THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT NAKAWA

CIVIL APPEAL NO. 36 OF 2012

PADDY MUSOKE==========APPELLANT

VERSUS

1. **JOHN AGARD**
2. **ANDREW DOERY**
3. **EVA WINFRED MAYANJA==========**

RESPONDENTS

BEFORE: JUSTICE WILSON MASALU MUSENE

JUDGMENT

This is an appeal arising from the Judgment of His Worship B. N. D. Sande, Magistrate Grade 1 delivered on the 16th of March 2012 in the Chief Magistrate's Court of Entebbe at Entebbe.

The background to this Appeal is that the Respondents who are neighbours to the Appellant brought an action for damages and trespass on an access road used by them through a Plot which belonged to the Appellant. The Respondents claimed that the Appellant entered onto the access road and excavated it up to over 2 meters deep so that the Plaintiffs/Respondents could not access their homes as usual and had to pass through a bush and that their water supply line damaged as a result of the defendant's excavation work.

The Appellant on the other hand counter-claimed to being owner and a registered proprietor of the suit land comprised in LRV 3448 Folio 11, KYADONDO BLOCK 268 PLOT 140 measuring 0.216 hectares and that he is in

physical use and occupation of the land constructing storey apartments and contended that the suit land had no access roads passing through it. He contended to having notified the Respondents not to pass through his Plot as he was going to use it but they took no heed and sued him. The trial Court delivered Judgment in favour of the Respondent and the defendant being dissatified with the trial Court Judgment filed this appeal.

The Appellant raised seven grounds of Appeal which are:-

1. That the learned trial Magistrate erred in law when he failed to properly evaluate the evidence and the law thus arriving at a wrong decision.

2. That the learned trial Magistrate erred in law when he held that there was an access road when on the contrary he simultaneously found that it remained unclear whether there is no access road onto Plot 140 thus arriving at a wrong Judgment.

3. The learned trial Magistrate erred in law and fact when he found that there was an access road through Plot 140 and that the Respondents had a right to use/enjoy the same.

4. The learned trial Magistrate erred in law and fact when he found that the Access to Road Act was not applicable in the circumstances of this case.

5. The learned trial Magistrate erred in law and fact finding that the Respondents were not tresspassers over Plot 140 belonging to the Appellant.

6. The learned Trial Magistrate erred in law and fact finding that the power of Attorney was invalid and illegal whereas not, thus

disregarding the evidence of the Defendant and thereby arriving at a wrong Judgment.

7. The Learned trial Magistrate erred in law and fact when he dismissed the Appellant's counter-claim, relating to Plot 140 over which the Respondent had no registerable interest or right.

The Appellant was represented by Kabega, Bogezi & Bukenya Advocates while the Respondents were represented by Matovu & Matovu Advocates. Both Counsel filed written submissions in Court.

Counsel for the Appellant argued grounds 5 and 7 jointly, 1, 2, 3 and 4 jointly and ground 6 was argued last.

In relation to grounds 5 & 7, Counsel for the Appellant submitted that the action against the Appellant was about an alleged trespass against the Appellant. He also noted that it was an agreed fact that the Appellant is the owner of the land comprised in LRV 3448 Folio 11 Block 268 Plot 140 and that it is not shown anywhere in the pleadings that the Appellant at any one time permitted or gave his consent to the Respondents to create an access road over his plot 140.

Counsel further argued that taking into consideration the fact that the Respondents agreed that the Appellant is the owner of Plot 140 and that the Appellant was in occupation and use of the same, they are estopped from holding a contrary view.

He therefore argued that had the trial Magistrate directed his mind to the above submission, he would have found that the Appellant was no trespasser over his own land and that instead it was the respondents who were trespassers on the said land since they used it without sanction of the Appellant.

In reply to these grounds, Counsel for the Respondents argued that this was a case where the Respondents brought an action to enforce an existing right

of way or access meaning that even if Plot 140 was assumed to be owned by the Appellant, he owned it subject to the existing rights.

Counsel further contended that all the evidence brought before Court which was not challenged by the Appellant pointed to the fact that there was an access road which passed through Plot 140 even before the Appellant bought his own Plot from Dr. Namusoke.

Counsel therefore submitted that the Appellant trespassed on an existing access road of the Respondents by blocking it and could not be said to have interest on the access road.

As far as grounds 1, 2, 3 and 4 are concerned, Counsel for the Appellant argued that an access road is a creature of statute under the Access to Roads Act Cap 350 and that in relation to the long little of the statute, one must apply to Court for leave to construct it.

Counsel pointed out the fact that PW1 in his testimony and titles did not show the presence of an access road and he admitted to have never applied for an access road.

He also pointed out that PW3 the Chairperson of the area in his testimony admitted to not knowing whether the predecessor and plaintiffs ever applied for the said access road.

Counsel for the Appellant therefore argued that all this evidence points to the fact that there was no compliance with the statutory requirement to obtain permission from Court to enable the construction of the access road and therefore there is no access road through Plot 140.

Counsel for the Appellant further argued that despite PW4’s testimony that Dr. Namusoke applied for creation of the access road, the Plaintiffs failed to call Dr. Namusoke to testify to this fact despite undertaking to do so.

Counsel also pointed out the fact that the Respondent failed to exhibit an order of leave of Court leading to creation of the road access which signifies

that the Respondents in law do not have a cause of action against the Defendant.

Counsel further argued that the trial Magistrate was misdirected to hold that the Access to Roads Act was not applicable to the circumstances of this case and that the Respondents' acts of tarmaking and illegally creating a road over the Appellant's land does not make their acts lawful but illegal.

Counsel for the Respondents in reply to the above 4 grounds contended that this was not a case about seeking an access road but rather about enforcing rights of way or an existing access road.

Counsel therefore pointed out the fact that the trial Magistrate's Judgment was based on the fact that the Plaintiffs (Respondents) upon purchase of their land from Dr. Namusoke found a reasonable access road from Entebbe High Way through their land and so there was no need to apply for leave to construct what already existed.

Counsel therefore concluded that the access road existed long before the Plaintiffs settled in the area and enjoyed it until the Appellant blocked it.

He stated that the Access Roads Act and all its elaborate procedures of obtaining an access road do not apply and so the Plaintiffs did not need an order of Court to obtain an access road.

Counsel for the Appellant in ground 6 submitted that the trial Magistrate erred in law and fact in finding that the power of Attorney was invalid and illegal whereas not and therefore disregarding the evidence of the Defendant and thereby arriving at a wrong Judgment.

Counsel argued that the Respondent's Counsel's submission that DW1 (Kiwanuka) had no locus to represent the Appellant and was a depature from the pleadings since it was not among the issues agreed upon during scheduling nor did Court on its own raise it.

He therefore stated that disregarding evidence of DW1 was wrong in law since a lease though expired was in law still subsisting subject to procedural renewal steps accoring to the Authority of **Habre International Trading Co. Ltd Vs Francis Bantariza SCCA No. 3 of 1999** which meant that the Appellant was still registered proprietor there of and that nothing was added by the Respondents by way of documentary exhibit that the Appellant's name was ever canceled from the title/register.

Counsel pointed out the fact that the power of Attorney was shown to Court, which received it and the same was duly registered and therefore cannot be said to be invalid because of an expired lease.

Counsel therefore prayed that Court allows the Appeal on the basis of the 7 grounds raised.

Counsel for the Respondent on the other hand disputed the fact that this point was a pleading but contended that it is a point of law and can be raised at any time during trial. Counsel re-stated Section 146(1) of the RTA which states that a registered proprietor may give a power of Attorney and therefore submitted that the power of DW1 was invalid as he had no authority to transact and/or give any evidence on behalf of the Defendant whose lease had expired.

Counsel also noted that the authority of **Habre International** is quoted out of context since it does not state that a registered Proprietor whose lease has expired can give a power of Attorney in respect of the expired lease.

I have carefully considered and internalised the submissions by the Advocates on both sides in this Appeal. I have also studied the record of proceedings and Judgment of the lower Court.

I wish to re-state the fact that as the first Appellate Court, this Court is bound to evaluate the evidence on record by giving it fresh and exhaustive scrutiny and thereafter arrive at its own conclusions as to whether the findings of the lower Court can be supported or not. This position of the law has been

expounded in a number of authorities including **PANDYA VR [1957] E.A. 336.**

In the case of **Serubiri Johnson Vs Uganda [2007] HCB 2**; the Court of Appeal of Uganda held that the first Appellate Court has a duty to give the evidence on record as a whole fresh and exhaustive scrutiny, draw Courts own conclusions of fact but remembering that the Court never heard the witnesses give evidence.

I shall proceed to consider the grounds of Appeal as urged by Counsel for the Appellant. Counsel for Appellant started with grounds 5 and 7. As already noted from the arguments of Counsel for the Appellant, the action by the Respondents against the Appellant in the lower Court was whether the Appellant's counter-claim relating to Plot 140 over which Appellant was registered proprietor was properly handled, and secondly whether the Appellant could be held to have tresspassed over his own land over which he was the registered proprietor. I agree with the position of the law as quoted by Counsel for the Appellant. Indeed in **Sheik Mohammed Lubowa Vs Kitara Enterprises Ltd, HCCA No. 4 of 1988,** trespass to land is constituted where the entry onto the land by the Defendant was without the consent of the owner.

However, and in my humble view, each case has to be considered on its own merits and circumstances.

In the present case, it was an agreed fact that the present Appellant is the owner of land comprised in LRV 3448 Folio 11 Block 268 Plot 140, under item 2 of the agreed facts.

According to the submissions of Counsel for the Appellant, the trial Magistrate was wrong to have come to the conclusion that "**An owner of the land can be held to be a tresspasser".**

According to the evidence of PW1, John Agard on pages 1 and 2 of the lower Court record, they were using the access road since September, 2006 and

even after. So whereas they may not have applied from the Appellant as owner of Plot 140 as submitted by Counsel for the Appellant, this Court cannot turn a blind eye to the evidence in the lower Court that the Respondents were using the road till it was excavated to nearly 3 metres deep.

PW1 on page 2 of the proceedings tendered in Court pictures which were marked Ex P.5 showing the excavation. PW1 went on to testify:-

> **"This excavation has affected us extensively. We are unable to access our home on foot, by car and we have to park our cars for security reasons 2km away and walk to our home from the other side of the hill through the bushes. In this location, there is no other access road. We have suffered great inconveniences……."**

The above position was supported by PW2, Semambo Frank aged 62 years and LC1 Chairperson of the area. He told the lower Court on page 4 of the proceedings that he did not know Paddy Musoke but he knew John Agard who bought the Kibanja in his area. And that John Agard reported to him that the access road to his home had been destroyed. He added:- "**I went to the scene. I found out that his access road had been excavated. Next day, I summoned area residents and all condemned that act and all blamed Plaintiff. On Sunday, we sat. It was resolved that Plaintiff re-instates the access road, but again he was absent. We communicated to him Wakiso District wrote instructing the Plaintiff to restore the access road. The letter was addressed to Paddy Musoke (Plaintiff)……..".**

PW2, the LC1 Chairman, Semambo Frank went on to testify that prior to Agard John buying that Kibanja, that access road existed and that John Agard constructed house using that access road to transport his materials. He added that at that time, there was no dispute over the access road and that the same was used by Eva Winfred Mayanja, a neighbour to John Agard.

PW2 concluded that apart from the access road in question, John and Eva have no other access road, and that it was Dr. Namusoke who sold them. During cross-examination by Mr. Abas Bukenya representing Paddy Musoke in the lower Court (page 5 of the proceedings), PW2, the LC1 Chairperson reiterated that he was a witness when Winfred Mayanja bought her portion of Kibanja and that the access road was there before.

The same or similar testimony was repeated by PW3, Andrew Doery on pages 6 and 7 of the proceedings. The evidence of the Respondents in the lower Court was not uncontraverted and was corroborated by independent witnesses. Their case was that they wanted to enforce an existing right of way or access to their respective homes which was there before and was being destroyed by the Appellant through extensive excavation. Even if the Appellant own Plot 140, he owned it subject to the existing rights that is Kibanja or easement whether registered or equitable. And as Counsel for the Respondents submitted, the Appellant had no oral or documentary evidence in rebuttal, and his title on Plot 140, a lease from Buganda Land Board had expired. It should be made clear here that having access road traditionally or already in existence over time is different from obtaining an access road by application under the **Access to Roads Act.**

The Appellant in this case therefore clearly trespassed on an existing access road of the Respondents by blocking it. I cannot therefore fault the Trial Magistrate in his findings.

In the premises, grounds No. 5 and 7 of Appeal fail.

I now turn to grounds No. 1, 2, 3 and 4 of Appeal. Counsel for the Appellant's submissions were that the creation of access roads is a creature of Statute to wit the **ACCESS TO ROADS ACT CAP 350, laws of Uganda**.

His emphasis was that for an access road to be constructed, one must apply to Court for leave to construct it. I agree with the authority quoted by Counsel for the Appellant that Court cannot give Judgment contrary to the

evidence that disproves the claim **(John Nagenda Vs Monitor Publications Ltd, SCCA No. 50 of 1994).** However, in the present case, the uncontraverted evidence on record, including by Semambo Frank, LC1 Chairman of the area was that the access road complained of was there before, already in existance. So it was not necessary to apply to Court for the same as provided under the Acess to Roads Act. Failure to call Dr. Namusoke in the circumstances was not fatal to the Respondent's case because that gap in evidence had been filled by the LC1 Chairperson (PW2). I therefore agree with Counsel for the Respondent that the present case about seeking **a new access road,** but seeking to enforce the rights of way over an existing access road.

And on page 4 of the Judgment of the lower Court, his Worship B. N. Sande, Magistrate Grade 1, held:-

> **"…. On a balance of probabilities I agree with Counsel for the Plaintiffs that where the Plaintiffs upon purchase of their land from Dr. Namusoke found a reasonable access road from Entebbe High way through their land up hill, where the Plaintiffs 1 and 2 used such an access road by tarmacdising part thereof, per the print shown in EX P.2 (Certificate of Title) then the Access to Roads Act Cap 350 Supra is irrelevant and inapplicable".**

I entirely agree with the findings and holding of the trial Magistrate as there was no need to apply for leave to construct what already existed. In my view, the Respondents discharged the burden of proof as provided under Section 103 of the Evidence Act. Therefore grounds No. 1, 2, 3 and 4 of Appeal equally fail.

Lastly was ground No.6 of Appeal to the effect that the Magistrate erred in law and fact when he found that the power of Attorney was invalid and illegal whereas not, thus disregarding the evidence of the Defendant.

Counsel for the Appellant submitted that it was a departure from pleadings for the issue of power of Attorney to DW1 to be raised on account of being invalid as the owner's lease had expired.

Counsel for the Respondents on the other hand, submitted that it was a point of law which could be raised at any time of the trial. The law under S.146 (1) of the Registration of Titles Act is clear. It provides that a registered proprietor may give a power of Attorney. So if the lease has expired, then one ceases to be a registered proprietor. I am therefore unable to disturb the findings of the trial Magistrate on the matter at page 5 of the lower Court Judgment. So ground No. 6 of Appeal is equally hereby rejected.

In the premises and having rejected all grounds of Appeal, I do hereby dismiss the entire Appeal with costs.

.....

WILSON MASALU MUSENE

JUDGE

21/05/2015