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THE REPUBLIC OF UGANDA
IN THE HIGH COURT UGANDA AT KABALE
CIVIL APPEAL NO.0009 OF 2021

DAVID BAMUHIGA===== APPELLANT

VERSUS

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- 1. CHARLES NDYANABANGI**
- 2. JUNIOR NDYANABANGI**
- 3. MARTIN NDYANABANGI=====RESPONDENTS**

BEFORE HON. JUSTICE SAMUEL EMOKOR

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JUDGMENT

The Appellant through M/s Onyango & Co.Advocates brought this appeal against the Judgment of His worship Vueni Raphael Magistrate Grade one at Kabale Chief Magistrates Court delivered on the 17/06/2016. Mr Sande Ben Duncan appeared for the Appellant while Ms. Nasiima Patience represented the 2nd Respondent.

Both Counsel proceeded by way of written submissions in this matter.

Facts of the Appeal.

The Appellant sued the Respondents jointly in the lower Court seeking declarations that the Appellant is the legal owner of land situated at Nyagande Mwanjari, Southern Division on which he was setting a fence but that during the month of July 2008 the Respondents without any colour of right unlawfully and maliciously set upon the barbed wire fence of the Appellant and destroyed it and took away a roll of barded wires causing the Appellant special damages of UgX 460,000/= (Four hundred sixty thousand shillings) and general damages for which the Appellant sought orders against the Respondents. The Respondents in

5 their joint Written statement of Defence denied the claims of the Appellant making no admissions to the alleged loss or damage to the Appellant's fence stating the same to be a sham. The Respondents set up a counterclaim against the Appellant seeking orders directing the Appellant to vacate the access road and make it available for public use and a permanent injunction restraining him from
10 interfering or blocking the Public from the access road, general damages and costs of the counterclaim.

In his decision the trial Magistrate found in favour of the Respondents (counterclaimants) holding that the Appellant (counter Defendant) blocked a Public access Road which was meant for the general use of the Public and ordered
15 the Appellant to vacate and unblock the same, issued a permanent injunction against the Appellant restraining him and his agents from further blocking the Public access road and ordered general damages of UgX 2,000,000/ to the Respondents as well as costs of the suit.

Being dissatisfied with the decision the Appellant filed this Appeal on the
20 following ground:

That the learned trial Magistrate erred in law and fact when he failed to properly evaluate the evidence on record thus arriving at an erroneous decision which occasioned a miscarriage of Justice to the Appellant.

Duties and mandate of the first Appellate Court.

25 As a first appellate Court I have the duty to subject the evidence presented in the lower Court to fresh and exhaustive scrutiny and come to my own independent

5 conclusion. In doing so I must remain mindful of the fact that it is the trial Court that had the opportunity to observe, listen and record the evidence at first hand.

See also Ramkrishan Pandya versus R (1957) EA 336.

Framed ground of Appeal.

The sole ground of Appeal argued by both Counsel is that:

10 The learned trial Magistrate erred in law and in fact when he failed to properly evaluate the evidence on record thus arriving at an erroneous decision which occasioned a miscarriage of Justice to the Appellant.

A summary of the submissions.

15 It is the submission of the Appellants' Counsel that the trial magistrate failed to evaluate the Appellants' evidence on record when he testified that previously both parties had litigated for the access road before the Town Clerk and that the Appellant won with the Town Clerk saying that each person should use his land as before and that when the Town Council requires access the plaintiff would be Compensated for the same.

20 It is Counsel's contention that no such compensation has been accorded to the Appellant as mandated under **Article 26(2) (b) (i) of the Constitution.**

Counsel for the Appellant also faults the trial Magistrate for going against his findings at the locus inquo submitting that the trial Magistrate in his record observes that there was no access as claimed by PW2 and that Plot 109 belongs to
25 the Plaintiff with the 1st Defendants' land not being surveyed and that the mark stones were planted by the District.

5 Counsel for the Appellant therefore submits that the trial Magistrate erred in finding that the Appellant blocked a Public access road which was meant for the general use of the Public.

Counsel for the 2nd Respondent in her submissions contends that the learned trial Magistrate properly evaluated the evidence on record and reached a right
10 decision. It is the submission of Counsel that the trial Court visited the locus in quo and verified that the access road complained of was indeed blocked by the Appellant and that this was the access road used by both the Appellant and the Respondents.

Counsel for the 2nd Respondent also submitted that the defence tendered in DEX1
15 a document showing complaints on how the Plaintiff/Appellant had blocked the access road between the Appellant and the Respondents. Counsel also submits that no litigation took place between the Appellant and the Respondents over the access road as evidenced by no such Judgment being tendered to Court in proof thereof.

20 It is also the submission of the 2nd Respondents' Counsel that PW2 before the trial Court informed the same that he was not aware that the Appellants' fence had been cut and that this was the only witness who came to corroborate the Appellants' testimony. It is Counsels assertion that the Appellant failed to prove his case on the balance of probability and the same was rightly dismissed.

25 **My decision.**

I have carefully perused the record of the trial Court and the submissions of both Counsel. It would appear from the submissions of the Appellants' Counsel that

5 the main thrust and indeed attack on the findings of the trial Magistrate is his decision that the Appellant had blocked a Public access road which was meant for the general use of the Public. The other findings that include the Respondents' not being responsible for the destruction of the Appellants fence were not brought into issue by the Appellants' Counsel.

10 I will therefore deal with the bone of contention which revolves around the blocked Public access road. This was framed as the 2nd issue by Counsel as being "whether the Plaintiff blocked the access road to the Defendants home"

The trial magistrate made the following finding in this regard and I will quote:

15 *"Issue 2: It is evident on the record that there is an access road separated from the Plaintiff's' home by mark stones which at the time of locus was blocked and the Plaintiff counter Defendant did not deny blocking it.*

DW2 an officer of the Division Council testified that the Plaintiff/counter Defendant blocked their access road. The Plaintiff testified that the land through which the access road was to pass is his.

20 *I do not find this as true as there are other structures in front of the access road belonging to other people. I therefore find that the Plaintiff/counter Defendant blocked a Public access road, which was meant for the general use of the Public.*

This issue is answered in the "affirmative"

I will return to this finding later in my judgment.

25 The record has the Plaintiff as testifying that he sued D1 because he damaged his fence and that previously they had a dispute at the Local Council I in respect to

5 that land for an access road through his land. The Plaintiff under cross examination revealed that the Defendant wants a bigger road to enable them pass through smoothly but that he had refused.

The Plaintiff presented PW2 a law enforcement officer who testified to visiting the scene in May of 2008 and states that when he got there he found that the 1st Defendant had re-opened the fence and put some wood to access his residence and that the 1st Defendant informed him that the reason why he was doing so is because the Plaintiff had blocked his entrance but that when he got to the real entrance that the 1st Defendant was alleging to have been blocked, it was not blocked because it was barely open and that when he spoke to him the 1st Defendant started using the access road up to now.

PW2 also clarifies that the fence that the 1st Defendant had cut to create an entrance was actually his.

The 1st Defendant in his sworn evidence before the Court testified that the Plaintiff started blocking the access road heading to his home in May 2008 and that though he reported the incident to the Town Clerk nothing was done about it and that the access road is blocked to date.

It is this access road that the 1st Defendant states as separating him and the 1st Defendant. The 1st Defendant also disputes the evidence of PW2 that at the time of his visit the access road was not blocked.

25 The trial Magistrate upon his visit to the locus in quo records PW2 as testifying that he helped the 1st Defendant to get access to his house because there was a blockage but the Court takes note to the effect that and I quote:

5 ***“Court sees no access as claimed by PW2”***

The first Defendant at the locus is also on record as testifying that and I quote:

“Plot 109 belongs to the Plaintiff. The 1st defendants’ land is not surveyed. The mark stones were planted by the District – Kabale”

10 The presence of mark stones that the trial Magistrate alludes to in his Judgment and the evidence of the 1st Defendant that the Plaintiffs’ Plot is surveyed on Plot 109 would mean that the Plaintiff would be in possession of a title for his land and this would have been a useful guide for the Court to determine whether the cadastral map on the same shows an access road between the property of the Plaintiff and the Defendants. The Plaintiff however was silent in this respect and as
15 such the Court made its decision in isolation of this evidence if indeed it ever existed that is.

The evidence of PW2 the law enforcement officer is clear that there does exist an access road between the Plaintiff and the 1st Defendant. I however find PW2 not to be a completely truthful witness as did the trial Magistrate.

20 PW2 testified to the 1st Defendant creating an access road to his home on the part that actually belongs to the 1st Defendant because according to the 1st Defendant the Plaintiff had blocked his Public access but that when PW2 visited the site he found the Public access way open and that the first Defendant was now using the same. The trial Magistrate on his visit to the locus in quo in the presence of the
25 parties and PW2 records that the Court sees no access as claimed by PW2. The trial Magistrate also draws a sketch plan that shows the blocked disputed access road.

5 The evidence of PW2 that the 1st Defendant created an access road through his private property is proof that the Public access road to his property had been interfered with.

The trial Magistrate also in his Judgment states that there are other structures in front of the access road belonging to other people. DW2 is also on record at the
10 locus informing Court that she has used the blocked access road since 1992.

The submission of the Appellants Counsel that the parties litigated this matter before the Town Clerk and that the Appellant was the successful party is not backed up by the Court record since no such decision was tendered to the trial Court and as such cannot be relied upon.

15 The trial magistrate in his Judgment on the 2nd issue mixed up the testimony of PW2 and DW2. I will now turn to the extract above from the decision of the trial Magistrate to address a minor miss representation of the evidence on the Court record.

The trial Magistrate makes reference to DW2 as the officer of the Division Council
20 which on record is reflected as the evidence of PW2. The trial Magistrate then refers to the evidence of DW2 as being given by PW2 which is not the correct position as per the record.

The mix up by the trial Magistrate however it is my finding was not fatal to the final decision that he arrived at and did not occasion a miscarriage of Justice.

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5 I am sufficiently satisfied that the trial magistrate properly evaluated the evidence on record. The instant Appeal is accordingly hereby dismissed with costs to the 2nd Respondent.

Before me,

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Samuel Emokor
Judge
28/02/2023

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