

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

ORIGNATING SUMMONS NO. 0001 OF 2023

NANKYA WINNIE MIIRO===== APPLICANT

Vs

LUTAAYA JOSEPH KATO =====RESPONDENT

Before: HON. LADY. JUSTICE ELIZABETH JANE ALIVIDZA

RULING

15 Representation

The Applicant was represented by Counsel Wazemwa Agnes W and the Respondent was represented by Counsel Kalemera Moses.

Introduction

20 The Applicant brought this suit by way of Originating Summons against the Respondent for determination;

- a. Whether the act of the Respondent erecting barriers in the access road provided to the Applicant was unlawful.
- b. Whether the erecting of barriers on the access road by the Respondent is unjustified and unreasonable.
- 25** c. Whether the Applicant is entitled to an access road as presented in the area deed plan.
- d. Whether there are any remedies available to the parties.

Applicant's Claim

30 The Applicant purchased land from the Respondent measuring approximately 0.01020 hectares of land comprised at Kibuga Block 35 Plot 595 at Mutundwe, Kiggaga Zone and an access road was provided for measuring 6.42 meters.



5 After the Applicant had acquired a certificate of title and the area deed plan clearly showing the demarcations of the access road. That the Applicant noticed that the Respondent had erected barriers on part of the access road.

That she tried to engage the Respondent about the issue but he was non cooperative including refusal to heed to the survey reports that showed boundary
10 opening and clearly showing that there was a demarcated access road which had been encroached on. That this encroachment is still ongoing to the detriment of the Applicant and community at large and that is basis of this suit.

Respondent's Defence

In his Affidavit in reply, the Respondent alleged falsehoods in the Applicant's
15 case though he didn't contend the fact that he sold the said land to the Applicant including an access road.

That he entered a sale agreement with the Applicant on 30th May 2022 and willingly provided an access road. However, he denied encroaching on it and stated that the road is being encroached on by a neighbour called Mutesasira
20 who planted trees and constructed a pit latrine on part of the access road.

That the barriers being talked about by the Applicant were planted long ago before the Applicant purchased the suit land. That the Respondent's perimeter wall has existed for over 10years.

The Respondent denied ever being in a meeting with Applicant in regards to the
25 suit land. Further, that when the boundaries were opened in 2021, the Applicant hadn't yet purchased the land. That the survey done by DASURVEY Co. Ltd was hired by the area LC1 Chairperson to settle a dispute between the Respondent and his neighbour a one Mark and not the Applicant. That the survey report confirmed that the access road had been encroached on by a one Mutesasira,
30 the owner of the plot opposite the Applicant's.

5 *Evidence*

This being an Application by way of Originating Summons wouldn't necessitate detailed evidence since the assumption of the law is that there are no contentious points to delve into. However, written submissions presented by both Counsel will be considered in the determination of this matter.

- 10 It is trite law that the standard of proof in civil cases is on a balance of probabilities. Further, in the case of Nsubuga Vs Kavuma(1978) HCB 307, it was held that in civil cases the burden lies on the Plaintiff to prove his or her case on the balance of probabilities. (Also see Section 101(1) of the Evidence Act)

Preliminary objections.

- 15 Counsel for the Respondent in his submission raised a preliminary objection on two points. First that the Applicant had not filed submissions and secondly that the procedure of bringing this suit by originating summons was wrong since the suit requires bringing forth evidence and visiting locus in quo.

- I am aware that a preliminary objection consists of a point of law which has been
20 pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. See Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] EA 696.

- I am also aware that in any preliminary objection therefore, there is no room for ascertainment of facts through Affidavit or oral evidence. A Defendant wishing
25 to rely on points of law as a preliminary issue is required to set out such points of law in the written statement of defence before the preliminary issue is regarded as properly raised. See *Order 6 Rule 28 of The Civil Procedure Rules*.

- I also noted that a point of law that is pleaded which when so raised is capable of disposing of the suit, may then by consent of the parties, or by order of the
30 Court on the Application of either party, be set down for hearing and disposed of at any time before the hearing. Therefore, a party seeking to raise a point of law based on disputed facts which, if properly presented and supported by some

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5 form of Affidavit evidence, may dispose the suit, is obligated to move the Court by way of a formal Application raising the point of law.

The formal Application should be duly supported by an appropriate Affidavit containing the necessary evidence in support of the point of law. Be that as it may, whether raised by way of formal Application or informally at the
10 commencement of the hearing, the Court has discretion to dispose of the preliminary objection immediately or defer its ruling until after hearing the whole case. Such a deferment may be made where it is necessary to hear some or the entire evidence to enable the Court to decide whether the objection raised is dispositive of the suit or not. See The Attorney General v. Major General David
15 Tinyefunza, S. C. Constitutional Appeal No. 1 of 1997)

This is procedural and legal matter with which strictness if followed to the dot would fault both the Applicant and the Respondent. Preliminary objections relate to points of law, raised at the outset of a case by the defence without going into the merits of the case. In any preliminary objection therefore, there is no room
20 for ascertainment of facts through Affidavit oral evidence. This disqualifies the first objection which pertains not filing submissions by the Applicant.

Though there are both parties' submissions on record, I notice that they were both filed on the same day; 4th July 2023, the Respondent receiving theirs a day later.

25 I am aware that the provisions of *Order 5 Rule 1 of the Civil Procedure Rules* on time of service and the consequence of non-adherence to the timeline are mandatory and strict but not the strict filing of submissions.

When the parties appeared before me, I made my last remark by ordering them to file their submissions by 4th July and then appear in Court on 5th July. I find
30 no fault on the Applicant in this regard and therefore dismiss this preliminary objection.

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5 Secondly on the procedure used, Court brought up this very question as to why the Applicant didn't file formal suit and the response was that there was a vendor-purchaser relationship between the parties. As the proceedings went on, this was uncontended and there was undeniable documentation that there was literally nothing to prove through formal evidence.

10 It is noteworthy that where the objection advanced is not pleaded and cannot be disposed of without ascertaining facts, then it is not a matter that befits a "preliminary objection" (see Katabazi and 21 Others v. Secretary General of the East African Community and Another (Ref No. 1 of 2007) [2007] EACJ 3). The Respondent in the instant case submitted that Court could not reach a decision

15 without evaluating evidence and visiting locus in quo which was fallacious and wide of the mark.

On the second preliminary objection of procedure, in the case of Yaya vs Obur & ors Civil Appeal no.81 of 2018, Justice Stephen Mubiru noted that there is no hard and fast rule that can and should be laid to fetter the Court's discretion.

20 The exercise of the discretion must depend on the facts and circumstances of each case. If we are to follow the stringent rules of procedure just as the law relating to pleadings should not be construed and applied with undue rigidity and strictness if no prejudice or embarrassment towards fair trial of the suit is caused.

25 I earlier mentioned that the matter was a simple one that didn't necessitate so much contention and true to it, all the titles and documentations were clear and uncontended. All the parties needed was clarity from a surveyor as to synchronizing the titles to ground and once that was done, the matter was resolved. Going for a formal suit would instead do fast and fair hearing rule a

30 disservice and on the other hand encourage a multiplicity of suits on things that can be hastily resolved.

I will therefore disregard the Respondent's preliminary objection and proceed to decide the matter on merit.



5 It was the duty of this Court to determine the following issues;

Issues

1. Whether the act of the Respondent erecting barriers in the access road he provided to the Applicant is unlawful?
2. Whether the erecting of the barriers on the access road by the Respondent is unjustified and unreasonable?
3. Whether the Applicant is entitled to the access road as presented in the area deed plan?
4. Whether there are any remedies available to the parties?

Issue one:

15 **Issues 1 and 2 will be resolved concurrently.**

1. *Whether the act of the Respondent erecting barriers in the access road he provided to the Applicant is unlawful?*
2. *Whether the erecting of the barriers on the access road by the Respondent is unjustified and unreasonable?*

20 The ideal part of this matter is the fact that the Respondent doesn't deny selling land inclusive of an access road to the Applicant and that these can clearly be visible on the area deed plan.

When the parties appeared before Court on 29th October 2023, I asked them if they could not resolve this matter amicably as it seemed non contentious until a bit of arguments and denials arose implicating third parties. However, the Applicant's Counsel insisted that they came by way of originating summons because there was a clear relationship of buyer-vendor between the parties. I concluded by asking them to file timely submissions to inform my decision as to whether to visit locus. The parties went ahead and carried out a mutual survey

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5 which was filed on 27th September, 2023 which I will equally rely on while reaching a final decision.

Counsel for the Applicant submitted that when the Applicant purchased land, she was given an access road of 6 meters which was captured on the deed plan that accompanies the certificate of title. She went ahead and hired surveyors to
10 carry out boundary opening and the report from there confirmed that the Respondent had encroached on the road and therefore by erecting the said barriers, the Respondent acted illegally without any justifiable reason.

Counsel for the Respondent on the other hand submitted that the road his client availed the Applicant with is being encroached on by the neighbour Mutesasira
15 and not him. He submitted that the Applicant has failed to prove in a balance of probability that the Respondent has encroached on her access road. That her allegations of sitting in a meeting with the Respondent over the same was false and so was the assertion of her hiring DASURVEY to carry out a survey over the same issue since the report there on indicates that the survey was carried out
20 on 21st September, 2021. That this was way before the Applicant purchased the said land. He ended by submitting that the barriers blocking part of the access road were not those of the Respondent but for the opposite neighbour.

I am aware that an access road is a legal entitlement for anyone in the state of the Applicant who buys land with need to linkage to the main/public road under
25 *Section 61[2] and 62[1] of the Roads Act 2019*. There is such no infringement in the instant case. However what needs to be cleared is that after the right was guaranteed, is there a possibility that the same grantor deprived his customer of full enjoyment of the right.

The parties went ahead and found a mutual surveyor to wit LAND POINT
30 Surveyors to redefine the boundaries of the area in contention and a detailed report was filed in this Court on 27th September, 2023. The report states that keen interest was put on Plot 594 and 592 and the Surveyors carried out cadastral maps analysis, orthophotos and photocopy of the title were used in

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5 this field work. They used the methodology of an RTK CHC global positioning system, 500m tape measure and a laptop to execute the work. Existing corner stones of the affected area were picked and plotted in an AUTO CAD software for analysis.

In their findings, the Surveyors found that;

- 10 • The land for Plot 596 [access road] is clearly available and measures 0.442 acres, plot 596 is also demarcated as access road as reflected on the title measuring 6 meters.
- That Plot 596 is encroached on by gardens of Mr. Lutaaya Joseph [Respondent] and the other unknown developer of Plot 597 by 0.107
15 acres. The toilet of the latter developer of Plot 70 encroaches on the access road by only its tip of one corner by distance of 0.2 meters of the toilet as seen on the sketch map.
- That the outer boundary of the toilet also passes approximately in the middle of the existing road.
- 20 • That at the time of survey, the representative of the developer of plot 596 [Applicant] and Mr Lutaaya [Respondent] were present and the extent of the access road were shown to them.

They advised that the developments/ architectural plans be synchronized with the findings of the survey.

25 I have taken time to analyse the attached documents and it's clear that Plot 596 is demarcated as an access road registered in the names of Lutaaya Joseph Kato the Respondent. This access road borders Plot 597 on one side and Plots 70, 329, and an unknown Plot on the other hand while it leads to Plot 595 [for the Applicant and 594 still adjacent to plot 597 on the other
30 hand.

Then the sketch map that gives the details shows that encroachment starts and is only on the side that borders Plots 597 and Plots 70, 329 and an

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5 unknown one before it corners to Plot 595 bordering 597. On the encroached area, it shows that the owner of Plot 70 encroached mid-way the road and constructed a latrine while the remaining mid-way is a perimeter wall/other fence that goes on encroaching mid-way the access road past plot 329 and the other plot up to the corner turning to plot 595.

10 In my interpretation, there are two encroachers. One being Mutesasira who built a latrine in the access road but just on a small portion and the bigger portion is encroached on by the owner of plot 597 who apparently is the Respondent. This means paragraph 7 of the Affidavit in reply is false.

15 In conclusion, I find issues 1 and 2 in favour of the Applicant that the barriers and pit latrine greatly encroached on the Applicant's access road unjustifiably and illegally and should be rectified.

Issue 3.

Whether the Applicant is entitled to the access road as presented on the area deed.

20 This issue is equally and automatically resolved. From the facts when the Applicant asserted that she was entitled to the access road vide Plot 596 which is the access road, the Respondent did not deny the same. On the contrary he just stated that someone else was encroaching on the access road but not him. The area deed plan and sketch map are elaborate on this access
25 road which leads to the Applicant's plot.

This issue is resolved in the affirmative.

Issue 4

whether there are any remedies available for the parties.

The Applicant prayed for orders;

- 30 I. That the erecting of the barriers on part of the access road was illegal and unlawful.

- 5 II. that the Respondent removes the barriers from part of the access road to
allow the Applicant enjoy access to her land
- III. a permanent injunction prohibiting the Respondent or any of his agents
from erecting barriers in the subject access road
- 10 IV. general damages for the inconveniences caused as a result of this
unlawful act
- V. costs.

In the premises, it has been proved that the Respondent erected barriers on the
biggest part of the access road and this was illegal and unlawful as it was the
Applicant's entitlement to the access road from 30th May 2022 when she
15 purchased land from the Respondent. Accordingly, this suit is held in favour of
the applicant and therefore the first three prayers are granted accordingly. A
permanent injunction is equally granted to the applicant forfeiting the
respondent or his agents from erecting any other barriers or perimeter wall in
the access road.

20 I shall consider each remedy separately.

Damages.

Black's Law Dictionary 9th Edition at page 445 defines damages as
the sum of money which a person wronged is entitled to receive from the wrong
doer as compensation for the wrong. It is trite law that damages are the direct
25 *probable consequence off the act complained of.*

The Applicant prayed for general damages and in the case of Luwemba Godfrey
& 3 ors Vs Badda Tom Kimbowa and Anor Civil suit No. 185 of 2014, Justice Percy
Tuhaise rightly stated that *it is trite law that damages are the direct probable*
consequence of the act complained of. Such consequences may be loss of use, loss
30 *of profit, physical inconvenience, mental distress, pain and suffering. General*
damages must be pleaded and proved (See Moses Kizige V Muzakawo Batolewo

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5 [1981] HCB 66). Also see Assist (U) Ltd V Italian Asphalt & Haulage & Anor HCCS 1291/1999, unreported, where inconvenience was held to be a form of damage.

In the instant case, the Applicant endeavoured to prove without contention that she bought land and Plot 595 was equally given to her as an access road to the land. However, the survey report shows quite vividly that the access road had
10 been badly encroached on and some parts were almost total blockage.

Court noted that the Respondent has done the bigger encroachment. There is also another person that was not sued in this matter who erected a latrine in the middle of the first corner of the access road. So in awarding damages it will be unfair to put the entire burden on the Respondent. It definitely goes without
15 mention that denial of a legal entitlement of the access road since she bought land in 2022, the Applicant has faced quite an inconvenience up to the level of even filing this suit.

However, In Oketha Dafa valenti vs AG, CS NO 69/2004. Justice Mubiru noted that, "...as regards the claim of general damages, without proof actual loss or
20 damage, courts usually award nominal damages. Damages are not to be at large i.e taking into consideration all relevant circumstances into account will reach intuitive assessment of the loss which it considered the plaintiff has sustained..."

The rules and principles in regards to damages are firmly rooted in the common law and doctrines of equity and are part of the law applicable in Uganda. See
25 Section 14(2) of the Judicature Act, Cap 13.

The test for the measure of damages was well stated in Assist (U) Ltd vs. Italian Asphalt & Haulage & another HCCS No. 1291 of 1999 at page 35, that a party who suffers damage due to the wrongful act of another must be put in the position he or she would have been had he or she not suffered the loss or injury.
30 Furthermore, general damages, according to Lord Macnaghten in the often-cited case of Stroms V. Hutchinson [1905] AC 515, are such as the law will presume to

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5 be the direct natural or probable consequence of the act complained of. Actual damage must be proved if the Respondent is to be awarded any damages at all.

In the circumstances, the applicant didn't detail the levels of damage suffered so I award general damages of UGX 2,000,000 to the Applicant

In conclusion, I enter judgment for the Applicant as follows:

- 10 a. The barriers and perimeter wall erected in the access road be removed and the access road be synchronized with the title on which it lies implying that even the person who constructed a latrine therein should be aligned.
- b. A permanent injunction restraining the Respondents and any other
- 15 encroacher or their agents from further encroaching on the access road.
- c. The Respondent is ordered to pay general damages of UGX 2 Million to the Applicant.
- d. Costs of the suit are awarded to the Applicant.

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Elizabeth Jane Alividza

JUDGE

Dated at Kampala this 16th day of April 2024