

THE REPUBLIC OF UGANDA
IN THE HIGHCOURT OF UGANDA AT KAMPALA
LAND DIVISION

CIVIL APPEAL NO.0035 OF 2023

**(ARISING FROM WAKISO CHIEF MAGISTRATES CIVIL SUIT
NO.36 OF 2020)**

BUKERA BOSCO:.....1ST APPELLANT
MUGISHA HENRY:.....2ND APPELLANT
MUTIIBWA INNOCENT:.....3RD APPELLANT
KIGUNDU AHMADA:.....4TH APPELLANT
KABEERA JENIFER:.....5TH APPELLANT

VERSUS

KABENGE JACKSON:.....RESPONDENT

BEFORE HON LADY JUSTICE ELIZABETH JANE ALIVIDZA

JUDGMENT

REPRESENTATION

The Appellants were represented by Counsel Wamimbi Samson.

The Respondent was unrepresented.

INTRODUCTION

This is an Appeal arising from the judgment of Her Worship Happy Monica Magistrate Grade one delivered on the 17th March 2023 at the Chief Magistrates Court of Wakiso at Wakiso.

The Appellants filed Civil Suit No.36 of 2020 against the Respondent for orders and declaration that the Respondent's actions of closing the existing access road is illegal, an order directing the Respondent to stop the construction, building of the wall fence/perimeter wall in

the access road, an order directing the Respondent to reopen the existing access road, general damages, punitive damages, interest and costs of the suit.

The trial Magistrate found in favor of the Respondent.

BACKGROUND

The Appellants' and Respondent are close neighbors at Ssenge Village Wakiso Sub-County in Wakiso District. Around 10th January, 2019 the Respondent purchased two plots described as Block 253 Plot 692 and 691 which are directly opposite his home sitting on Plot 778. In between the Respondent's home and his newly acquired two plots there is an existing access road which runs from Kawanda road for the Appellants and other community members.

On the 10th May, 2021 the Appellants found that the Respondent was closing the existing road by erecting a wall fence. The Respondent contended that he is the registered proprietor of plots comprised in Busiro Block 263 Plot 778, 691 and 692, lands at Ssenge.

The Respondent stated that he purchased Plot 778 in 2008 and built his matrimonial home. That he bought plots 691 and 692 in 2019. That the land have certificates of title and clear survey deeds and drawings, mappings. That there is no access road that passes through his land or home as alleged by the Appellants. That the Appellants have a clear road that is well demarcated on the title deed and it passes at the edge of the Plots 692 and 691 which is in use.

The following issues were raised in the lower Court;

1. Whether the Plaintiffs have or enjoy legal right of way through the Defendant's land?
2. Whether the right of way has been violated by the Defendant?
3. Whether the Plaintiffs are entitled to the remedies sought?

At trial, the Appellants/Plaintiffs adduced the evidence of five witnesses PW1 Kigundu Ahmada, PW2 Namata Milly, PW3 Bukera Bosco, PW4 Mutibwa Innocent and PW5 Nakate Rose. The Respondent adduced the evidence of two witnesses DW1 Kabenge Joseph and DW2 Nakiwala Ruth.

Court visited locus on the 22/12/22. All the witnesses other than DW 2 testified and were cross examined at the locus. It is noted that during the locus visit, the Appellants' Counsel moved Court to allow the LC1 of the area to testify. However Court declined the request on grounds that LC 1 chairman was never brought by any of the parties as a witness during trial.

The trial Magistrate held in favour of the Respondent hence this appeal.

GROUND OF APPEAL

The Appellants raised fourteen grounds of appeal as follows;

1. The Learned Trial Magistrate erred in law and fact when she deviated and changed the facts of the Plaintiffs' case thus arriving at a wrong decision
2. That the Learned Trial Magistrate grossly misdirected herself when she held that there is an access road that is clearly marked on the

deed plan and physically available as observed at the locus at the edge of Plot 592 and 591 to Kayunga Road.

3. That the Learned trial Magistrate contradicted herself when she held that the access road passes at the edge of Plot 692 and 691, end at Plot 695 and that there is a running road from Plot 1802 to 695 to 691 then 692 onward to Kayunga Road.
4. The Learned Trial Magistrate erred in law and fact when she held that the Appellants are forcing their way through the Respondent's land amounting to trespass.
5. The Learned Trial Magistrate misdirected herself when she held that the Appellants have a clear road to their homes as observed at locus.
6. The Learned Trial Magistrate misdirected herself when she ignored material facts as observed at locus and came up with her own facts thus arriving at a wrong decision.
7. The Learned Trial Magistrate grossly misdirected herself when she held that there is no existing access road through the Respondent's Plots 692 and 691 when there is one.
8. The Learned Trial Magistrate grossly misdirected herself when she held that there is no access road indicated on the deed plan ignoring material evidence presented to her showing a clear access road through Plot 692 and 691.
9. The Learned Trial Magistrate misdirected herself when she held that there is an access road through Plot 695 deviating from the earlier finding of 14th December, 2021 in Misc. Application No. 53 of 2021 that the Road at the edge of Plots 692 and 691 only feeds and stops at Plot 695.

10. The Learned Trial Magistrate erred in law and fact when she relied on the decision in Harriet Fowler & Anor vs. Arthur Busingye whose facts are perfectly different thus arriving at a wrong decision.
11. The Learned Trial Magistrate misdirected herself when she held that the Respondent broke part of his Plot 691 to create access to Plot 692, which he did during the pendency of the suit to mislead Court.
12. The Learned Trial Magistrate misdirected herself when she held that the Respondent did not in any way block the Appellants' access road for he owns the two Plots and no access road is marked on those two Plots per the deed plan whereas the access road exists and is indicated on the deed plan.
13. The Learned Trial Magistrate generally failed to properly evaluate evidence on record and made manifestly wrong conclusions and findings.
14. The Learned Trial Magistrate erred in Law and fact when she failed to consider the Appellants' written submissions and relied only on the Respondents submissions thus arriving at wrong conclusions and findings.

ROLE OF THE FIRST APPELLATE COURT

It is the duty of this Court as a first Appellate Court to re-hear the case by subjecting the evidence presented to the trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion (see Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17 of 2000; [2004] KALR 236).

In a case of conflicting evidence the Appeal Court has to make due allowance for the fact that it has neither seen nor heard the witnesses. It must weigh the conflicting evidence and draw its own inference and conclusions (see Lovinsa Nankya v. Nsibambi [1980] HCB 81).

The practice is that the Appellate Court may interfere with a finding of fact if the trial Court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial Court.

Section 101 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist and the burden of proof lies on that person.

RESOLUTION.

When this Appeal came up for hearing, Court issued guidelines for parties to file written submissions. By the time of writing this Appeal, only the Appellants' had filed submissions that have been taken into consideration.

The Appellants in their submissions argued grounds 1,6 and 10 together, grounds 7,8 and 11 concurrently, grounds 2,3,4 and 5 concurrently, ground 9 independently, and grounds 12,13 and 14 concurrently.

Before resolving this Appeal, this Court notes that the grounds of Appeal offend the rules of procedure. Order 43 rule 1 and 2 of the civil

procedure Rules requires a memorandum of Appeal to set forth concisely the grounds of the objection to the decision appealed against. It provides that; *The memorandum of appeal shall set forth, concisely and under distinct heads the grounds of objection to the decree appealed from without any argument or narrative and the grounds shall be numbered consecutively.*

The Appellant raised 14 grounds of Appeal, having perused through the grounds, I find most of the grounds raised by Counsel to be argumentative and narrative, notably grounds 2, 3, 4, 5, 7,8,9,10,11 and 12. Some grounds are even repetitive. These grounds are ably covered under ground 13 dealing with failure to properly evaluate and reach a correct decision. Accordingly, I struck out grounds 2, 3, 4, 5,7, 8, 9,10, 11 and 12.

I also find that grounds 1 and 6 are similar. It focuses on facts collection at the locus in quo. I shall resolve them together.

LAW APPLICABLE

This Appeal is based on a dispute about an access road that was blocked. Right of way through another person's property is a form of easement. An easement is a social cultural right rooted in common law that grants a party the right for use of another person's property for a specific person. The most common one is the right of way to a public road.

Easement rights are created voluntarily through negotiation including sale or mandatory through the force of law. What is important to note is that the right of way is not automatic.

In the case of Musoke v Agard and 2 Others (Consolidated Civil Appeals 134 of 2017; Consolidated Civil Appeals 46 of 2016) [2020] UGCA 2164 (10 December 2020) the Court of Appeal noted that what is required to give effect to the common law principles as to easements requiring a person on whose land the road passes to recognize that the road is an easement for the benefit of those who are entitled to use it.

In Uganda, the law on access to roads is provided for under the *Roads Act Cap 346* that repealed the *Access to Roads Act Cap 350*. *Section 2 of the Roads Act Cap 346* defines access to road to mean a public or private road affording access to a public road or to a highway.

Section 60 of the Roads Act Cap 346 provides for the application for leave to construct access road through private property, it provides;

- 1) *where the owner of any land is unable through negotiations to obtain leave from adjoin landowners to construct an access road to a public road, he or she may apply to the minister for leave to construct an access road over any land lying between the land of the owner and the public road.*

I am aware that in Fairey vs. Southampton County Council [1956]2 ALL ER 853, where it was held that the legal burden is on a landowner to rebut the presumption of a public's right of way. It was further held that; "The plaintiff must prove that he challenged the existence of a public

right of way in so open and notorious fashion that it was clear to not strangers but also to local residents that a public right of way did not exist.

The plaintiff could have done so by for instance, putting a barrier a barrier across the path or putting up a notice forbidding the public to use the path. If so much time has passed without the land owner challenging the existence of a public right of way, the use of the public right of way for a continuous period of is enough to raise the presumption of a public right of way”.

In the above case, Lord Denning stated that “In my opinion, a land owner cannot escape the effect of twenty years ‘prescription by saying that, locked in his own mind, he had no intention [to dedicate] [to grant public right of way]; or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate.

In order for there to be “sufficient evidence that there was no intention” to dedicate the way, there must be evidence of some overt acts on the part of the land owner such as to show the public at large-, the public who used the path, in this case the villagers-that he had no intention to dedicate. He must, in Blackburn’s words, take steps to disabuse those persons of any belief that there was public right.

Such evidence may consist, ... of notices or a barrier, or the common method of closing the way one day in a year”.

In light of above, legally the land owner has to oppose the existence of the right of way and it is not enough to prove continuous period of use.

Ground 13: Failure to properly evaluate evidence on record and made wrong decision. (this also covers grounds 2,3,4,5,8,9,11 and 12)

I will remind myself of the burden and standard of proof

The cardinal principle in civil cases is that the burden of proof is upon the Plaintiffs to prove their case on a balance of probabilities. *Section 101, 102 and 103 of the Evidence Act* provide that he who asserts a fact must prove it. Furthermore, whoever desires any Court to give the judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The Court has to be satisfied that the Plaintiff has furnished evidence whose level of probability is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345 and Sebuliba Vs Cooperative Bank Ltd (1982) HCB130)

It is further a cardinal principle of law that in civil suits all evidence is proved on a balance of probabilities. See the cases of Miller V Minister of Pensions [1947] 2 All.E.R 372 and Katumba V Kenya Airways, Civil Appeal 9 of 2008 (SCU)

I am aware that this Court is not bound to follow the trial Magistrate's findings of fact if it appears either that the learned trial Magistrate clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence or if

the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.

I also remind myself about evaluation of evidence.

The formula for evaluating evidence was laid down in the case of Abdu Ngobi V Uganda. S. C. Cr. Appeal No 10 of 1992 where it was held that ... *"The evidence of the prosecution should be examined and weighed against the evidence of the defence so that a final decision is not taken until all the evidence has been considered. The proper approach is to consider the strength and weakness of each side, weigh the evidence as a whole applying the burden of proof as always resting upon the prosecution and decide whether the defence has raised reasonable doubt"*.

I am also aware of the fact that a Judicial Officer only makes fair and just decisions based on law and evidence. A judicial officer is prohibited from making judicial decisions based on fanciful theories, rumors, speculation and conjuncture (refer to Court of Appeal case Mbabazi Rovence Natukunda and Loyce Kahunda Vs Uganda. (Criminal Application Number 47 of 2012); where this trite law was re-emphasized.

Though this above principle refers to criminal cases, it also applies to civil cases.

I will go head to evaluate the evidence as a whole, bearing in mind the burden of proof.

Counsel for the Appellants submitted that the existence of the access road is a matter of fact. That all the witnesses confirmed to Court that

the Respondent found the disputed access road in place. Counsel submitted that the previous proprietors of the two plots 691 and 692 respected the existing access road.

Counsel also submitted that the trial Magistrate contradicted herself when she observed that at page 6 that there is an access road that passes at the edge of plot 692 and 691 and ends at 695.

Looking at the judgment, the trial Magistrate on page 6 stated that court visited locus on 2nd December 2022 and observed that there is an access road that passes at the edge of plot 692,691 and ends at 695.

Court also noted that the Defendant broke part of his plot 691 to create access to plot 1802 for PW1 and that there is a road running from plot 1802, to 695 to 691 then 692 onward to Kayunga road.

From the record, all the Appellants' and the Respondent testified at locus and a sketch map was drawn. PW1 testified that the access road in question is not indicated on the plan and agreed that there is a road on top of plots 692 and 691 and it is reflected on the title deed.

PW2 testified that his plot is 695, that there is an access road that ends at his plot and it does not pass on the disputed area. PW3 testified that he found the access road there. That he has access to his home.

PW4 testified that the access road was not captured in the agreement but he has an access road on the Respondent's plot. PW5 testified that her house is behind the Respondent and that she has an access road on plot 776.

DW1 testified that on the contested area there is no access road. That it is not provided on the title. That he wanted to put a drainage system. That there is an alternative road which stops at plot 695 but he created way to join the road to the 1st Appellant and 4th Appellant.

That he broke somewhere on his plot and he gave them access. He further stated that building to join plots 691,692 to 778 was not an afterthought as it is his land. He confirmed that there was no road and he broke his wall fence to create a road for his neighbors.

The evidence from the locus visit on record shows that the Respondent created an access road that joins to another access road from plot 1802, 1803, 1804 and 1805.

I note that this access road is not reflected on the deed plan. It is a fact from the Respondent's evidence that he created this access road as a result of having blocked the existing access road that was created through plot 691 and 692 and it was also not reflected on the deed plan. I note that the Respondent attached DEX 7 and DEX 8 pictures of expanded access road.

Having looked at the sketch maps drawn and the deed plan, it is my finding that that the Respondent created an access road that passes at the edge of Plot 691 and 692 ends at Plot 695 and that there is a running road from Plot 1802 to 695 to 691 then 692 onward to Kayunga Road. This is the alternative access route that the Respondent created for the Appellants having blocked the access road that passed through his plots 691 and 692.



It is my conclusion that the trial Magistrate was right in her findings that the Appellants have a clear access road for the Appellants. However her reasoning may not have been clear but her conclusion is just, fair and correct.

Ground 13 and related grounds fail.

Ground one :The Learned Trial Magistrate erred in law and fact when she deviated and changed the facts of the Plaintiffs' case thus arriving at a wrong decision

Ground 6: The Learned Trial Magistrate misdirected herself when she ignored material facts as observed at locus and came up with her own facts thus arriving at a wrong decision.

I am unable to ascertain the deviation and changing of facts at trial or during locus in quo. Having critically analyzed the deed plan on PEX1 certificate of title for block 263 plot 1805, PEX2 certificate of title for plot 1807, and certificate of title for block 263 plot 1802.

It is evident that there is an access road that plots 1805, 1804, 1803, 1802 and 1807 use. This access road joins to another access road that leads to plots 695, 691 and 778.

It is my finding from the deed plan, there is no other access road in between plots 691, 692 and 778, however the deed plan shows that there is an access road between plots 691,692, 693 and 694 that ends right at plot 695.

DW1 testified that there is no road on the deed plan, that there was no access road to PW3's house (on plot 1802), that he opened for him an



access road, during re-examination, he confirmed that there is an access road above the plots as access to the PW3's home.

During cross examination PW3 Bosco Bukera stated that the deed plans indicate the access roads , that he did not see an access road in the plots 691 and 692 and that there is an access road between his plot and plot 691, an access road passing through at the edges of plot 692 and 691.

DEX9 the survey report from the findings, it is observed that the existing road as shown on drawing passes through plots 691 and 692. The photographs of the boundary opening and area verification show that accessing road in question falls within the boundaries of both plot 691 and 692.

It is my conclusion that the creation of an access road is governed law and or negotiations of the parties. Therefore, however much the access road through plots 691 and 692 existed for a period of time, the access road is not reflected on the deed plans. This means that the registered proprietor would have to forfeit part of his land for it to continue in existence. The fact that the Respondent created a new access road clearly resolves this issue and ensures that rights if any of the Appellants are protected.

In this case, having critically examined the deed plans adduced into evidence, it is also my conclusion that the access road in contention does not exist on the deed plans, therefore the trial Magistrate was right in her findings and conclusions.

Conclusion

This Appeal fails. Since the parties are neighbours, each party bears their own costs in this Court and in the lower Court.

I so order.



Elizabeth Jane Alividza

Judge

27th June 2025

27th June 2025

Judgment delivered on ECCMIS



Elizabeth Jane Alividza

Judge