Copyright and Neighbouring Rights Act which includes under the protection of the enactment, audiovisual works and sound recording, including cinematographic works and other works of a similar nature. Secondly there is reliance by the Defendant and the third-party on derivative works under section 5 (2) of the Copyright

I agree with the Plaintiff's Counsel to the extent that in either subsection 1 or subsection 2 of section 5 of the Copyright and Neighbouring Rights Act, the common denominator is subsection 1 which deals with the kinds of works that may enjoy or are eligible for copyright protection. Subsection 2 thereof deals with the pre-existing works defined by subsection 1 of section 5 of the Copyright and Neighbouring Rights Act 2006. The wording of section 5 (1) of the Copyright and Neighbouring Rights Act is crucial and I will quote:

Before taking leave in order to look at the definition of an "author", it is necessary to emphasise section 4 of the Copyright and Neighbouring Rights Act. Both Counsels emphasised section 4 (1) which provides that: "The author of any work specified in section 5 shall have the right of protection of the work, where the work is original and is reduced to material form in whatever method irrespective of quality of the work or the purpose for which it is created." Further critical matters may be highlighted from this subsection. These are "work", "originality of the work" and "created or creation of the work".

The questions flow from the ingredients prescribed by sections 4 and 5 of the Copyright and Neighbouring Rights Act. Consequently it has to be considered whether the Plaintiff is the creator of the works. Secondly whether it is the Plaintiff who reduced the work into material form and lastly whether the work is an original work of the Plaintiff.

I have carefully considered the novel controversy generated by the facts of this case and the submissions of Counsel. The question of who is the author of the works has generated a unique controversy. It is not disputed that the works comprised of audio recordings which were rendered into ringtones by the third-party and thereafter sold to the Defendant who does not deny having offered it as ringtones to its transcribers.

The word "author" in relation to sound recording is problematic and may be susceptible to various meanings if the provision of the law is not considered carefully. The definition of the word "author" under section 2 of the Copyright and Neighbouring Rights Act is not exhaustive and requires other provision for a definite meaning as we shall demonstrate. The question of who

is an author also depends on the facts and circumstances without losing sight of the definition. What must be highlighted is that section 4 (1) of the Copyright and Neighbouring Rights Act, protects the works of an author as listed under section 5 of the said Act. In other words an author is associated with "works" and the creation of such works or work. It is the Plaintiff's case that the Plaintiff used his skill and experience in delivering the "talk". There is factual controversy as to whether the ringtones comprise of a "speech" or "speeches".

Strangely the Plaintiff's Counsel wants to bind the Defendant on the pleadings on the ground that they conceded to the fact that the ringtones comprise of "speeches" and he accordingly objected to the submission that the speeches were elicited by interviews from journalists. The written statement of defence of the Defendant in paragraph 5 (b) refers to "speeches" in the following averment namely: "The said speeches were publicly broadcast in Uganda as current news of public and political events". A careful analysis of the pleadings shows that the Defendant was responding to the averments in the pleadings. Paragraphs 4 (a) of the original pleadings refers to the Plaintiff's speeches/addresses as contained in the ringtones. Secondly this is contained in paragraph 4 (b) of the amended pleadings. In paragraph 3 the Plaintiff makes a reference to the said speeches/addresses. Similarly in paragraph 4 (a) to 4 (i) of the amended pleadings, several references are made by the Plaintiff to the said speeches/addresses of the Plaintiff.

The conclusion is that the Defendant was responding to the pleadings of the Plaintiff on the subject matter pleaded which is the speeches/addresses of the Plaintiff captured in the ringtones, the subject matter of the suit. In the premises the Defendant is not bound by the pleading that the ringtones are speeches of the Plaintiff and the nature or characterisation of the ringtone whether as speeches, talks or any other characterisation can be established from evidence. The pleadings did not amount to an admission of fact. Even if they made a reference to the word "speeches", under section 57 of the Evidence Act, an admitted fact may be proved otherwise than by what is contained in an admission. In this case evidence was adduced in exhibit TPD1 which is a video recording of the event where the speeches were recorded from. The evidence demonstrates whether what transpired arose from a question and answer session or a speech and will help the court in the characterisation of the ringtones.

I have attentively listened to and watched the video exhibit TPD1 and it proves that the Plaintiff came out of one of the entrances to the Parliament building and was immediately surrounded by several persons all pointing recording equipment at the Plaintiff. Several questions were posed to the Plaintiff and he answered them variously both in English and in Luganda. The questions were posed by different people without any apparent order and the Plaintiff was not even seated. The Plaintiff did not deliver a speech but was responding to questions put to him by several persons whose identities are not disclosed by the video recording or specifically identified by TPD1. Out of the several questions asked, the Plaintiff answers were recorded as well as the questions and answers eventually ended up with the Third Party. It is my conclusion that whoever asked the questions need not be established for purposes of characterising the works.

The Plaintiff may have responded using his characteristic style and skill and his answers obviously generated a lot of merriment.

The other question is whether it is material to characterise the Plaintiff's answers to the various questions as "a talk or address". There was no formal arrangement that may lead to the characterisation of the event as a press release. The Plaintiff was surrounded by numerous persons and asked by several other persons who were not in view of the camera which recorded the event.

That notwithstanding **Words and Phrases Legally Defined** adopts several statutory definitions in the UK of the word "author". The first definition is found under the Copyright Act 1956 section 35 (5) thereof which defines the word "author" in relation to sound recording or a cinematographic film to mean the maker of the recording or the film. I have not seen any further meaning in relation to sound recording. Secondly the provision is a statutory. The second definition of the word "author" which also is apparently based on statutory provisions or with a statutory basis can be found in Osborn's Concise Law Dictionary 11th edition at page 45 as follows:

"For copyright purposes, the author is the person who creates the work. This is taken to be the producer of the sound recording, the producer and principal director of the film, the person making the broadcast, the publisher in the case of the typographical arrangement of a published edition."

Notwithstanding the statutory basis of the UK law on sound recordings, it is still useful for comparative purposes to consider how the issue has been handled in the UK.

In paragraph 113 of Halsbury's laws of England fourth edition reissue volume 9 (2), it is written that:

"in the case of both sound recordings and films the author is taken to be the producer, that is to say the person who made the arrangements necessary for making the recording or film, as the case may be, although in the case of films made on or after 1 July 1994 the principal director is also an author.

The difficulty presented by the definition is the fact that the Plaintiff was recorded not by his own arrangement but by the Third Party's agents. A sound recording is defined by section 2 of the Copyright and Neighbouring Rights Act, 2006 to mean any exclusively aural fixation of sound in a material carrier such as a tape, disc or other similar material but does not include audiovisual work including sound. The ringtones or caller tunes comprised of sound recordings and not audiovisual work. The audiovisual work exhibit TPD1 is just evidence of how the recording was made and the circumstances in which the Plaintiff's voice was recorded in the question and answer session.

Section 2 of the Copyright and Neighbouring Rights Act defines audiovisual fixation separately to mean:

"works consisting of a series of related images, which impart the impression motion, with or without the accompanying sounds, susceptible of being made visible and where accompanied by sound, susceptible of being audible such as cinema, television or video films."

The caller tunes in question are therefore sound recordings of the Plaintiff's voice. There is no controversy about the fact that the Plaintiff is the one who produced the voice comprising of words which were captured by the Third Party's agents and stored in a tangible form which forms the subject matter of the suit. However the words were recorded and kept in a tangible form capable of being reproduced and sold to subscribers of the Defendant by the Third Party. There is no doubt in my mind that the Plaintiff never intended the recordings to be made in the manner and used in the way that the caller tunes have been used. There is also no doubt in my mind that the Plaintiff did not collaborate with the third-party or the Defendant for the production and sale of his voice or talk. Furthermore the evidence establishes that the Plaintiff did not consent to and he was not asked for any participation or agreement for the use of his voice in the caller tunes. The sound recording in the sense of putting it in a tangible form was admittedly made by the third-party who claims ownership and as well as authorship.

The Plaintiff in his written testimony testified that he had prepared for the interaction with the media. Secondly his testimony is that his speeches or literary works are of original composition and he does not imitate or copy from anyone. Thirdly he testified in writing that the Defendant repeatedly and without any prior authority from him, licence or consent or permission copied or otherwise reproduced the speeches for sale to the public as caller tunes and ringtones for their selfish and illegal economic benefit. Furthermore he protested the violation of his property rights occasioned by the publication for sale of the speeches by the Defendant but this was disregarded by the Defendant and Third Party. The Plaintiff testified as PW1 and was cross examined. He admitted that as a public figure he had been recorded very many times by newspapers, radio stations and TVs and he has not sued any of those stations. He further testified by agreeing under cross-examination that when he gave the interviews and statements in the suit, he knew he would be recorded. He further agreed that the recorded words were spoken in response to questions of members of the press and that the questions were put to him on an impromptu basis. He agreed that he did not allow the Defendant to edit the speeches or to sell the speeches. In re-examination the Plaintiff testified that he gave speeches in Parliament in front of people. They wanted to know his fate in the committee and he tried to answer their questions. He tried to give the information to the journalists but to his surprise he heard them in ringtones whereupon he went to his lawyers and complained. He did not sue the radio and TV stations because they had not tried to duplicate his speech.

The Plaintiff's evidence is unequivocal about the fact that the sound recordings of whatever he said, was used by the Defendant and Third Party without his consent. He did not call any other witness.

DW1 Mr Christopher Ssali testified on behalf of the Defendant that the ringtones were obtained from SMS Media Ltd, the third-party. He further testified that the third-party owns the copyright. Furthermore the contents of ringtones 504528 – 504532 were played in court by the Third Party's witness Mr Simon Kaheru and audio CDs were admitted in evidence as TPD2 and TPD3 respectively. He testified that the Plaintiff was addressing the media and intended his message to be utilised for the general public. The number codes, the subject matter of the suit are the same recording but with different numbering according to the written testimony of third-party witness Mr Simon Kaheru in paragraphs 10 to 33 of his written testimony. I have also listened to the audio recording in the CD admitted in evidence and the words spoken are the same words of the Plaintiff in the audiovisual recording exhibit TPD1.

The conclusion is that the subject matter of the suit are recordings of the Plaintiff's voice while answering questions of members of the public after his interview with the Parliamentary Appointments Committee for purposes of being vetted as a Minister without portfolio nominated by His Excellency the President of the Republic of Uganda and the occasion was captured in the video exhibit TPD1.

Subsequently the specific voice in answer to questions was captured but the Third Party edited out the various questions out of the audio recording thereby forming the ringtones which in that sense were created by the third-party exclusively using the Plaintiff's words and voice. Some audio reactions from the public in the form of laughter and sounds of incredulity and other excited emotive and audio reactions of the public are audible in the background.

Going back to the definition in Osborn's Concise Law Dictionary 11th edition at page 45, the author of a work for copyright purposes is the person who creates the work:

“This is taken to be the producer of the sound recording, the producer and principal director of the film, the person making the broadcast, the publisher in the case of the typographical arrangement of a published edition.”

The definition suggests strongly that the author is the person directing or doing the recording and not the person being recorded.

As noted earlier the United Kingdom law has a statutory basis and a long history. According to Halsbury's laws of England (supra) the word "author" was not defined for works made on or after 1 June 1957 and before first of August 1989. The expression 'author' in relation to sound recordings referred to the maker who in the case of sound recordings was the person who owned the first record embodying the recording at the time when the recording was made. In Halsbury's

laws of England (supra) after 1 August 1989 in paragraph 117, the author of the works is taken to be the person who created the work according to case law. Secondly sound recordings were defined as:

"records, perforated rolls, and other contrivances by means of which sound would be mechanically reproduced and work protected as if they were musical works and the person who was the owner of the original plate from which the contrivance was directly or indirectly derived at the time when the plate was made was deemed to be the author".

In paragraph 118 it is written that prior to 1912, the meaning of the word "author" was derived from case law.

No further guidelines are given by the definition under section 2 of the Ugandan Copyright and Neighbouring Rights Act, 2006 of the expression "author". However there is a hint given by the definition of the expression "sound recording" as the aural fixation of sound in a material carrier such as a tape, disc or other similar material. Taking the definition of the word "author" as well as the meaning of the expression 'sound recording', the two definitions give a guideline as to who the author of the sound recording is. From the definition of the expression "author", it is the person who created or creates work protected under section 5 and includes a person or authority commissioning work or employing a person making work in the course of employment. Is it the case that the Third Party employed persons to do the recording of the Plaintiff's voice and therefore is the creator of the works? Secondly the work was by fixation. The expression "fixation" is also defined under section 2 of the Copyright and Neighbouring Rights Act, to mean inter alia the embodiment of sound in a:

"material form sufficiently stable or permanent, to permit them to be perceived, reproduced or otherwise communicated through a device during a period of more than transitory duration."

This definition taken together with the meaning of "sound recording", clearly means the fixation of the sound in the material carrier such as the tape, disc or other similar material. The act of fixation or the manipulation of that fixation was done by the third-party employees who for purposes of claiming authorship of the recording make the third-party the creator of the works.

Detailed discussion of the expression "authorship" can be found in the textbook by David Bainbridge on Intellectual Property Sixth Edition between pages 78 and 83. He makes the important distinction that the author of the work has moral rights while the owner of the works has economic rights. These two rights may be merged in one person but that is not always necessarily the case. Sometimes the author of the work will also be the owner of the copyright in the work. Ownership flows from authorship which means the person who makes the work who is normally the first owner of the copyright in the work provided he did not create the work in the course of employment. Furthermore the author notes that the expression "author" of the work is

the person who creates it under the UK statutory law of Copyright, Designs and Patents Act 1988 section 9 thereof. This definition is similar to that found under section 2 of the Ugandan Copyright and Neighbouring Rights Act, 2006.

David Bainbridge (supra) in the discussion also states that the author does not have to be the person who carries out the physical act of creating the work. In other words a person who takes dictation is not the author of the dictated work. In the review of the case of **Robin Ray versus Classic FM plc (reported in [1998] FSR 622)** David Bainbridge quotes from Lightman J for the proposition that someone acting as a mere scribe producing the copyright expression accurately in accordance with instructions and without making any creative contribution whatsoever can never be an author or co-author of a work.

The cases reviewed however do not deal with recording using a device and editing of the recording which is the category in which the Plaintiff's case falls. As far as they use of devices is concerned **David Bainbridge** (supra) notes at page 80 that in the case of sound recordings the author is deemed to be the person by whom the arrangements necessary for the creation of the work was undertaken. The author of a sound recording is the producer according to the statutory law. Under the Ugandan law section 2 of the Copyright and Neighbouring Rights Act, 2006 defines a producer to mean the person who organises and finances the production of an audiovisual fixation or sound recording.

In the main submissions the Plaintiff's Counsel relied on the case of **Walter versus Lane (1900) AC 539** between pages 556 – 557 per Lord Brampton for the definition of the author of a speech as the author of the language orally uttered by the person. After making reference to this case, the Plaintiff's Counsel subsequently in rejoinder rejected the case as an outdated authority on the ground that the case was decided under the Copyright Act 1842 which had no originality requirement. In that case the Earl of Roseberry delivered speeches on five occasions between 1896 and 1898 and the speeches were taken down by the Times reporters in shorthand, corrected, revised and punctuated and thereafter published. An action was brought against the appellants on the ground that the copyright in the works vested in The Times. He held that the producer of the written composition is the person who is the author of the book within the meaning of the statute. Lord Davey further held that in his opinion the reporter was the author of his own report. It was he who brought into existence in the form of writing the materials in question. He further noted that copyright under UK law at that time had nothing to do with originality or literary merits of the author or composer.

I agree with the Plaintiff's Counsel when he retracted the use of the above case and the case is not directly applicable to the facts and circumstances of the Plaintiff's case. This is because the reporters in that case used their skill and expense to render the speeches into typescript and added punctuation and did editorial work. Lord Davey further expressed himself on the issue and held that another person shall not just reap where they have not sowed. Can that analogy be used

in a situation where an electronic device is used to copy exactly what somebody said? What would be the situation where a person secretly records a musician in a public live performance? Would that person be taken to be the creator of the musical works or sound recording?

Further reference was made to the case of the estate of **Martin Luther King Jr Inc versus CBS Inc** (supra). There is no need for me to consider the case because in that case the question of who was the author of the works was not in dispute. What was in dispute was the copyright to the works. Moreover the works had been registered under the American law for copyright protection and the case is clearly distinguishable from the facts and circumstances of the Plaintiff's case. What is in controversy in the Plaintiffs action firstly relates to the issue of who the author of the ringtones is? The Plaintiff claims authorship by virtue of the ringtones having his words exactly from a recording made of his answers to questions put to him by persons who have not been clearly identified in the proceedings according to exhibit TPD1 and who surrounded the Plaintiff after he came out of parliament on the occasion of his interview by the Parliamentary Appointments Committee.

I do not doubt the fact that some labour was expended in the recording and editorial work was done so as to produce the ringtones with exclusively have the Plaintiff's voice and talk or answers. The fact that the recording has the Plaintiff's characteristic style and personal charisma is also not doubted as the reactions to the Plaintiff's answers generated a lot of merriment from the listeners in exhibit TPD1 which is the video recording of the event. The fact that the Plaintiff is a public figure is also not in doubt and the style of his delivery is personal. The Plaintiff's answers was likely to be saleable material and that is the basis upon which it could be marketed by the third-party to the Defendant and the Defendant was able to offer it to its subscribers for a fee.

It is the Defendant's defence that the Plaintiffs talk was intended to be published to members of the public. Secondly the audio recordings do not represent a prepared speech but was elicited from the Plaintiff by persons who asked some questions of the Plaintiff and the Plaintiff answered them. In the second issue the Defendant's defence is that the Plaintiff has no copyright in the interview.

After review of the statutory law provisions, the case law and the evidence, it is my conclusion that the word "author" has a specific meaning. In the relation to sound recording the word "author" has a restricted meaning by virtue of the definition of the expression "sound recording". It is the fixation of sound in a material carrier such as a tape, disc or similar material. Secondly by definition of the word "fixation", the meaning becomes more apparent as embodiment of sound in a material form sufficiently stable or permanent, to permit them to be perceived, reproduced or otherwise, communicated through a device. Last but not least the person who commissions or creates the work is the person who does the recording or commissions the recording of the works. In the restricted meaning therefore it is the third-party who is the author

of the recording of the Plaintiff's voice in the sense that it carried out the fixation of the Plaintiff's voice in a material form and was able to reproduce it and sell it to the Defendant. Before doing that, it compiled the Plaintiffs answers to different people and to different questions and merged the answers together with the audible background sounds of reactions from members of the public who were present. On the other hand the Plaintiff never arranged the recording and never consented to the use of his voice in the manner in which it was utilised by the third-party and the Defendant as ringtones for sale to the subscribers of the Defendant. In the premises he could not have been the author of the works to which he never consented or willingly participated.

Before taking leave of the matter I have considered the question of moral rights accruing to an author.

Moral rights mean the right to claim authorship or performance as provided in sections 10 and 23 of the Copyright and Neighbouring Rights Act, 2006. The further definition of moral rights is found under section 10 of the Copyright and Neighbouring Rights Act but to the extent of the definition of an author, section 10 is inapplicable to the Plaintiff's situation. This is evident from the wording of section 10 (1) of the Copyright and Neighbouring Rights Act which provides that the author of any work protected by copyright shall have a moral right. By application of the definition of the word "author" as used in the enactment, the Plaintiff is not the author of the works and therefore the provisions of section 10 of the Copyright and Neighbouring Rights Act, 2006 are inapplicable to the Plaintiff.

With regard to the provisions of section 23 of the Copyright and Neighbouring Rights Act, the provision falls under neighbouring rights. Section 21 (1) defines neighbouring rights as rights attached to the auxiliary role played by performers, producers of sound recording and audiovisual and broadcasting companies. A performer has a right to be identified as the performer and to have his or her name mentioned each time the performance of the broadcast of communication of the fixation is used according to section 3 of the Copyright and Neighbouring Rights Act.

Was the Plaintiff a performer? The expression "performer" is defined under section 2 of the Copyright and Neighbouring Rights Act inclusively to include an actor or actress, singer, musician, dancer or other persons, who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expression of folklore. Furthermore the expression "performance" means the presentation of the work by actions such as dancing, acting, playing, reciting, singing, delivering, declaiming or projecting to listeners or spectators.

Was there presentation of the work through delivery? In the case of **Sikuku Agaitano vs. Uganda Baati HCCS No. 0298 of 2012**, I had occasion to consider the meaning of the expression "performer". The Plaintiff's photos appeared in a promotional magazine of the Defendant. However the evidence was that the Plaintiff was notified that there would be a filming of them while at work. At page 12 of the decision I held that the reference to

neighbouring rights assumes that the Plaintiff is not the author of the works which is the subject of the copyright ownership independently of the Plaintiff's right. In other words neighbouring rights are auxiliary to the original works. Even if that decision is to be re-visited, the Plaintiff obviously did not agree to any performance or performing right as may enjoy the protection of a performer.

According to Halsbury's laws of England fourth edition reissue volume 9 (2) and paragraph 11 thereof on the right in performances:

"There is no copyright in the performance of a work as distinct from the work itself, but performers are protected by both civil and criminal law against the unauthorised recording, filming, broadcasting and inclusion in a cable programme service of their performances and have both property and non property rights in their performances."

Even in the UK law quoted above, there has to be a work as distinct from the performance itself. In this case the Plaintiff in the sense of the answers to questions was actually the originator of the answers. However when it came to the recording, the Plaintiff was not the author thereof. Secondly the Plaintiff willingly gave his answers for the consumption of the public.

I have additionally considered the provisions of section 11 of the Copyright and Neighbouring Rights Act which provides for co-authorship rights. It provides that:

"Where work is created by more than one person and no particular part of the work is identified to have been made by each person, such that the work is indistinguishable, all the authors shall be co-owners of the economic rights and moral rights relating to that work and the co-owners shall have equal rights in that work."

To be a joint owner however has to be consensual. According to Halsbury's laws of England (supra) paragraph 114 a work of joint ownership means "a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from that of the other author or authors". Furthermore there must be a common design and cooperation in the work of carrying out the design for there to be joint authorship. Furthermore:

"A claimant to joint authorship in work must establish that he has made a significant and original contribution to the creation of the work and that he has done so pursuant to a common design."

The analogy in the above provision is useful in the consideration of the Plaintiff's predicament. The Plaintiff in his own testimony indicated that he complained about the use of his voice. The Plaintiff had also filed a criminal complaint for copyright infringement.

Last but not least the Plaintiff answered questions put to him by members of the public and it is his answers which were merged together by the third-party excluding the questions and that merger of his answers forms the subject matter of the suit as the ring tones complained about.

In conclusion the Plaintiff is not the author of the works and therefore not being the author he does not enjoy copyright protection under the Copyright and Neighbouring Rights Act, 2006. Furthermore I agree with the submissions of the Defendant's Counsel as well as that of the Third Party's Counsel on this point.

I further want to emphasise the authorities cited by the Third Party's Counsel on the pertinent question of whether verbal utterances made with the knowledge that they are likely to be broadcast, and made to members of the public can enjoy copyright.

In the case of **Gould Estate versus Stoddart Publishing Company (1996 8209 (ONSC))** the Supreme Court of Ontario, Canada held that generally that conversation elicited in an interview was not a literary work because it was not expressed in a material form. Secondly a person's oral statements in his speech, interview or conversation are not recognised in that form as a literary creation capable of attracting copyright protection. In that case the brief facts are that a young concert pianist Mr. Gould was interviewed by Jock Carroll for an article in the Weekend Magazine. The interviewer accompanied the young pianist on a vacation to the Bahamas and took approximately 400 photographs and copious notes including some tape recordings of their conversations. Certain of the photographs and comments were used in the magazine article and nearly 40 years later in 1995 Jock Carroll published through Stoddart Publishing Company Ltd a book entitled "Glenn Gould: Some Portraits of the Artist as a Young man". By this time Gould had died and the estate brought the action against the publishing company. The court considered the right of excluding publicity through the tort of appropriation of personality. The estate of the deceased submitted that the book in question was a compilation of the photographs and act of selling the book was to take commercial exploitation and therefore unlawful appropriation of the personality of the deceased. The second ground of the action was grounded in copyright law in Canada which is a creature of statute. The statute namely the Copyright Act provides that: "Copyright shall subsist in Canada in every original literary, dramatic, musical and artistic work". The authority is persuasive on the question of the use of tape recordings and photographs. A judgement of the Supreme Court by Lederman J at page 8 of the supplied authority agreed with and also quoted from a decision of the United States courts in *Falwell versus Penthouse International Ltd*, 215 U.S.P.Q 975 (Vir. Dist. Ct. 1981) (this case was also supplied) which case considered the interview of Rev Jerry Falwell published in the Penthouse magazine without his consent after an interview. The publication contained his name and picture and a claim was made for common law copyright infringement where it was held:

“Plaintiffs claim of copyright presupposes that every utterance he makes is a valuable property right. If this were true, the courts would be inundated with claims from

celebrities and public figures all of whom may argue that their expressions should also be afforded the extra ordinary protection of copyright. Such a result was never contemplated by the development of the law regarding common law copyright, and such a result would run counter to the firmly established constitutional guarantees of freedom of speech and of the press....

However different or unique Plaintiff's thoughts opinions maybe, the expression of these opinions or thought is too general and abstract to raise the level of the literary or intellectual creation that may enjoy the protection of copyright. Although the general subject matter of the interview may have been outlined in the reporter's minds prior to their meeting with the Plaintiff, the actual dialogue, including the unprepared responses of the Plaintiff, was spontaneous and proceeded in a question and answer format. There is no defined segregation, either by design or by implication of any of the Plaintiff's expressions of his thoughts and opinions on the subject discussed which would aid in identifying Plaintiff's purported copyrighted material.

In the case at bar, Plaintiff will fully and freely participated in the interview. An interview with members of the media is not a private conversation. Like a press conference, Plaintiff in this action responded to questions in a spontaneous manner and not from a carefully prepared text or even from notes. Moreover, Plaintiff was aware that his comments were not made in the context of a private conversation but rather was destined expressly for dissemination to the public...."

This case supports my conclusion that copyright in a sound recording vest in the producer. The above case is also very persuasive in this case in the sense that the Plaintiff made his utterances in public and meant them to be communicated or disseminated to members of the public. He did not give any restrictions as to how that information was supposed to be used by the people to whom he freely gave his answers. He has not come to this court claiming a tort of appropriation of his personality but claims inter-alia unjust enrichment and copyright infringement. Because he enjoys no copyright in the circumstances, the action for copyright infringement has to fail and is hereby dismissed.

The other issues are corollary to the question of whether the Plaintiff enjoyed copyright by virtue of being the author of the works. Because it has been held that the Plaintiff is not the author, it followed that the Plaintiff enjoyed no moral rights under section 10 or 23 of the Copyright and Neighbouring Rights Act, 2006. Furthermore having held that the Plaintiff enjoyed no copyright to the ringtones, there is no need to consider the issue of derivative rights as well as defences of fair use of existing copyrights as provided for under section 15 of the Copyright and Neighbouring Rights Act, 2006.

With regard to the cause of action founded on unjust enrichment, the cause of action is a species of quasi-contract. The Plaintiff relied on the case of **Nipun Norattam Bhatia vs. Crane Bank**

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~?+:*

Ltd, Court of Appeal Civil Appeal Number 75 of 2006. In the judgment it was noted that English law for a long time has accepted a third category of remedies that is different from that in tort and contract which provides against unjust enrichment or benefit according to the speech of Lord Wright in the case of **Fibrosa Spolka Akcyjna vs. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 and 61**. I have generally considered this definition in the citation of the case as **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 at Page 135** in the judgment of Lord Wright. The case was for money paid for a consideration which failed where he held that:

“It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.”

Illustrations by Lord Wright of the principle of recovery for unjust enrichment are as follows: ‘Money paid under a mistake of fact’; ‘money paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled’; ‘prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due;’ “In such circumstances there was no intention to enrich the payee”. He further held that “the gist of the action is a debt or obligation implied or more accurately imposed by law, in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost.”

I further wish to make reference to the **Oxford Dictionary of Law Fifth edition** definition of the term "quasi contract" at page 401 that:

“A field of law covering cases in which one person has been unduly enriched at the expense of another and is under an obligation *quasi ex contractu* (as if from a contract) to make restitution to him. In many cases of quasi-contract, the Defendant has received the benefit from the claimant himself. The claimant may have paid money to him under a mistake of fact, or under a void contract, or may have supplied services under the mistaken belief that he was contractually bound to do so. In that case, he is entitled to be paid a reasonable sum and is said to sue on a *quantum meruit* (as much as he deserved). Alternatively, the claimant may have been required to pay to a Third Party money for which the Defendant was primarily liable. The Defendant's receipt of the benefit need not necessarily, however, have been from the claimant. It is enough that it was at the latter's expense, and he may therefore be liable in quasi-contract for money paid to him by a Third Party on account of the claimant.”

As far as the third-party is concerned, the action of the Defendant against the third-party is an action by the Defendant against the Third Party and costs cannot be imposed on the Plaintiff. As far as the claim for indemnity against the Third Party is concerned though no order was made against the Defendant, the Defendants claim against the Third Party stands dismissed with costs enforceable against the Defendant.

Judgment delivered in open court the 6th of March 2015.

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Peter Kauma for the Third Party

Nelson Walusimbi for the Plaintiff

Bruce Musinguzi and Joseph Matsiko for the Defendant

Plaintiff in court

Simon Kaheru and Stephen Banage for the Third Party

Bosco Sempijja Manager Legal Affairs of the Defendant in Court.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

6 March 2015