

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION**

CIVIL APPEAL NO. 44 OF 2013

ARISING FROM CIVIL SUIT NO. 3 OF 2012

AHMED KIZITO..... APPELLANT

VERSUS

ERIA KALIBBALA..... RESPONDENT

JUDGMENT

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

This is an appeal from the decision of His Worship Ereemye James J.M. Principal G.1 Magistrate of the Chief Magistrates Court of Mengo at Mengo in Civil Suit No. 3 of 2012. The facts as admitted by the trial court were that the appellant and respondent owned adjacent plots, with the respondent being the holder of his interest first in time. That after the appellant acquired his interest, he commenced renovation and extension of the existing structure that blocked the access to the respondent's plot. The respondent thereby sued for a permanent injunction, general damages, vacant possession, a demolition order and general damages. The appellant denied the claim, contending that he did not block the respondent's access but left ample space on either side of his developments before he commenced his developments. He further argued that if the respondent's access was blocked, it was not by him but by one Kalagala who owned adjacent land to that of the appellant and respondent. Judgment was entered for the respondent and hence this appeal.

The memorandum of appeal contained the following grounds of appeal;

1. *That the trial Magistrate erred in law and fact when he failed to properly evaluate the evidence thereby coming to an erroneous conclusion.*
2. *That the trial Magistrate erred in law and fact when he disregarded the actual measurements of the appellant's plot of land thereby coming to a wrong decision.*
3. *That the trial Magistrate erred in law and fact in holding that the respondent's access was part of the land that the appellant bought.*

4. *That the trial Magistrate erred in law and fact when he disregarded the fact that the appellant's developments were not outside the area he bought.*

The appellant therefore requested for orders that the appeal be allowed and that the judgment of the Principle Magistrate GD1 of Mengo be set aside and/or reversed.

At the hearing of the appeal, the parties were directed and filed written submissions.

This being a first appellate court, it must subject the evidence to a fresh and exhaustive scrutiny before coming to its own conclusion, bearing in mind that it did not see the witnesses. Further, this court must be guided by the impressions of the trial court on the manner and demeanor of witnesses. **See for example: - (Banco Arab Espanol vs. Bank of Uganda SCCA No. 8 of 1998).** I have borne these principles in mind in resolving the issues raised by this appeal.

Resolution of the grounds of appeal

Counsel for the appellant submitted on grounds 1 and 2 together while grounds 3 and 4 were handled independently. Counsel for the respondent submitted on all the grounds concurrently. A scrutiny of the grounds of appeal shows that although worded differently, they are all premised on evaluation of evidence by the trial Magistrate. Accordingly I will resolve the grounds of appeal together.

Counsel for the appellant with regard to the first ground specifically submitted that the trial magistrate misdirected himself when he held that the appellant bought a house instead of a plot and that he also wrongly held that the house covered the exact area purchased by the appellant thereby ignoring the actual size of the plot and that he then came to a wrong finding that the appellant blocked the access road by extending the walls of the original house. He argued therefore that the trial magistrate clearly ignored the fact that the appellant's agreement was for purchase of a plot.

Counsel further submitted that the respondent failed to prove that the appellant's entry and usage of his land measuring 32ftX57ftX34ftX57ft was unlawful. Also that the respondent failed to show the size of the access road allegedly blocked by the appellant and did not deny that there existed an open space in front of Kalagala's house whose size he also did not know. That since

the appellant did not even fully utilize all his land and the building he was renovating is within the boundaries of his plot, there was no entry upon the respondents land and therefore, the case of trespass and blocking the respondent's access cannot stand against him. In support of this arguments counsel cited the case of **Justine EMN Lutaya Vs. Sterling Civil Engineering Co. Ltd SCCA No.11 of 2002** and **Sheikh Muhammed Lubowa Vs. Kitara Enterprises Ltd 91992) KALR 732.**

In reply, counsel for the respondent submitted that the appellant and respondent both produced agreements upon which they acquired their respective plots. That in the respondent's agreement of purchase made in 1990, the access is clearly indicated as passing on the verandah of the house belonging to Milly Namirembe the vendor. That that same house was later sold by the beneficiaries of the estate of the late Namirembe to the appellant who constructed a new house that blocked the access road.

The main issue before the trial court was whether the plaintiff/respondent had a cause of action against the defendant/appellant. In order to demonstrate that there was a cause of action the respondent had to establish that he had a right which was violated and the defendant/appellant was liable as noted in the case of **Auto Garage Vs Motokov (1971) 314 EA.**

In his judgment, the trial magistrate considered the oral and documentary evidence and his observations at the *locus in quo*. He then made a finding that both parties to this appeal purchased from the same Milly Namirembe and the person who purchased from the representatives of her estate. That both agreements of sale indicated an access road through the appellant's land to that of the respondent. That the former did not deny the fact that he built a wall that extended beyond the original house by 3ft which remarkably reduced the access to the respondent's plot. He was satisfied that the access road started from the appellant's veranda towards Kalagala's land and that the absence of the exact measurements/size of the access road would not make it fall within Kalagala's land. After summation, he found in favour of the respondent.

I have likewise looked at both agreements of sale. In the prior agreement of sale to the respondent dated 25/11/90, there is a definite mention of an access road stretching between the vendor's (Milly Namirembe) veranda and the borders of Mr. Kalagala's land who is started to be the neighbor on the left. Similarly, in the agreement of sale to the appellant dated 11/4/10, there is mention of an access which was even drawn into the sketch that appears on the face of it. At page 48 of the record, DW3 confirms that fact when she states *that "that the house ends at the verandah of the house of Namirembe. That is the same house we sold to Kizito."* There is no doubt in my mind that the vendor in the latter agreement was aware and made it clear to the appellant at the time of the sale, that there was an access road on the left side of the plot which was the subject of the sale.

The evidence above is supported by that of the respondent who alleged to have bought a plot which provided for an access road (into his plot) running along the veranda of Molly Namirembe the vendor. This evidence was corroborated by the evidence of the PW3, DW2 and DW3. PW3 stated (at page 41 of the record) that *"...when Kizito bought the land he reconstructed the old house...the access was ending at the end of the house. We used to pass through that access and one could be able to pass through which is now impassible..."* DW2 who claimed to be the widow of the late Hussein Kyeyune, whose children sold to the appellant was even more specific when she stated (at page 46 of the record) that *"I looked at the agreement and I was shown the area which was for access. It was there and everyone was using it and was to remain there. It was on our land and Kizito when he bought was to leave it there since all people where using it..."* (Emphasis mine)

Further in cross examination, DW2 stated that *"...On the land there was a house which Kizito bought. The house had a veranda which was small on the house itself and the road was just on it. The veranda was of cement and brick. It was a small veranda and sometimes people would walk on it..."* Further to this, DW3 stated at page 47 of the record that *"The access open area was wide enough... vehicles could park there. Even Kalibala would park there."* This evidence was not rebutted to by the defendant/appellant.

Also I note that the appellant stated in cross examination at page 45 of the record that *"On the agreement...it reads that at this side, there is an access road...The agreement does not show the*

width and length of the road but shows that there is a road. In the plot was an old house. It had no veranda. The veranda had shrunk under.... When I bought there was an access which when I rebuilt the house I left 3ft and 4ft on either side and I told the neighbors to now use the area I left for them...”

Steaming from the above, I am convinced that there was an access road which was being used by many people including the respondent, before the appellant purchased his interest. In my view, the appellant was fully aware of that fact and thus when he blocked it, he violated the respondent's right to use it. I have no reason to fault or disbelieve the trial magistrate who visited the locus and saw for himself the actual demarcations on the ground *visa vis* the developments stated to have been put up by both the respondent and Kalagala. Furthermore, the evidence is clear enough that in the first agreement, Ms Namirembe who sold to the respondent, clearly states that the access road stretches from her veranda up to Kalaga's boundary *and not* into his land. Although the appellant denied knowledge of the existence of the verandah at the time he purchased, DW2 and DW3 disapproved it when they stated that he was shown the access which was wide enough and that the verandah which was small had only been obliterated over the years. PW1, PW3 and DW2 testified that the appellant extended his development beyond that verandah, which means that he was by that action encroaching on the access road.

In proving his case, the appellant appeared to have relied heavily on the report of Deputy RCC – Kampala in charge of Lubaga division. It was her finding that the respondent left four feet on either side of his house to maintain an access into the plots behind his plot and that it was Kalagala who constructed a wall to block the access. However, it is clear from the report that Kalagala was never a party to those proceedings and therefore his views on the allegations against him were never sought and cannot be known.

Further, since the agreement between the respondent and his predecessors was silent on the size of the access, it is not explained how and why he decided to leave a space of 4ft if at all. On the other hand, the fact that the respondent left 4ft would not take away the fact that he built beyond his predecessor's verandah into what was originally demarcated as an access to those resident behind his plot, including the respondent. There was also overwhelming evidence that the access

was open to users well before he obtained his interest and the respondent is expected to have been aware of that fact or at least, inquired into it. It was irrelevant whether or not the appellant bought a plot or a house what was important was for him to confine himself within the boundaries he purchased making that any developments he desired did not encroach on the access clearly marked in his agreement of sale.

I also find the third ground of appeal redundant, because I again found no decision of that sort. After evaluating the evidence, the Magistrate granted the respondent vacant possession of the access road which was to cover specific boundaries; he then awarded a permanent injunction to prevent the appellant or his agents and servants or those claiming under him from any further blockage or construction on that access only.

One could argue that by using the word 'vacant possession' the trial Magistrate was in fact granting the respondent ownership to the access road. However, in my view, that finding cannot be read in isolation of the facts of the case which were that the respondent could only seek usage of the access because when he purchased his interest from the late Namirembe in 1990, it was agreed that the access into his plot traversed her verandah. That agreement did not specifically provide that Namirembe sold the plot inclusive of the access but that the right to use that access uninterrupted and unimpeded. This is supported by the evidence of the other witnesses who testified that that access had always existed and was used by many people. It would also explain the express provision in the latter agreement of purchase (*ExD1*) in which the successors in title of the late Hussein Kyeyune who sold to the appellant a plot, but with a road running through it. Therefore, the access was part and parcel of the land that the appellant bought and although he owned it, he has to recognize that part of it comprised a road in which the respondent had an interest. As such, the respondent could not carry out any activity that would interrupt or impede the respondent's peaceful and full usage of the access.

The above notwithstanding, that would not entitle the respondent to vacant possession but instead, uninterrupted and perpetual use of the access. Therefore I move to set aside the first award of the trial Magistrate in his judgment and in its place, order that the plaintiff (now respondent) is entitled to peaceful, uninterrupted and perpetual access and use of the access road found in the area between the permanent wall of Kalagala and the extended area beyond the old house verandah. In that regard, ground one and three of the appeal only succeeds in part.

The appellant argued in the second and fourth ground that the Magistrate disregarded the actual measurements of the *appellant's* plot and that he also disregarded the fact that the *appellant's* developments were not outside the area he bought. With due respect, I have not seen any such findings in the judgment. At page 7 and 8 of his judgment the magistrate stated that;

“The court also was able to see the old house sold to the defendant (now appellant) within the area as sketched in DEXI. The court observed that the new structure of the defendant stretched beyond the original area The defendant did not deny extending the wall beyond the original house”

My understanding of that quote is that the Magistrate placed the developments of the appellant within the boundaries indicated in the sketch on D Ex.1. Even then, those boundaries clearly indicated the inclusion of an access road and therefore the appellant could not make any developments or extensions that encroached on it.

In summary therefore, save for the reversal I have made with regard to part of the judgment and order of the trial Magistrate, I find no merit in the appeal and it is accordingly dismissed. Since the trial magistrate, ordered each party to bear their costs of the suit, that order is maintained. The appellant shall meet $\frac{3}{4}$ (three quarters) of the costs of this appeal.

I so order.

EVA K. LUSWATA
JUDGE
22nd August 2014