THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

HCT – 01 – CV – CS – LD – 0050 OF 2013

(Arising from FPT – 05 – CV – CS – 005 of 2011 of Chief Magistrate's Court of Fort Portal at Kahunge)

MUGISHA STEPHEN .....APPELLANT

VERSUS

KARUGABA YOSTASI.....RESPONDENT

BEFORE: HIS LORDSHIP HON. JUSTICE OYUKO. ANTHONY OJOK

Judgment

Introduction

This is an appeal against the judgment and orders of His Worship Kategaya John Senior Magistrate Grade one, Kamwenge, delivered on 30th November 2013.

Background

The Appellant instituted a Civil Suit against the Respondent for an easement and costs of the suit. That on 6th June 2010 the Appellant bought a piece of land from One Jackson Nsabiyera and at the time of purchase there was a Public path leading to his home and land. In April 2011 the Respondent being his neighbour then fenced and blocked the path leading to the Appellant's land where he has coffee, bananas and other crops. That due to this blockage the Appellant has no access to his gardens and yet a path had existed before. Where of the Appellant prayed that Court orders that the barbed wire be removed and the Respondent pays costs of the suit.

The Respondent on the other hand in his defence denied all the contents of the plaint and averred that the suit path belongs to him having purchased it on 12/11/2009. That before the suit was instituted the Appellant had created a dispute with the Respondent where he told him to fence off his land and the Respondent obliged. That there was never a public path but rather a private path and if the Appellant wants to use it then he should do so according to the provisions of the law. (**See: Record of Proceedings**)

The issues for determination in the lower Court were;

1. Whether the path is a real easement and if so whether the Plaintiff can use the Defendant's land as of right without the Defendant's consent/authority?

2. Whether the Plaintiff can be granted the relief he seeks?

The trial Magistrate after hearing the case and visiting the locus-in-quo found that the Appellant had no cause of action and dismissed the case with costs and ordered the Appellant to follow the proper legal procedure as per the Access to Roads Act. Hence, this Appeal.

The Appellant being dissatisfied with the decision of the trial Magistrate lodged this appeal whose grounds are as follows;

1. That the learned trial Magistrate failed to properly evaluate the evidence on record thereby coming to a wrong decision.
2. That the trial Magistrate erred in law and in fact when he relied heavily on the Respondent's witnesses disregarding the Appellant's testimony thus causing miscarriage of justice.
3. That the learned trial Magistrate wrongly concluded that there was an agreement to block the Appellant to access his land.
4. That the learned trial Magistrate wrongly concluded that the Respondent purchased the access path whereas not.

M/S Mujuruzi, Alinaitwe & Byamukama [MAB] Advocates, appeared for the Appellant and M/S Byamugisha, Lubega, Ochieng & Co. Advocates represented the Respondent.

The grounds of appeal are discussed in the following order; Grounds 1 and 2 together, followed by Grounds 3 and 4 together and Ground 5 was abandoned. By both agreement both parties filed written submissions.

Grounds 1 and 2:

1. That the learned trial Magistrate failed to properly evaluate the evidence on record thereby coming to a wrong decision.

2. That the trial Magistrate erred in law and in fact when he relied heavily on the Respondent's witnesses disregarding the Appellant's testimony thus causing miscarriage of justice.

In the case of **Banco Arabe Espanol versus Bank of Uganda, SCCA No.8 of 1998**, Order JSC held that;

"The first Appellate Court has a duty to re-appraise or re-evaluate evidence by affidavit as well as to evidence by oral testimony, with the exception of the manner and demeanour of witnesses, where it must be guided by the impression made on the trial judge."

In the instant case the Appellant told Court that the Respondent had blocked the access road leading him to his land and thus sought Court intervention.

Counsel for the Appellant submitted that the trial Magistrate only relied on the Respondent's evidence in reaching his decision that the Respondent had bought the path and was ordered to fence it off, to which he obliged. Thus, the path was the personal property of the Respondent.

That the path as blocked by the Respondent was intended to punish the Appellant because the Respondent had paid him compensation worth UGX 1,000,000/= for the destruction of his crops.

Further, that PW2 Nyirahabineza Peace wife to Jackson who sold to both parties told Court that the Respondent bought land and not a path. That, the said path, was used by the seller, and later by the Appellant before being blocked by the Respondent. That, the sale agreement, was also irregularly admitted without anyone identifying it in Court. That the above evidence was ignored by the trial Magistrate and instead he only relied on the evidence of the Respondent.

Counsel for the Respondent on the other hand submitted that there is undisputed evidence proving that the Respondent purchased the suit path from the previous owner Jackson Nsabiyera at UGX 800,000/= as per the sale agreement dated 12th/11/2009. That the sale agreement clearly stipulated that it was the path that had been sold and this was corroborated by the evidence of PW2 Peace Nyirahabineza. Thus, the path was private property.

Further, that the Appellant in his testimony told Court that the path would only benefit him and the Respondent, that in light of that, the Appellant cannot then say that the path was a public path otherwise it would have benefited more people than just the two parties. Hence, the suit path was private property that the Respondent only used with the Appellant out of good neighbourliness. That the suit path therefore, should be protected as private property, as per the provisions of **Article 26** of the Constitution. Finally, that the continued use of the path by the Appellant is only dependent upon approval and consent of the Respondent or Court order in accordance with the law.

The statement that the Respondent blocked access to punish the Appellant suggests that the Respondent was out to revenge for being fined UGX 1,000,000/= for destruction of crops. However, it cannot be proven that the fencing was indeed revenge since, according to the record of proceedings; the Respondent was compelled by the Appellant and Police to do so.

The mere fact that the trial Magistrate visited the Locus-in-quo and entertained witnesses and interviewed neighbours satisfies the Appellate Court that the issue whether the suit path is a public facility was thoroughly examined.

However, visiting locus is not mandatory and depends on the circumstances of each case. In the case of **Yeseri Waibi versus Edisa Lusi Byandala [1982] HCB 28,** it was held that;

The practice of visiting the Locus-in-quo is to check on the evidence given by witnesses and not to fill the gap for them or Court may run the risk of making itself a witness in the case. There are established procedures and principles for guidance when conducting a visit to the Locus-in-quo. Practice Direction No. 1/2007 states that during hearing of land disputes, the Court should take interest in visiting the locus. While there, the Court is to:

1. *Ensure that all the parties, their witnesses and advocates, if any are present.*
2. *Allow the parties and their witnesses to adduce evidence at the locus-in-quo.*
3. *Allow cross examination by either party or his/her Counsel.*

4. *Record all the proceedings at the locus-in-quo.*
5. *Record any observation, view, opinion or conclusion of the Court, including drawing a sketch map, if necessary.*

In the case of **Erukana Jamagara versus Obbo Ogolla [1976] HCB 32**, where Court relied on **Fernandes versus Noronha [1969] E.A 506**, it was held that;

"The proper procedure when visiting the Locus-in-quo is for the Court to make a note of what took place during that visit in its records and this note should be either agreed to by the advocates or at least read out to them."

The trial Magistrate found that the suit path was private property and belonged to the Respondent. There is need to note however that when the Appellant purchased his property there was a path that had been in usage prior the sale by Jackson(vendor) though not known for how long. The Magistrate while at locus ought to have found out for how long the suit path had been used, was there an alternative route available to the Appellant to access his land. It is thus, not known if the Appellant could have access to his property through another route or whether the suit path was the only access road to his land.

Thus, the trial Magistrate did not properly evaluate the evidence on record otherwise he would have realised that by the time the Appellant purchased his property the vendor had sold to him land that had an access road only for it to later be blocked as a preventive measure by the Respondent. That, the Appellant, was not given an alternative route to access his property which is unjust and unfair. That, the act of the Respondent buying the suit was out of malice and not genuine reasons.

Therefore, Grounds 1 and 2 succeed.

Ground 3 and 4:

3. That the learned trial Magistrate wrongly concluded that there was an agreement to block the Appellant to access his land.

4. That the learned trial Magistrate wrongly concluded that the Respondent purchased the access path whereas not.

An easement means an interest in land owned by another person in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross it for access to a public road). (**See**: **Black's Law Dictionary 8th Edition Pg. 548**)

Section 2 of the Access to Roads Act provides for an application for leave to construct a road of access and states;

"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 or she may apply to the land tribunal for leave to construct a road of access over any lands lying between his or her land and the public highway."

Under **Article 43** of the Constitution of the Republic of Uganda, in the enjoyment of the rights and freedoms described in the constitution no person shall prejudice the fundamental or other human rights and freedoms of others or public interest while enjoying their rights.

According to the Appellant he alleges that he has a right to access his property. That the suit path was the only access to his land, and hence is entitled to a right of way on the said land. The right of way is an inherent right against the property of another.

Counsel for the Respondent on the other hand submitted that the Appellant proceeded wrongly by ordinary plaint yet the Access to Roads Act has a set format under which one is expected to apply for leave to construct/access a road. In the case of **Zziwa Ssalongo & Another versus Kafumbe Anthony Luyirika, Civil Appeal No. 33 of 2012**, Percy Night Tuhaise J. Upheld the decision of the trial Magistrate and stated that;

"This was a proper case for her to exercise her discretion and granted the Applicant/Respondent leave to construct an access road to link the Applicant's/Respondent's kibanja to the old Gayaza Road."

This is however, distinguishable from the instant case in that there already existed a private path that was blocked.

Counsel for the Appellant noted that there is no sale agreement indicating that the Respondent was to fence his land according to the Records. Thus, the trial Magistrate making such a finding was erroneous.

Counsel for the Respondent however, submitted that there was an agreement that required the Respondent to block the said path and this was to prevent his animals from straying onto the Appellant's land and destroy his crops. That the Appellant admitted the same and that the Respondent obliged and put up a fence in that regard. That the trial Magistrate was right to find that the Respondent was the owner of the path and thus was fencing off what was his.

It is not true that there is no sale agreement indicating the Respondent was to fence off his land. This is contained in the sale agreement with Jackson Nsabiyera dated 12/11/2009 and witnessed by Ms. Peace Nyirahabineza among others.

PW2 peace's testimony that her husband, Jackson Nsabiyera, only sold to the Respondent the land and not the path is not supported by the agreement, to which she was witness, instructing him to fence off the PATH for live animals. This was to be done before he could bring them (the animals) to his property. It must be noted that the agreement mentioned above was dated 12/11/2009 which is several months before the Appellant bought the neighbouring land as per agreement dated 6/6/2010. However, this creates doubt as to which agreement is genuine and which one is not because it is an agreed fact that the Respondent's animals had strayed on the Appellant's property and it as a result of that that the suit path was blocked. Therefore, it is very clear that the action of the Respondent is fishy, why would he have an agreement dated at an earlier date than when the Appellant purchased his property yet the Respondent purchased the suit path later due to a misunderstanding between the two parties.

Section 100 of the Magistrates Courts Act provides that;

"Any magistrate's court may, at any stage of any trial or other proceeding under this Act, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if that person's evidence appears to it essential to the just decision of the case; but the prosecutor or the advocate forthe prosecution or the defendant or his or her advocate shall have the right to cross-examine any such person, and the court shall adjourn the case for such time, if any, as it thinks necessary to enable that cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness."

It is also not known why the trial Magistrate did not summon Jackson (vendor) to be produced as a material witness in the instant case.

It is true that the agreement between the vendor and the Respondent mentions that he (the Respondent) must fence off the path for his animals before he could allow them on this newly purchased land. However, he has the right to choose where the animals can access any part of his property, including the suit path, as long as he has fenced it off in order to prevent them from straying into neighbouring properties and for their security. However, much as the Respondent has a right to deal with his private property as he wills, this should not be to the detriment of his neighbours and in the instant case the Appellant who was using the suit path to access his property.

Section 4(2) of the Access to Roads Act empowers the tribunal to make an order with such modifications to the course of direction of the road of access as shown on the sketch map or plan as it deems necessary granting the applicant leave to enter upon the adjoining land and construct a road of access. This however is subject to such conditions as the land tribunal may seem fit to impose, and to the payment of such compensation in respect of the use of the lands, the destruction of crops or trees and such other property as the land tribunal may determine.

The objective of the Access to Roads Act, as is stated in the long title, is to provide for procedure by which a private land owner who has no reasonable means of access to a public highway may apply for leave to construct a road of access to a public highway and for other purposes connected with that.

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

"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."

Access is defined in **Black's Law Dictionary, 6th Edition Page 12**, in real property law, as denoting the right vested in the owner of land which adjoins a road or other highway to go and return from his own land to highway without obstruction that "access" to property does

not necessarily carry with it possession. An easement of access is that right which a landowner has of ingress and egress from his premises, in addition to the public easement in the street. The order to construct an access road on another person's land is normally granted where there is no other way by which the Applicant/grantee can access the public highway except through the land of the Respondent/grantor who is another landowner.

In the instant case it is not on record whether there is an alternative path whatsoever to access the Appellant's land bearing in mind that the Appellate Court has not visited the Locus-in-quo. Equally, there is no record from the trial Court to show that an alternative was explored.

Grounds 3 and 4 partially succeed.

All in all the appeal is allowed in part namely; Grounds 1 and 2 succeed, but Grounds 3 and 4 partly succeed. The lower Court's orders are set aside. It is also ordered that the Appellant compensates the Respondent in order to be able to create an access road to his property and this may be assessed by a Certified Professional Valuer and the Report be submitted to Court to determine the compensation and finally dispose of the appeal. Each party bears its own costs as to this appeal.

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OYUKO. ANTHONY OJOK

JUDGE

22/06/16