THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 3 OF 2018

(Arising out of Civil Suit No. 524 of 2014)

1. STEVEN KALANZI KATABAZI
2. HENRY SENOGA
3. ISAAC MATOVU :::::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

1. IGNATITUS KADOMA
2. **HATI KOBUSINGYE** (*Suing through their attorney Dr. Yusuf Mpairwe*) **::::::::: RESPONDENTS**

CORAM: HON. JUSTICE ELIZABETH MUSOKE, JA

HON. JUSTICE STEPHEN MUSOTA, JA

HON. JUSTICE REMMY KASULE, AG. JA

JUDGMENT OF JUSTICE STEPHEN MUSOTA, JA

Background

The respondents are the registered proprietors of the suit land measuring approximately 1.021 acres having purchased the same from Mr. Yusuf Kagumire. Initially, Mr. Kagumire had purchased a lease interest in the suit land from Uganda Company Holdings Ltd and was registered on 12/02/1993 under Instrument No. 256063. In 2001, he purchased a freehold interest upon which the lease was cancelled. On 06/04/2001, he was registered under Instrument No.

315448 as the freehold owner of the suit land. After the respondent's purchase, they proceeded to verify and open up boundaries. A survey exercise was conducted and it was discovered that approximately 0.18 acres of land had been subdivided leaving a residue of 0.841 acres to create an access road on the suit land. In 2014, the respondents commenced fencing and after completion of the wall fence, the same was pulled down by the appellant's agents. The respondents filed a suit against the appellants in the High Court and judgment was made in favour of the respondents.

The appellants were dissatisfied with the finding of the High Court and filed this appeal on the following grounds;

1. The learned trial Judge erred in law and fact when he acknowledged that there was a footpath on plot 25 but held that there was no easement.
2. The trial Judge erred in law and fact when he held that the plaintiffs did not commit any act of private nuisance.
3. The trial Judge erred in law and fact when he awarded special and general damages as prayed by the plaintiffs without regard to the law in respect of damages.

Representation

At the hearing of the appeal, Mr. Esau Isingoma appeared for the appellants while Mr. Amos Bashaija appeared for the respondents.

Submissions of the appellant

Counsel submitted that the trial Judge failed to recognize that a foot path on the suit land is a form of easement that confers access rights on the users. An easement means an interest in land owned by another person in the right to use or control the land, or an area above or below, for a specific limited purpose. It is a right to prevent an owner of the land from utilizing it in a particular manner. A foot path is a form of easement recognized under the Ugandan law that can legally encumber a person's property. Counsel argued that use

of an easement in form of foot path does not give rise to a cause of action in trespass.

Further, that it is a recognized principle of law that an easement that exists on the land cannot be freely improved nor be expanded from what it is and improvement only comes with consent of the registered proprietor. The order of vacant possession made by the trial Judge was unlawful since the appellants had used the foot path for a long time.

Counsel submitted that a private nuisance relates to invasion of the interest in the use and enjoyment of land. The act of constructing a permanent fence obstructing the appellants from using the foot path to access their homes amounts to a private nuisance. Counsel prayed that the appeal be allowed and the orders of the trial court be set aside.

Submissions of the respondents

Counsel submitted that the trial Judge rightly held that no access road ever existed on plots 25, 26 and 50-55 and creating one without the respondent's consent amounted to trespass. The mere recognition of the footpath by the trial Judge on the suit property does not qualify the same to be an easement. In addition, the appellant's claim for an access road on the suit property was not even based on the existing footpath. The appellants did not adduce any evidence that the existence of a footpath established any rights of easement on the respondent's land.

The trial Judge did not only rely on the respondent's deed prints/cadastral plan of 2001 to come to a conclusion that there had never been an access road between plots 25 for the respondents and plot 26 for the 1st appellant, but also had regard to the fact that the respondents' title of 2001 originates from the cadastral plan of 1968. The cadastral map in the respondent's title and survey report shows

that there was no access road between plot 25 and 26 until the 1st appellant created one in 2012.

Consideration of the appeal

This is a first appeal and the duty of this Court as a first appellate court is to re-evaluate the evidence, weigh conflicting evidence, and reach its own conclusion on that evidence, bearing in mind that court did not see the witnesses testify. (See ***Pandya v R [1957] EA p.336 and Kifamunte v Uganda Supreme Court Criminal Appeal No. 10 of 1997.*** In the latter case, the Supreme Court held that;

> *"We agree that on a first appeal, from a conviction by a Judge, the appellant is entitled to have the appellate Court's own consideration and views of the evidence as a whole and its own decision thereon. The first appellate court has a duty to review the evidence of the case and to reconsider the materials before the trial judge. The appellate Court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it."*

I have kept these principles in mind in resolving this appeal.

Ground 1: *The learned trial Judge erred in law and fact when he acknowledged that there was a footpath on plot 25 but held that there was no easement.*

Easement is a right to cross or otherwise use someone else's land for a specified purpose. From the record, PW1 testified that the respondents purchased the suit land comprised in plot 25 FRV 365 Folio 10 Lubowa estate measuring approximately 1.021 acres from Mr. Kagumire vide instrument No. 340165. Prior to the purchase, a search was carried out at the land office and it showed that there was

no access road on the western boundary. The testimony of PW2 was that after his leasehold interest was converted into freehold, the size of the land did not change. PW2 further testified that at the time he purchased the suit land, no access road existed between plot 25 and 26 save for a footpath that was used by the local residents. In 2004, he transferred the suit land to the respondents in its undeveloped state and for the time he owned the land, he never allowed anyone to create a road.

The respondents also produced a cadastral plan of 2001, the cadastral plan of 1969 which was authenticated by the Commissioner of Lands and the survey report by Newplan consulting engineers which demonstrated that there had never been any provision for the access road between plots 25 and 26 servicing 50, 51, 52, 53, 54 and 55. Both cadastral maps indicated that the said plots had alternative demarcated access routes.

The appellant's case was that the said access road was already in existence as per the land title. The evidence of DW1 and DW2 alluded to the existence of the access road on the suit land. Their evidence of the topography of the area based on the cadastral maps on their titles at the time they bought their plots in 2009 and 1980s shows that the access road had been in existence.

The learned trial Judge held that;

> *"In the instant case, given that the defendants' cadastral map bearing different measurements was issued in 1994, it would not take any precedence over the plaintiffs' cadastral map which was issued earlier in 1968 whose measurements have never been altered. Logically, that means that no access road has ever existed on plots 25 servicing plots 26, 50-55. It also follows that by creating an access road on plot 25 without the plaintiffs' consent and without due regard to the procedure/guidelines set out in the Access to Roads Act Cap. 350, the defendants were simply trespassers..."*

From the above excerpt and other evidence on record, I find that the existence of a footpath was not a form of easement on the property. The creation of an access road on plot 25 without the consent of the respondents was definitely unlawful. There was no access road servicing plots 26, 50-55 and creation of the same without following the requisite procedure laid out in the Access to Roads Act amounted to trespass. I therefore find no reason to defer from the learned trial Judge's finding and consequently, ground 1 fails.

Ground 2: *The trial judge erred in law and fact when he held that the plaintiffs did not commit any act of private nuisance.*

A private nuisance is an invasion of the interest in the use and enjoyment of land. In other words, it is the unlawful interference with a person's use or enjoyment of land. The appellant's case is that there existed an easement on the suit land in form of a footpath and interference of the same amounted to private nuisance.

For the respondents, the footpath that existed on the suit property was not a form of easement and therefore, there could not be any act of private nuisance.

As already stated above, there was no access road servicing plots 26, 50-55. Therefore, the act of the respondents constructing a permanent wall fence on their land cannot be held to amount to a private nuisance. A private nuisance is an unlawful interference with a person's enjoyment of land and I note that the interference must be unlawful.

From the record, creation of the access road without following the requisite procedure laid out in the Access to Roads Act was unlawful. Therefore, the construction of a wall fence did not amount to a private nuisance. Ground 2 also fails.

Ground 3: *The trial judge erred in law and fact when he awarded special and general damages as prayed by the plaintiffs without regard to the law in respect of damages.*

It is now well settled law that an appellate court will not interfere with the award of damages made by the trial court unless the assessment of such damages by the trial court was based on an erroneous principle of law, or the award was outrageously high or ridiculously so low, so as not to reflect the measure of damages, the successful party to the suit ought to have been awarded.

The respondents/plaintiffs were awarded all special damages pleaded in the plaint. The respondents pleaded USD 2,615 and USD 15, bank charges being the cost of building the perimeter wall, Ug. Shs 2,520,000 being the cost of the damaged frame, Ug Shs. 400,000/= being the cost of surveying and Ug. Shs. 379,000/= being other costs. PW1 testified that as a result of the appellant's actions, the respondents sent money including building the perimeter wall, carrying out valuation and survey reports.

PW1 exhibited a valuation report bearing the valuation of the perimeter wall and the cost of surveying to ascertain the damage. It is on this basis that the trial Judge granted the special damages as pleaded and I find no reason to interfere with his finding.

The trial Judge awarded the respondents Ug. Shs. 50,000,000/= general damages. General damages are usually awarded at the discretion of court. It was held in the case of **Uganda Commercial Bank Vs Kigozi [2002] 1 E.A 305** that; *"in assessment of the quantum of damages, courts are mainly guided by the value of the subject matter. The economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered."*

The damage in this case was in respect of a perimeter wall. The value of the subject matter was thus not very expensive. There was also no evidence of excessive economic inconvenience caused to the respondents. The very nature and extent of of the injury suffered was thus not excessive. The award of Ug. Shs. 50,000,000= was thus on the high side. It is my considered opinion that an award of

20,000,000/= general damages would be sufficient in the circumstances of this case. The award of Ug. Shs. 50,000,000= in general damages is set aside and is substituted therefor with the award of Ug. Shs. 20,000,000= (Twenty million shillings), general damages.

This appeal stands dismissed and the decision and orders of the trial court upheld save for the order of award of general damages.

Since the appeal has failed on almost all grounds, except as relates to the reduced general damages, the respondents are awarded the costs of the appeal and those in the court below.

Dated this 24th day of July 2020

Stephen Musota, JA

THE REPUBLIC OF UGANDA

In the Court of Appeal of Uganda

At Kampala

Civil Appeal No. 3 of 2018

(Arising from Civil Suit No. 524 of 2014)

1. Steven Kalanzi Katabazi
2. Henry Senoga
3. Isaac Matovu
:::::::::::::::::::::::: Appellants

Versus

1. Ignatitus Kadoma
2. Hati Kobusingye
:::::::::::::::::::::::: Respondents

Coram: Hon. Justice Elizabeth Musoke, JA
Hon. Justice Stephen Musota, JA
Hon. Justice Remmy Kasule, Ag. JA

Judgement of Hon. Justice Remmy Kasule, Ag. JA

I have had the benefit of reading through the draft Judgment of my brother Hon. Justice Stephen Musota, JA.

I concur in his decision that the general damages of Ug. Shs. 50,000,000= awarded to the respondents are excessive and that the same be reduced to Ug. Shs. 20,000,000=.

I too agree that all the other grounds of the appeal fail by reason of want of merit.

I concur in the order that the respondents have the costs of the appeal and those in the Court below.

Dated at Kampala this 24th day of July 2020.

Remmy Kasule
Ag. Justice of Appeal

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 0003 OF 2018

1. STEVEN KALANZI KATABAZI
2. HENRY SENOGA
3. ISAAC MATOVU::APPELLANTS

VERSUS

1. IGNATITUS KADOMA
2. HATI KOBUSINGYE

(SUING THROUGH
THEIR LAWFUL ATTORNEY
DR. YUSUF MPAIRWE)::RESPONDENTS

(An appeal from the decision of the High Court of Uganda at Kampala (Land Division) before Bashaija, J., dated the 26th day of May, 2017 in High Court Civil Suit No. 0524 of 2014)

CORAM: HON. LADY JUSTICE ELIZABETH MUSOKE, JA.
HON. MR. JUSTICE STEPHEN MUSOTA, JA.
HON. MR. JUSTICE REMMY KASULE, AG. JA.

JUDGMENT OF ELIZABETH MUSOKE, JA.

I have had the advantage of reading in draft, the lead judgment of Hon. Justice Stephen Musota, JA in this matter. I agree with it, with nothing useful to add.

As Hon. Justice Remmy Kasule, Ag. JA also agrees, the decision of the Court in this matter shall be on the terms proposed in the lead judgment of Hon. Justice Stephen Musota, JA.

Dated at Kampala this ....24th....day of ....July....... 2020.

....

Elizabeth Musoke

Justice of Appeal