THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
CIVIL SUIT NO. 214 OF 2011

STEWART GAWAYA TEGULE::PLAINTIFF

VERSUS

1. **KAMPALA CITY COUNCIL AUTHORITY**
2. **ANTHONY MULINDWA::DEFENDANTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff commenced this suit against the defendants seeking a declaration that the demolition of the plaintiff's behind structure was unlawful and Permanent Injunction to restrain the 2nd defendant from further trespassing on to the plaintiff's suit land and special damages of 595,628,083/=, general damages, exemplary and punitive damages.

The plaintiff is the registered proprietor of land and developments comprised in Kyadondo Block 257 plot 775 at Munyonyo.

The 2nd defendant and other adjacent neighbors of the plaintiff raised complaints about the plaintiff's development to the 1st defendant and in February 2010 the plaintiff's behind structure at Munyonyo was demolished by the 1st defendant officials.

That the plaintiff was summoned to appear before the 1st defendant officer on several occasions with regard to the development being carried out on his property in question

The agreed issues to be decided on by court are;

1. *Whether the demolition of the plaintiff's structure by the 1st defendant was unlawful?*
2. *Whether there is a lawful access road through the plaintiff's land to the defendant's land.*
3. *What remedies are available?*

The plaintiff was represented by *Golooba Muhammed* and *Nsimbe Musa* while the 1st defendant was represented *Dennis Byaruhanga* and the 2nd defendant was represented by *Bernard Mutyaba.*

Whether the demolition of the plaintiff's structure by the plaintiff was unlawful?

The plaintiff's counsel submitted that the plaintiff presented his development plans to KCCA (KCC) planning committee on 15th October 2007. The 1st defendant did not communicate to the plaintiff for 2 years to ascertain whether his plans were approved or rejected. And as per the law, Regulation 6 of the Town and Country Planning Regulations SI 246-1 provides that if within 60 days of receipt of any application or further plans or particulars relating to the application, the planning committee does not

approve the building plan approval application, the application shall be deemed to have been approved and the permission of the planning committee shall be deemed to have been duly given. The fact that he did not get his response after the 60 days, he commenced his building after 1 year upon submission of his documents.

That the said development plans were endorsed on by a one Bashir who was working with the 1st defendant. Proof of his submission were the payments of the building plans assessment fees that he believed amounted to the approval of building plans.

The 1st defendant's counsel submitted that the enforcement and physical planning officers of Makindye Division of the Kampala City Council visited the site to make first hand assessments and it was established that the plaintiff was carrying out developments on his land without approved plans nor a commencement permit as required.

The plaintiff was issued a notice to remove the illegal developments and when the plaintiff ignored the notice issued to him, he further failed to comply with the said notice and his structures blocking the access to the road and were demolished.

The plaintiff neither in his witness statement nor in his trial bundle attached any approved plans, commencement permit or job card to show or prove to court that his said construction activities were indeed in

compliance with the law. PW1 told court that he never had any copy of the alleged building plans submissions to the 1st defendant.

Counsel further cited the laws on Public Health (Building) Rules SI 281-1, Rule 13, requiring any developer before commencing any construction works to give notice to the local authority, in this case KCCA planning committee and the town and country planning regulations, Regulation 2 as stated in the plaintiff's argument, creates a legal requirement that the application for development permission is only made to the planning committee of the Local authority.

Regulation 4(1) of the Public Health (Building) Rules, provides for approval of the development application in writing. The plaintiff claimed that payment of the building plans assessment fees amount to approval of building plans. During cross examination the plaintiff failed to produce a copy of the building plan submission which he based on to commence construction works blocking the access to the 2nd defendant and the neighbors, the plaintiff failed to produce any in court that he did not have any. No evidence was adduced by way of a witness or the person or his agent who prepared and submitted his alleged building plans to the 1st defendants planning committee.

Counsel for the plaintiff raised Regulation 6 of the Town and Country Planning Regulations SI 246-1 in his defence however this provision does not apply to the plaintiff who merely alleges that he submitted his building

plan to the 1st defendant's planning committee, it only applies to any developer who duly submitted building plans for approval and has evidence of the submission which he/she based on to commence construction works and who also applied for and obtained a commencement permit and job card.

The plaintiff during the hearing told court that he based on the alleged endorsements on various documents by a one Bashir to commence his developments blocking the access yet at the same time, it is to the knowledge of this court that the planning committee is the only legally mandated authority to handle building plan approvals and rejections. It is not anywhere proved to this court who a one Bashir is, since the plaintiff claims that he was an agent of the committee. No evidence was adduced in this matter.

Analysis

Section 101-103 Evidence Act, Cap 06, provides that the burden of proof lies on the person who alleges. In this case the plaintiff alleged that the demolition of his structure was unlawful since he had building plans for the structure.

The plaintiff relies on exhibit P3 and P4 as the receipt P8 as the basis for the assertion that the building plans were indeed submitted to the 1st defendant and that he was authorized to proceed with the construction of the structure.

It should be noted that the 2nd defendant and other residents in the area complained about the illegal construction being carried out by the plaintiff. Indeed the 2nd defendant visited the site and confirmed that the plaintiff did not have any approved building plans by April 2007. The plaintiff does not dispute this fact that at the time he was carrying out construction in April 2007 he never had any plans or approved plans for the said building for which he had carried out excavation works.

It would appear that the plaintiff made efforts of legitimizing the process by presenting building plans and proceeded even to pay for the same on 8th October 2007. However, there was no proof of submission of the said building plan or any acknowledgment of receipt of the said building plan. Even at trial the plaintiff did not attach any such building plan that was submitted although he continued with the construction and he premises his actions on a note written on exhibit P3 and P4.

The plaintiff as a developer had duty to retain a copy of the building plan in order to guide the construction which he had commenced. The failure to produce any copy of the building plan leaves this court in doubt whether the plaintiff was lawfully carrying out the construction. It is not enough to present the receipt of payment for the building plan as proof of having a building plan but actual possession of a building plan was required.

This court will not base its decision on assumptions and conjecture to infer existence of the building plan that was never exhibited in this court. The

plaintiff argued that the 1st defendant never led any evidence to rebut the plaintiff's case. I wish to note as stated earlier that it is the duty of the plaintiff to prove their case on balance of probabilities even when a matter proceeds exparte. The evidential burden does not shift to the defendant unless there is cogent and credible evidence produced by the plaintiff on the issue. ***See Musisi Dirisa & others v Sietco (U) Ltd SCCA No. 24 of 1993 [1993] IV KALR 67***

The court cannot assume that the facts are undisputed, but rather it must evaluate the evidence presented to it and make a finding on whether the plaintiff has proved their case or not. Where the evidence exists and the same is not adduced in Court, the court may presume that it is unfavourable to the party withholding it. ***See Peterson Gutu Ondiek b Daniel Njigua Gichohi HCCC No. 4018 of 1990***

The 1st defendant is allowed under the law to demolish any unauthorised building or structure. The demolition of unauthorised building is intended to teach a lesson to the unscrupulous builders or developers and also serve as a warning for the citizens not to indulge in such activities in future. The 1st defendant could not be faulted for demolishing the plaintiff's building/structure since he failed to produce an approved plan. The notes written on PE 3 & PE4 could not form the basis of continuing to carry on any construction in absence of actual building plans. The said purported

authority could not be a substitute for a building plan and the same could have been secured through acts of bribery.

The demolition of the plaintiff's structure/building was therefore lawful in the circumstances of the case and the evidence adduced before this court. The 1st defendant was carrying out a statutory function. The development control function vested in the 1st defendant is to protect against many evils including weak structures, unplanned land use among others.

Therefore any developments carried out without approved plans or a plan properly lodged with the authority within a stipulated timeline is illegal and liable to be removed or demolished.

Whether there is a lawful access road through the plaintiff's land to the defendant's land.

The plaintiff in his testimony stated that he never illegally blocked any access since none existed on his land and the 2nd defendant and the neighbor have an alternative access to their property. If there existed an access road through plot 775, then it was created illegally.

The 1st defendant testified that he acquired his land in 1996 and his certificate of title clearly shows the dotted line as an access road. The said access road has been in existence for over 30 years.

The plaintiff's counsel submitted that there was no evidence that the said access was created in accordance with the law or through negotiations. He

relies on subsequent events of attempted negotiations while the matter was already in court as the basis for the failed negotiations over the access road.

Analysis

The court is supposed to establish whether the 2nd defendant and other people in the neighbourhood have a right of way or an easement through the plaintiff's land. An easement is a right of cross or otherwise use some else's land for a specific purpose. It allows another to use and or enter into property of another without possessing it e.g a land owner may enjoy the right of way over the land of another to access the property.

The plaintiff claimed that the 2nd defendant has an alternative access road which he can use and that there is no justification for trespassing on this land. The court visited the locus in order to establish the alternative road or route which the defendant and other neighbours are supposed to use.

It was the established and found that there is no existing alternative access road that the 2nd defendant can use to access their homes together with other persons after the 2nd respondent's home. It was further established that the other persons property have been developed on approved plans that clearly show an existing access road through plot 775 belonging to the plaintiff.

The circumstances of this case clearly show that there has existed an access road even before the plaintiff acquired his interest in the said land in 2005.

The plaintiff does not dispute this fact except that he is trying to rely on his certificate of title which does not indicate an access road with dotted lines. During cross examination, the plaintiff confirmed that the access road existed.

The said access road has been in existence before the plaintiff acquired this land and this is a question of fact and the fact that the same had never been disputed by the plaintiff's predecessors in title infers that there as reflected on the certificate of title buttresses the fact that the access road was indeed in existence. It could be true that the same was never marked-dotted on the plaintiff's certificate of title that does not mean it was illegally created to amount to trespass. It would be unfair to try and block this access road to the neighbourhood and yet the same has been in existence for over 30 years. The court would imply an easement premised on the intention of the original parties and how they intended the same to be used. It is possible to create an easement simply by having used the property in a similar way before. The court will assume that the original owners intended to create it as an easement but forgot to have the same noted on the title deed.

The plaintiff never challenged the existence of the road when he first filed a suit in 2011. The challenge for the alleged trespass on the plaintiff's land through an access road first arose in January 2018 when the amended plaint was filed in this court.

Having considered the evidence before this court and after visiting the locus, the plaintiff failed to show court while at locus the access route he claimed. To the contrary the 2nd defendant showed court that there is only one access to his property and the neighbors and it is the access that the plaintiff attempted to block forcing them to protest and petition the 1st defendant to intervene.

In the case of **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.

According to **Meggary and Wade's text book titled "The law of real property" 8th Ed page 1245,** it stated that *"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.*

The author continues to write that an easement constitutes an incorporated hereditament on land. Further the authors' state at page 1246 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."

It is therefore noted that at common law, easements could be utilized even without the consent of the serviette tenement owner. But there is a difference between having an access road traditionally or already in existence overtime is different from obtaining an access road by application under the Access Road Act

Justice Elizabeth Musoke in **Paddy Musoke v. John Agard and 2 others Civil Appeal No. 46 of 2016 and Civil Appeal No. 134 of 2017** further notes that one may enjoy an easement by virtue of the access to Roads Act Cap 350 or as a common law right as discussed above. But the Access to Roads Act, in the judge's view concerns situations where there has never existed an access road so that an application to construct one may be made.

Section 2(1) of the Act provides as follows application for leave to construct a road of access

(1) Where the owner of any land is unable through negotiations to obtain leave from adjoining landowners to construct a road of access to the public highway, he/she may apply to the land tribunal for leave to construct a road of access over any lands lying between his/her land and the public highway

Where on the other hand, a land owner has been gaining access to a public high way through a road, albeit going through another's piece of land, the above provision would not apply because then the need to construct a road of access does not arise. What is required is to give effect to the common law principles as to easements requiring the person on whose land the road passes to recognize that the road is an easement for the benefit of those who are entitled to use it.

Therefore in my view, the defendant could only access his home using a road going across the plaintiff's land, which road the 2nd defendant enjoyed even before the plaintiff purchased the said land, which entitles him to have access. Therefore, in the present case it was wrong to call the 2nd defendant a trespasser on the said land while using the available access road since the same is a lawful access road through the plaintiff's land. The easement arises by prescription or prior use (long user or existence of the access road). In order for such easement to exist it must be shown that; both properties were in joint ownership of a person and persons; the properties were subdivided; the easement was patently obvious i.e discernible by inspection; and the easement is reasonably necessary and benefits the dominant tenement.

The scrutiny of the evidence or the documents clearly shows that the said the other person's title clearly indicated an access road and the subsequent neighbouring land uses the same access road. The failure to indicate or

mark the access road on the plaintiff's certificate of title would not mean that there is no lawful access road through the plaintiff's land since it existed before he acquired the same land in 2005.

The plaintiff's unilateral report could be used to infer unlawfulness of the access road when it was made specifically for court purposes without the involvement of the 2nd defendant and other adjacent plot owners who use the same access road. When the court visited the locus it was obvious it was used by many more people and it was not used by the 2nd defendant alone.

It is the finding of this court that there is a lawful access road through the plaintiff's land which ought to be reflected to avoid future disputes. This suit would not have been necessary, if the same had been properly dotted on the plaintiff's title as it was done on the 2nd defendant and the other persons' titles in the neighbourhood.

The suit is dismissed and I make no order as to costs.

SSEKAANA MUSA
JUDGE
21ST JUNE 2021