



**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT MBARARA**  
**HCT CIVIL APPEAL NO 35 OF 2023**  
**(ARISING FROM NTUNGAMO LAND SUIT 018 OF 2022)**

**1. MAUDAH KANYAMAISHWA ----- APPELLANTS**  
**2. TWINAMATSIKO FRANK**

**VERSUS**

**KIROMBA WILBER ----- RESPONDENT**

**BEFORE :** Hon. Justice Nshimye Allan Paul M.

**JUDGEMENT**

**REPRESENTATION**

The Appellants were represented by Adv. Urban Namanya of M/S Ngaruye Ruhindi, Spencer & Co Advocates, while the Respondent was represented by Adv. Charles Twinebyona of M/s Ahimbisibwe, Agaba & Company Advocates.

**BACKGROUND**

The respondent herein filed a suit against the Appellant herein in Ntungamo chief Magistrates Court Vide NTU-00-CV-LD-018 OF 2022 seeking declarations which are itemised in paragraph 3 of the plaint that;

1. The plaintiff (respondent herein) enjoys an easement through the land of the defendants (appellants herein)
2. The purported sale of land between the 1<sup>st</sup> defendant (1<sup>st</sup> appellant herein) and 2<sup>nd</sup> defendant (2<sup>nd</sup> appellant herein) is unlawful in as far as it includes the plaintiff's (respondent herein) access road.
3. The defendants (appellants herein) have trespassed on an access road connecting the plaintiff (respondent herein) home to the main road among other orders in the plaint.

The case was heard by His Worship Kakuru Edgar who delivered his judgement in favour of the respondent herein on 28<sup>th</sup> February 2023, declaring that the plaintiff has a right of way by way of an easement through the defendant's land among other orders (See the Judgement of His Worship Kakuru Edgar dated 28<sup>th</sup> February 2023)

The appellants herein being dissatisfied with the Judgement of His Worship Kakuru Edgar dated 28<sup>th</sup> February 2023, lodged this appeal in the High court.

## **GROUND**

The grounds as stated in the memorandum of appeal are that;

1. The learned Trial Magistrate erred in law and fact when:
  - a. He failed to properly evaluate the evidence on record thereby reaching a wrong decision.
  - b. He made a wrong assessment and award of damages of shs 4,000,000/= to the respondent.
  - c. He failed to appreciate the evidence of the appellants/ defendants in court and the locus and came up with a wrong decision.

Wherefore the Appellants prayed for orders that;

- i. The appeal be allowed.
- ii. Costs for the lower court and High Court.

## **SUBMISSIONS**

The appellants filed written submissions on 6<sup>th</sup> October 2023. The respondent filed written submissions in reply on 6<sup>th</sup> October 2023 and the appellants filed written submission in rejoinder on 16<sup>th</sup> October 2023.

### **Appellant's submissions**

The appellants addressed ground 1 (a) and (c ) together, submitting that the 1<sup>st</sup> appellant in her evidence contended that she sold her land to the 2nd appellant, while it contained an access road for the respondent. That however, upon closure of the access road, the 1<sup>st</sup> appellant created another access road for the respondent

but it's the respondent who refused the alternative access and insisted that he had to be given back where the former access road was located.

5 The appellants contend that the Trial magistrate ignored the evidence of PW2 a member of the local council committee that testified that he passed where the alternative road had been put and found it was NOT closed. This according to the appellant shows that the respondent just refused to use the alternative road.

10 The appellant stated that the respondent also confirms in his testimony that he was given an alternative road, he quoted the testimony on page 12 line 4-7 of the record of proceeds where the respondent as PW4 sated

15 *"Within about a week they shifted me to another road which I accepted and they shifted me to another part where there is a gate currently and I accepted, in about 2 weeks they again shifted me to another place where I refused to change the gate"*

20 The appellant then contended that the respondent had an access road but refused to use it, so it was wrong for the trial magistrate to hold that the respondent had no access road.

The appellant then submitted that if the Trial Magistrate had considered all the evidence he would have ruled differently, compelling the respondent to use the alternative access road.

25 On ground 1 (b) the appellant submitted that it was exorbitant and there was no evidence to justify the grant of damages.

The appellant then prayed that the appeal be allowed with costs and the decision of the lower court be over turned.

### 30 **Respondent's submissions**

The respondent also submitted on ground 1 (a) and (c ) jointly. He stated that the Trial Magistrate properly evaluated the evidence on court record and reached a right decision.



He contended that the evidence on record shows that the respondent had an access road for a long time, he referred court to page 5 line 17 – 19, page 6 line 8 – 10, page 8 line 6 – 10, page 5 line 17 – 19, page 14 line 7 – 10, page 15 line 26, page 17 line 1 – 10 among others.

He also contended that the evidence from all the witnesses is that the appellants blocked/ fenced off the whole access road of the respondent, and he now has no access road. That even at locus no access road was shown to court.

He concluded that the Trial Magistrate reached a correct decision to hold that the plaintiff had a right of way by way of an easement and that the blocking of the access road was unlawful.

On the ground dealing with damages, the respondent stated that the evidence on court record shows that his motor vehicle that he uses for hire was blocked at his home and he lost earnings of 300,000/= per day. He also stated that he could not take his produce to the market. He then stated that the award of shs 4,000,000/= was not erroneous.

The respondent invited court to find that the Trial Magistrate was correct to hold that all the crops and temporary structure constructed on the access road be demolished and the plaintiff be compensated to the tune of shs 4,000,000/=. He prayed that the award of damages be increased by this court to shs 10,000,000. He also prayed that the whole appeal be dismissed with costs.

### **DUTY OF APPELLANT COURT**

The duty of a first appellate court was laid out in the case of **FR. NARSENSIO BEGUMISA AND 3 ORS V. ERIC KIBEBAGA SCCA NO. 17 OF 2002** that;

*“The legal obligation of the 1st appellate court to reappraise the evidence is founded in the common law rather than rules of procedure. It is a well settled principle that on a 1st appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in*

*case of conflicting evidence, the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses.”*

The above principles will guide this court in the determination of the grounds of appeal that will be determined together.

## **DETERMINATION**

It is trite law that the party that alleges has duty to prove the same as stipulated in section 101 – 103 of the Evidence Act and as was also held in **KARAMIRA V KIGGUNDU HIGH COURT CIVIL APPEAL 93 OF 2018**.

The appeal is in respect to the respondent's (**KIROMBA WILBER**) claim of an easement on land belonging to the 1<sup>st</sup> appellant (**MAUDAH KANYAMAISHWA**). I have found it necessary to first lay down the way in which easements may be created in Uganda.

An easement is a right by a person to have use of another person's property for a special purpose. In respect to land, an "easement of access" is the right which an abutting owner has of entry and exist from his premises, in addition to the public easement in the street. "Access to an underground sewer" means more than a right to open the surface to make repairs and implies the right of connection by branches (see **Black's Law Dictionary 4th Ed**).

The Courts of law in Uganda exercise their jurisdiction subject to the Constitution of Uganda, conforming to the written law, observing customary law, and in cases when the written law does not apply, then court can revert to Common law, doctrine of equity and established practice. (see **Section 14 & 15 of the Judicature Act**). I will therefore highlight common law cases relating to creation of easements along site the position that can be inferred from the Laws in Uganda.

Laws change, which means that it is important to explore the creation of easements in respect to Uganda, because different laws prescribe different procedures. For example, the Roads Act 16 of 2019 repealed the Access to Roads Act, this means

that the procedure relating to easements that was originally followed to apply for an easement in the Access to Roads Act is no longer applicable.

### **Creation of easements**

5 In principle easements in Uganda arise in different ways. The ways in which they may be created include;

1. By statute or law
2. By agreement between the property owners
3. By Implication
- 10 4. By long usage rights eg creating bonfide Kibanja rights provided in the Land Act.
5. By necessity after application to a relevant authority.
6. To give effect to a common intention between parties

#### 15 **1. Easement created by statute.**

A. **Section 60 of the Registration of Titles Act** provides circumstances in which a Certificate is conclusive evidence as to title to easements, it stipulates that, “Whenever any certificate of title or any duplicate registered or issued under any of the provisions or otherwise under the operation of this Act contains  
20 any statement to the effect that the person named in the certificate is entitled to any easement specified in the certificate, the statement shall be received in all courts as conclusive evidence that he or she is so entitled.”

B. **Section 16 of the Condominium Property Act 4 of 2001**, provides for  
25 Easements in favor of unit owner, it stipulates that; “After the registration of a condominium plan, there is implied in favour of each unit shown on the plan, in favour of the owner of the unit and as appurtenant to the unit—(a)an easement of the subjacent and lateral support of the unit by the common property and by every other unit capable of affording support;(b)an  
30 easement for the shelter of the unit by the common property and by every other unit capable of affording shelter; and(c)an easement for the passage or provision of water, sewerage, drainage, gas, electricity, garbage, artificially heated or cooled air and other services including telephone, radio and television services through or by means of any pipes, wires, cables or

ducts for the time being existing in the parcel to the extent to which those pipes, wires, cables or ducts are capable of being used in connection with the enjoyment of the unit”.

5     **2. Easement created by agreement between the property owners**

An express easement is in writing, either by a deed, will or contract can create an easement. **Section 65 of the Registration of Titles Act** provides that easements existing under deed or writing to be noticed as incumbrances.

10    **3. Easement created by implication**

A. Application For Certificate of Customary Ownership as provided in Form 1 & 23, found in the First Schedule of The Land Regulations, 2004 requires any easements or rights of way to be described in the form as encumbrances on the customary land.

15

B. **Section 99 of the Registration of Titles Act** also specifies circumstances for Creation of easements by implication. It provides that “Whenever any transfer or lease of freehold land contains the words *“Together with a right of carriage way over”* (specifying or describing the road or roads over which the easement is created and referring to a plan endorsed on which the road or roads is or are coloured brown), those words shall have the same effect and be construed as if there had been inserted in the transfer or lease the words contained in the Fifth Schedule to this Act”.

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25    **4. Easement created due to long usage rights.**

In **Paddy Musoke v John Agard & 2 ors Civil Appeal No. 36 of 2012**, The respondent had acquired “Kibanja” rights on what ended up being a registered title owned by the appellant. Hon Justice Wilson Masalu Musene then held that having an access road traditionally or already in existence over time is different from obtaining an access road by application under the Access to Roads Act. It only requires enforcement of rights of way due to an existing access road.

30

In my opinion, long usage in respect to proving an easement on land based on long usage, can be proved when a person shows that they have used land

5 belonging to another for 12 years uninterrupted. The basis of this opinion is that bonafide occupant rights as stipulated in **section 29 (2) of the Land Act** can vest on a person after 12 years. In the same vein it is worth noting that a suit for a claim of right to land cannot be instituted after the expiration of 12 years from the date the right of action accrued (see **Semusambwa James v. Mulira Rebecca [1992-93] HCB 177**).

I am also of the considered opinion that an easement created by long usage is limited to the area that is the subject of the long usage.

10 **5. Easement created by necessity after application to a relevant authority.**

**In Barclays Bank versus Patel, [1970] EA 88, the Court of Appeal of Kenya, held that;**

15 *“A way of necessity arose by operation of law and continues to exist for as long as the necessity exists notwithstanding that it was not referred to in the certificate of title to the servient tenement.”*

20 An easement that is created by necessity may require an application to the relevant authority so that it is granted in accordance with the applicable law. I will highlight some laws that provide for application to acquire an easement.

25 A. **Section 62 of the Roads Act 16 of 2019**, provides for an Application for leave to construct access road through private property. **Section 62 (1) of the Roads Act 16 of 2019** stipulates that; *“Where the owner of any land is unable, through negotiations, to obtain leave from adjoining 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 his or her land and the public road.”*

30 B. **Section 118 of The National Environment Act, 2019** stipulates that A person may apply to Court for the grant of an environmental easement.

C. **Section 36 of the Water Act, Cap. 152** provides for circumstances in which a person with a water permit or waste discharge permit who has been unable



to obtain an easement by agreement with the owner or occupier of that land, to apply to the director of water development for the creation of an easement over that land. The easement sought would give the applicant a right to enter on land owned or occupied by another person for all or any of the following purposes - (i) to construct works on or in that land; (ii) to store water on or in that land; or (iii) to carry water, drainage or waste under, through or over that land.

It is worth noting that before granting an easement by necessity, it is imperative that the easement sought ought to be the only available option to the person seeking it. In the case of **Fowler & Anor vs Busingye MA No. 111 of 2013**, Hon Justice Joseph Murangira stated that where the plaintiff already has an access road, there is no legal ground to warrant him force his way through the Applicant's land as it is selfish, unjust and unfair to inconvenience others and even go to the extent of grabbing part of their property to maximize profit on one's land.

#### **6. Easement to give effect to a common intention.**

In the case of **Wong v Beaumont Property Trust Ltd [1965] 1 QB 673**, the landlord had consented to the use of the premise as a restaurant and therefore, even though there was no term in the contract or easement for such an installation. Wong was entitled to gain access to the property for the purposes of constructing, maintaining, and repairing a ventilation system for use in connection with the restaurant. The Court found that it was stated that the law readily implies the grant of an easement that is necessary to give effect to the common intention of the parties.

#### **The evidence on court record shows that ;**

**PW1 Natukunda Joy**, 35 yrs. testified that when she was born, she found when there was a road that her father-in-law used to use with a motor Vehicle. That it was in use for a long time and was now blocked (*see page 5 of the record of proceedings*) she further testified that "the 2<sup>nd</sup> defendants brought part with an access road where we were passing and blocked it. We started passing through an alternative access road through the 1<sup>st</sup> defendant's land. It is a foot path. I shifted

my gate and spent a lot of money changing the gate. Our family motor vehicle no longer has where to pass" (*see page 6 of the record of proceedings*)

5 **PW2 Kabandie Erick 76 yrs**, testified that the plaintiff (Kiromba Wilber) **had an access road that passed through his land, the late Katembo and late Kanyamaishwa's land up to Kiromba's land**. He added that **in 2008 he drove the plaintiff (respondent herein) in a motor vehicle through the access road** (*see page 8 of the record of proceedings*). That the local council committee agreed to give an alternative route for the plaintiff, but the defendants did not put it, and now the  
10 plaintiff has **no other option to access the main road** (*see page 9 of the record of proceedings*).

**PW4 Kiromba Wilber, 42 yrs** testified that he is suing the defendants, who are his mother-in-law and neighbor for blocking his access road. That the road was in use  
15 unchallenged by the late Kanyamaishwa from the 1980's. He further testified that "*the 1<sup>st</sup> defendant sold part of her land where the road passes to the second defendant. She requested to shift the road and I accepted. Within about one week they shifted me to another road which I accepted and they shifted the road to another part where there is a gate currently and I accepted*" (*see page 12, line 2 -6 of the record of proceedings*). The 1<sup>st</sup> defendant and her sons later also blocked the  
20 alternative road they had given me.

**DW1 Mauda Kyamashwa 73 yrs**, testified that the plaintiff had a foot path through her land to the main road, that it existed for about 15 years and even his late father  
25 had a motor vehicle that used to pass there like three times. That the plaintiff's late father did not have an alternative path for his motor vehicle save for the one in her land (*see page 14 of the record of proceedings*). She testified that after selling land to Twinamastiko, the road was changed. she closed the first access road and created an alternative access road for the plaintiff. That the plaintiff wanted her to  
30 sign an agreement for her in respect to the alternative access road, that is when she closed it (*see page 14, line 11 of the record of proceedings*)

**DW2 Twinmasiko Frank, 40 yrs** testified that the alternative road was on the 1<sup>st</sup> defendant's land. He stated that he closed the existing access road so that the

plaintiff would open the alternative road (*see page 18, line 2 and 12 of the record of proceedings*).

### **Analysis of the principles, law and evidence.**

- 5 It is clear from the evidence on court record given by both the appellants and respondents in the lower court that the respondent had an access road on the 1<sup>st</sup> appellants land for more than 15 years, that the access road could be used by a motor vehicle, and it was the only access the respondent had to the main road. When considering the evidence, it shows that this would constitute an easement  
10 created by long usage of more than 12 years that was discussed above.

It is important to note that **PW4 Kiromba Wilber**, whose is the **respondent in this appeal**, testified in the lower court that;

- 15 *“the 1<sup>st</sup> defendant sold part of her land where the road passes to the second defendant. **She requested to shift the road and I accepted**. Within about one week they shifted me to another road which I accepted and they shifted the road to another part where there is a gate currently and I accepted” (see page 12, line 2 -6 of the record of proceedings) (emphasis mine)*

- 20 In the same vein, **DW1 Mauda Kyamashwa**, who is the **1<sup>st</sup> appellant in this appeal**, testified in the lower court, that after selling land to Twinamastiko, the road was changed. she closed the first access road and **created an alternative access road for the plaintiff (Emphasis mine)** (*see page 14, of the record of proceedings*).

- 25 The testimony from both key parties shows that they agreed to create an easement by agreement, this is corroborated by the testimony of the local leader PW2 Kabandie Erick 76 yrs, who testified that the local council committee agreed to give an alternative route for the plaintiff (*see page 9 of the record of proceedings*).

- 30 In my opinion the easement by long usage was terminated by agreement of the 1<sup>st</sup> appellant and respondent, who then created an alternative access road by agreement. This means that the access road to the respondent’s property is now an easement by agreement. The 1<sup>st</sup> appellant in her testimony seems to have been against executing a formal agreement creating the alternative access road, this is

what caused the discord after the easement by agreement had been created, culminating to filing of a suit in the lower court.

It is my understanding that an agreement between parties may be oral as is provided in section 10 (2) of the Contracts Act, 2010. It therefore follows that by admission of the 1<sup>st</sup> appellant and respondent in their testimony in the Magistrates Court, they both agreed to an alternative road, which is an easement by agreement. in my opinion the respondent could have filed a suit in the lower court seeking specific performance to enforce the oral agreement for an easement comprised in the alternative access road agreed upon by him self and the 1<sup>st</sup> appellant.

I therefore find that had the Learned Trial Magistrate correctly evaluated all the evidence on court record, he would have reached different decision. I set aside the orders of the lower court and substitute them with the following orders.

1. The appeal is allowed.
2. The orders of the Trial Magistrate in Ntunagmo Land Suit 018 of 2022 are set aside.
3. The respondent is entitled to an easement comprised in the alternative access road he agreed with the 1<sup>st</sup> respondent and was also shown to the Local Council officials.
4. The appellants shall not interrupt the respondent's use of the alterative access road.
5. The respondent shall pay costs of the appellants in this appeal at the High court.



NSHIMYE ALLAN PAUL M.

JUDGE

21.02.2024