THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – LD – CA – 0004 OF 2022

(ARISING FROM KJJO – 21 – CV – CS – LD – 19/2018)

1. **BETH KIRIKAIJA**
2. **ALIGANYIRA STEPHEN :::::::::::::::::::::::::::::::::: APPELLANTS**

VERSUS

RWAKIJUMA JOSHUA :: RESPONDENT

BEFORE: HON. JUSTICE VINCENT WAGONA

JUDGMENT

Introduction:

This is an appeal against the decision of His Worship Mukanza Robert, Principal Magistrate Grade One at Kyenjojo in FPT – 21- CV – CS – 018 OF 2013 delivered on 4th February 2022. The appellant asked court to allow the appeal and set aside the judgment of the trial court and consequently dismiss the Respondent's suit in the lower court with costs.

Background:

The Respondent filed Civil Suit No. 18 of 2013 against the appellants for a declaration that he had an easement on the appellant's land, a declaration that the appellants trespassed on his land and a permanent injunction restraining the appellants from blocking the easement and trespassing on the respondent's land.

It was averred by the respondent that on 4th July 2008, he bought a piece of land with an easement. That subsequently, the appellants also bought land adjacent to his on 31st August 2013. It was averred that without the knowledge and consent of the Respondent, the appellants blocked an access way to the Respondent's land by fencing off theirs. That since then, the Respondent could not take his animals for grazing on the land and the appellants started trespassing on his land by grazing animals thereon. That as a result of the appellants' actions, the Respondent suffered damages which he sought to recover. He prayed for judgment in his favour.

The appellants in their written statement of defense disputed the Respondent's claim of having any easement or path on their land and contended that the land the Respondent bought had no path. The appellants also denied trespassing on the Respondent's land. They contended that it were the elephants from Kibale National Game Park that go through his land and other people's land. That the Respondent was not entitled to any damage since the appellants never blocked the path to his land since none existed and neither did they take their animals for grazing on the Respondent's land. The appellants thus asked court to find that the Respondent's plaint disclosed no cause of action against them and proceed to dismiss the same with costs.

The trial Magistrate heard the evidence of both parties and entered judgment in favour of the Respondent with the following orders; (a) a declaration that the Respondent had a right of easement through the appellants' land, (b) the appellants were declared trespassers on the Respondent's land, a permanent injunction was issued restraining the appellants and their agents/workers/servants from blocking the

easement and trespassing on the Respondent's land, an award of general damages of shs 8,000,000/= and costs of the suit. The appellants being aggrieved with the afore-mentioned finding lodged an appeal to this court.

Grounds of appeal:

The memorandum of appeal contained three grounds of appeal:

1. **That the learned Principal Magistrate Grade One erred in land and fact when he held that the Respondent has a right of easement through the appellants' land.**
2. **That the learned Principal Magistrate Grade One erred in law and fact when he held that the appellants were trespassers on the suit land.**
3. **That the learned Principal Magistrate Grade One erred in law and fact when he awarded excessive general damages of shs 8,000,000 without any justification.**

Representation and Hearing:

Mr. Bwiruka Richard of M/s Kaahwa, Kafuuzi, Bwiruka & Co. Advocates appeared for the appellants while ***Mr. Dusabe of M/s Kesiime & Co. Advocates*** appeared for the Respondent. Both counsel addressed me on the appeal by way of written submissions which I have considered herein.

Duty of this Court:

As the first appellate court, the duty of this court is to rehear 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 & 3 others vs Eric Tiberaga SCCA 17 OF 2000 [2004] KALR 236)***. The first appellate court does re-evaluation of the evidence on record of the trial court as a whole weighing each party's evidence, keeping in mind that an appellate court, unlike the trial Magistrate had no chance of seeing and hearing the witnesses while they testified, therefore this court had no benefit of assessing the demeanor of the witnesses. ***(See: Uganda Breweries v Uganda Railways Corporation 2002 E.A)***

CONSIDERATION OF THE GROUNDS OF APPEAL:

Ground 1: That the learned Principal Magistrate Grade One erred in land and fact when he held that the Respondent has a right of easement through the appellants' land.

Submissions:

Mr. Bwiruka for the appellants submitted on what that constitutes a right over property of another. It was submitted that an easement is usually a right of ingress and egress to and from the premises of the person exercising the right to a street or public way. (See ***Mary Shelly BallerioNamaganda v Vero Rugumba, HCCS No.37 of 2001 (2005) KALR 723).*** That the Respondent did not demonstrate the existence of the foot path through the appellant's land and that the witnesses contradicted themselves as to the alleged existence of the footpath. That PW2 Turyamureeba

David who wrote the agreement (PE1) stated that Kasheri Nyinabikali who sold had not been staying on the land sold and that there was small path going through the land of Katuramu Herbert to the land purchased by the Respondent. That at Locus PW2 admitted that he was staying far away from the suit land and thus his evidence was unbelievable. That PW1 stated that his herdsman Musana had informed him that the path had been blocked and the said Musana did not testify as a witness. That on the other hand Katuramu who testified as DW4 indicated that the there was no access path through his land to that of Kasheri Nyinabikali. That Kasheri Nyinabikali was not staying on the land but would pass through his court yard to his gardens. It was submitted that at locus the path was not visible and as such, there was no independent evidence as to the existence of the path.

Mr. Bwiruka further contended that no evidence had been led to show that the footpath had existed in use for long without interruption. Learned counsel invited court to the case of ***Mrs. E Makumbi & Anor v Piran Singh Ghana and Anor [1962] 1 E.A 331*** where it was held that the length of time during which the use of an easement must exist in order to raise the presumption of its existence varies with the circumstances but long uninterrupted use would suffice to create one. He contended further, that an easement can arise by prescription or prior use (long use or existence of the access road). That in order for such easement to exist, it must be shown that both properties were in joint ownership of a person or persons; that both properties were subdivided and the easement was patently obvious i.e by inspection and that the easement is reasonably necessary and benefits the dominant tenements. Mr. Bwiruka contended that the respondent led no evidence to show that the footpath existed for long without any interruption. That in fact the evidence of the appellants'

witnesses (DW3 and DW4) from whom they acquired the land suggested that Kasheri Nyinabibali who sold land to the respondent would only occasionally pass through their land to attend to her gardens and there was no defined path. He thus asked court to allow this ground of appeal.

In response, it was contended for the Respondent that he led evidence through PW1 and PW2 which confirmed the existence of the footpath. That PW1 testified that he acquired the land in 2008 from Kasheeri Nyinabikali per the purchase agreement exhibited as PE1. That after purchasing, he fenced off his land using barbered wire and Miko trees were used as poles. That he would graze on the land every two weeks before the appellants acquiring their land in 2009. It was pointed out that in 2013 when the Respondent's herdsmen had gone to graze, they found when the appellants had erected a fence blocking the Respondent's access path/easements measuring about 4ft and it was contended that this evidence was not challenged in cross examination. That the Respondent further testified that the appellants denied him access and went ahead to destroy his fence and started grazing in his land. It was submitted that at locus, the Respondent showed court the barbered wire. That PW1's evidence was corroborated by PW2. That DW2 in cross examination confirmed that the appellant had no other access while DW3 stated that Nyinabikali used to cultivate her land and would use the same access. That this was also confirmed by DW4 who in cross examination stated that Kasheri used to pass through Katuramu's land who sold the same to the appellants. It was submitted that at locus, the old footpath was visible. Learned counsel thus asserted that the Respondent bought land and found an access which had been in existence for a long time. That therefore the purchase by the appellants was subject to an easement. That this ground ought to fail.

Ground 2: That the learned Principal Magistrate Grade One erred in law and fact when he held that the appellants were trespassers on the suit land.

Submissions:

Mr. Bwiruka for the appellant contended that the evidence on record was insufficient about the alleged trespass on the suit land by the appellants. That the appellants were on their land and did not interfere with the Respondent's land.

In reply Mr. Dusabe submitted that there was evidence on record that the appellants grazed on the Respondent's land. He invited me to the position in ***Justine Lutaya v Stirling Civil Engineering Co. Civil Appeal No. 11 of 2002 SC*** as to what constitutes trespass. He asserted that the appellants had grazed on the appellant's land without his consent and that it constituted trespass.

Ground 3: That the learned Principal Magistrate Grade One erred in law and fact when he awarded excessive general damages of shs 8,000,000/= without any justification.

Mr. Bwiruka, learned counsel for the appellants contended that general damages are awarded to compensate the injured party for the loss or damage suffered. He invited me to the case of ***URA V Wanume David Kitamirike C.A.C.A No. 43 of 2010*** where it was emphasized that general damages are intended to restore the wronged party to the position he would have been if there had been no breach or wrong done. He contended that damages are discretional and the appellate court can only interfere with the same if the award is based on a wrong principle of law or the amount is high

or low to make it an erroneous estimate. ***(See Visram and Kassam v Bhait [19650 E.A 769 & Crown Beverages Ltd v Sendu Edward, SCCA No. 1 of 2005).*** It was submitted that in the present case, no evidence was led by the Respondent to show that the footpath existed for such a long time without any interruption and there was no evidence of the alleged trespass or interference with the Respondent's land. That the Respondent did not prove that he was inconvenienced or suffered mental anguish thus the award of shs 8.000.000/= was based on a wrong principle of law, was high and excessive and unnecessary and such this ground ought to succeed.

In response Mr. Dusabe argued that the Respondent testified that he was denied access to his land by the defendants for a period of over eight years from 2013. That the appellants took advantage of that and gazed their cattle on the appellant's land without his consent. That as such the award of shs 8,000,000/= was fair and justifiable in the circumstances to indemnify the Respondent for the loss suffered. He thus asked court to dismiss the appeal with costs.

CONSIDERATION BY COURT:

Ground 1: That the learned Principal Magistrate Grade One erred in land and fact when he held that the Respondent has a right of easement through the appellants' land.

An easement connotes a right held by one property owner to make use of the land of another for a limited purpose, such as a right of passage. ***(Black's Law Dictionary 8th Edition).*** It also implies the liberty, privilege, or advantage without profit, which

the owner of one parcel of land may have in the lands of another. ***Magnolia Petroleum Co. v. Caswell, Tex., 1 S.W.2d 597, 600; Hasselbring v. Koepke, 263 Mich. 466, 248 N.W. 869, 873, 93 A. L.R. 1170*** & ***Black's Law Dictionary (supra).***

In ***Paddy Musoke v. John Agard and 2 others Civil Appeal No. 46 of 2016 and Civil Appeal No. 134 of 2017,*** Justice Elizabeth Musoke noted that the common law developed principles to the effect that a land owner had the right to use a road passing through an adjoining piece of land owned by another. Such a right was deemed to constitute an easement.

Further, the learned authors of ***Meggary and Wade's text; "The law of real property" 8th Ed page 1245 - 1246,*** commented in relation to easements thus:

> *"common law recognized a limited number of rights which one landowner could acquire over the land of another, and these rights were called easements and profits, examples of easements are right of way, right of lights and right of water. That an easement constitutes an incorporated hereditament on land. That the following requirements are necessary for an easement to be said to exist. Four requirements must be satisfied before there can be an easement. First, there must be a dominant tenement and a serviette tenement. Secondly, the easement must confer a benefit on (or accommodate) the dominant tenement. Thirdly, the dominant and serviette tenements must not be owned and occupied by the same person. Fourthly, the easement must be capable of forming the subject-matter of a grant."*

In this case, the Respondent claimed an easement being a footpath of 4ft wide. It was the case of the Respondent that after buying his land in 2008, he had continued

using the access path which he found in existence on the defendant's land. It was contended that in 2013, the defendant blocked the access road to his land after fencing off their land using barbered wire. That there is no way he could access the land other than passing through the defendants' land. At locus, PW1 stated that he was using the land for grazing. That originally there were two passages. That his cows would pass through the defendants' land. That by then, the owner of the land was Katurumu who never complained it was the evidence of PW1 that when the defendants blocked the way, they started using another path. That Nyakaisiki Adyeri sold to the defendant who fenced off the 2nd path.

In my re-evaluation of the evidence, the appellants and the Respondent are neighbors. From the evidence of PW1 and DW3, Nyinabikali who sold land to the Respondent had more than one access point used to access his land. PW1 stated at locus that when the defendants blocked the access through Katuramu's land, he started using another path which partly went through the defendant's land and that of Nyakaisiki. When Nyakaisiki sold her land to the defendant, they blocked the 2nd path. It is trite law that for one to prove existence of an easement there should be clear evidence regarding long usage of such easement without any interruption. No evidence was led of long usage of the alleged path in the past. Nyinabikali who is alleged to have used the access first did not testify. The purchase agreement PE1 did not state that the land had an access. On the other hand, DW3 who sold land to the appellants stated that that the said Nyinabikali did not have a foot path on his land. DW4 who also sold land to the appellants also stated that the plaintiff or the former owner of land purchased by the plaintiff did not have an access to his land.

Consequently, the respondents at trial on the balance of probabilities, failed to prove their claim. I therefore resolve this ground in the affirmative.

Ground 2: That the learned Principal Magistrate Grade One erred in law and fact when he held that the appellants were trespassers on the suit land.

In ***Justine EMN Lutaya v Stirling Civil Engineering Company Ltd (Civil Appeal No. 11 of 2002) [2003] UGSC 39 (10 November 2003),*** Mulenga JSC gave guidance on what amounts to trespass to land thus: ***"Trespass to land occurs when a person makes an unauthorised entry upon land, and thereby interferes, or portends to interfere, with another person's lawful possession of that land. Needless to say, the tort of trespass to land is committed, not against the land, but against the person who is in actual or constructive possession of the land. At common law, the cardinal rule is that only a person in possession of the land has capacity to sue in trespass. Thus, the owner of an unencumbered land has such capacity to sue, but a landowner who grants a lease of his land, does not have the capacity to sue, because he parts with possession of the land."***

The Respondent stated in evidence that the appellants grazed on his land which constituted trespass. DW2 stated in cross examination thus; "***my cows go to the plaintiff's land for grazing while his also come to our land for grazing***." DW1 on the other hand denied trespass. The trial Magistrate seemed to have relied on the admission by DW2 above to find that the appellants were trespassers. In my re-evaluation, the evidence tended to support a prevailing practice for cattle to graze on each other's land, which could not constitute trespass. There was no intention to

interfere with the owner's possession since they both used to graze on the other's land and this was not denied by the Respondent. The evidence on record did not support trespass that is actionable. I therefore resolve this ground in the affirmative.

Ground 3: That the learned Principal Magistrate Grade One erred in law and fact when he awarded excessive general damages of shs 8,000,000 without any justification.

In ***Catholic Diocese of Kisumu vs. Sophia AchiengTete Civil Appeal No. 284 of 2001 [2004] 2 KLR 55*** court set out the circumstances under which an appellate court can interfere with an award of damages in the following terms: ***"It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate." (emphasis is mine).***

Similarly, in ***Jane Chelagat Bor vs. Andrew Otieno Onduu [1988-92] 2 KAR 288; [1990-1994] EA 47***, the Court of Appeal held that: "***In effect, the court before it interferes with an award of damages, should be satisfied that the Judge acted on wrong principle of law, or has misapprehended the fact, or has for these or other***

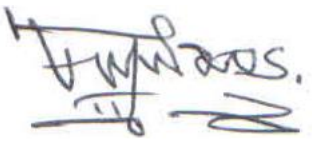
reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

In the present case, the trial Magistrate awarded a sum of shs8,000,000/= as general damages to the Respondent. The trial Magistrate in his judgment observed in relation to general damages thus: ***"Since the plaintiff has suffered loss occasioned by the plaintiff, he is entitled to general damages. I find that given the period the plaintiff has suffered; he is entitled to award of general damages to the tune of UgShs 8,000,000/=".*** The trial Magistrate did not detail the form of suffering the Respondent was subjected to warrant an award of shs 8,000,000/=. The trial Magistrate did give any reasons for the award. Moreover, since the first and second ground succeeded, the award cannot stand.

This appeal succeeds with the following orders:

1. **The judgment and orders of the trial court in KJJO – 21 – CV – CS – LD – 19/2018) are hereby set aside.**
2. **The respondent's suit in the lower court is hereby dismissed.**
3. **Nothing in this judgment bars the parties from amicably agreeing on the creation of access for the respondent to his land.**
4. **The costs of this appeal and in the lower court are awarded to the appellants.**

I so order.



Vincent Wagona

High Court Judge

DATE: 08/04/2024