# THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA HCT-00-LD-CS-0073-2019

MUNYAGWA EDWARD & 6 ORTHERS:::::: PLAINTIFFS

VERSUS

**HENRY LUKONGE MATOVU** 

BIRUNGI & 2 OTHERS......DEFENDANTS

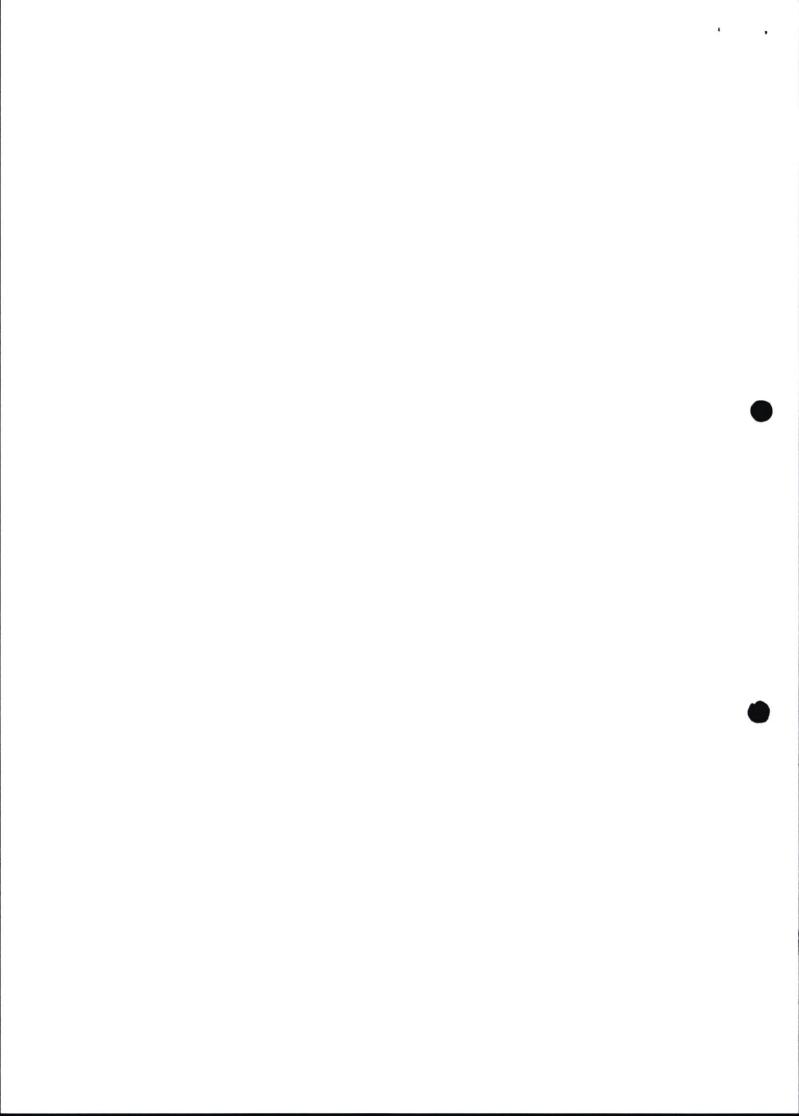
BEFORE HON. JUSTICE TADEO ASIIMWE

# **JUDGMENT**

## **BACKGROUND**

From the Pleadings, the plaintiffs filed a suit against the defendants seeking to enforce an easement of right of way on an access road through plot 3532 belonging to the defendants, declaratory orders, a permanent injunction, general& punitive damages, interest and costs.

The plaintiffs case is that they had enjoyed access of the said road commonly known as lake view drive for over 40years which was unreasonably and unlawfully blocked by the defendants.



On the other hand the defendants denied the plaintiffs case and argued they are children of late Josephine lukonge who is a registered proprietor of plot 3532 and as such beneficial owners of the said land for which there is no gazetted road. Further that the plaintiffs have access to their respective homes through pepsi road in kansanga but forcefully want to create a road and grant themselves a shorter route which has never existed.

## **SCHEDULING**

At scheduling three issues for determination were agreed upon by the parties as follows:

- 1. Whether the plaint in as far as 2<sup>nd</sup> -7<sup>th</sup> plaintiff discloses a cause of action against the defendant.
- 2. Whether the plaintiffs have a right of easement over the suit land.
- 3. What remedies are available to the parties?

At the hearing, the plaintiffs was represented by Counsel RONALD OINE while the defendants were represented by Counsel Isaac Bakaayana. Both counsel filed written submissions which I shall consider in this judgement.

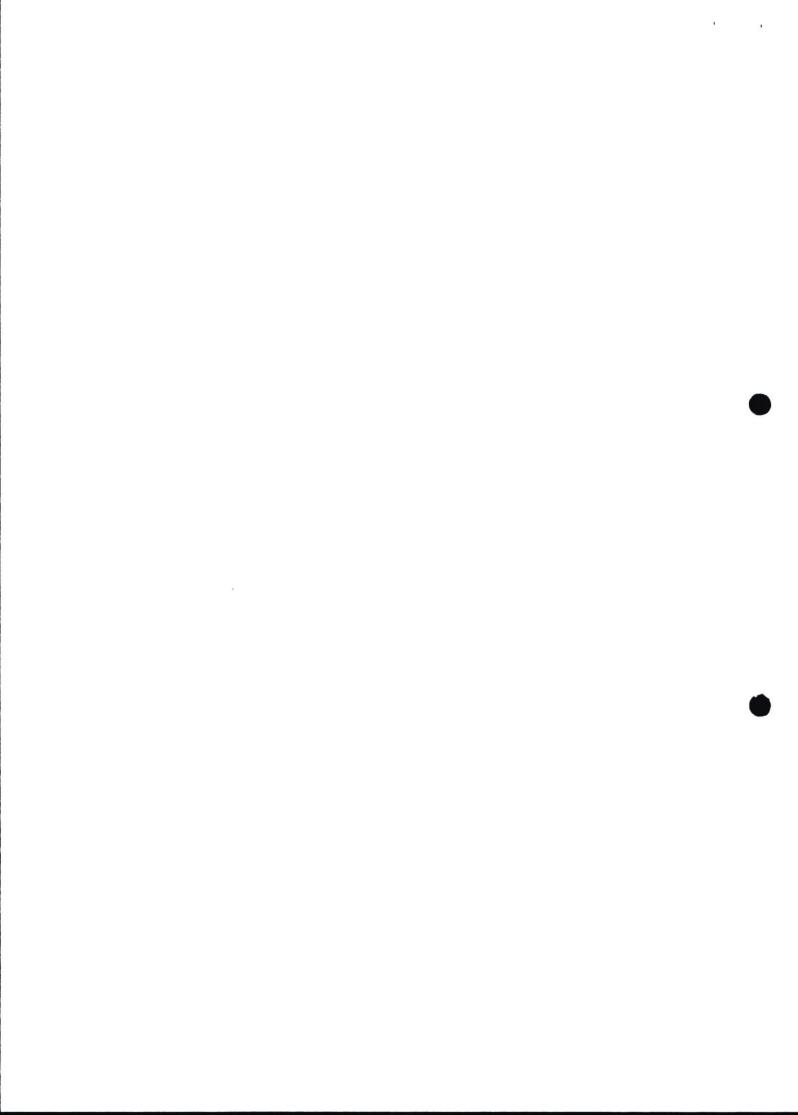


#### RESSOLUTION

Before the commencement of the trial, the 1<sup>st</sup> issue was resolved through a ruling delivered on 5<sup>th</sup> May leaving court with only two issues to determine.

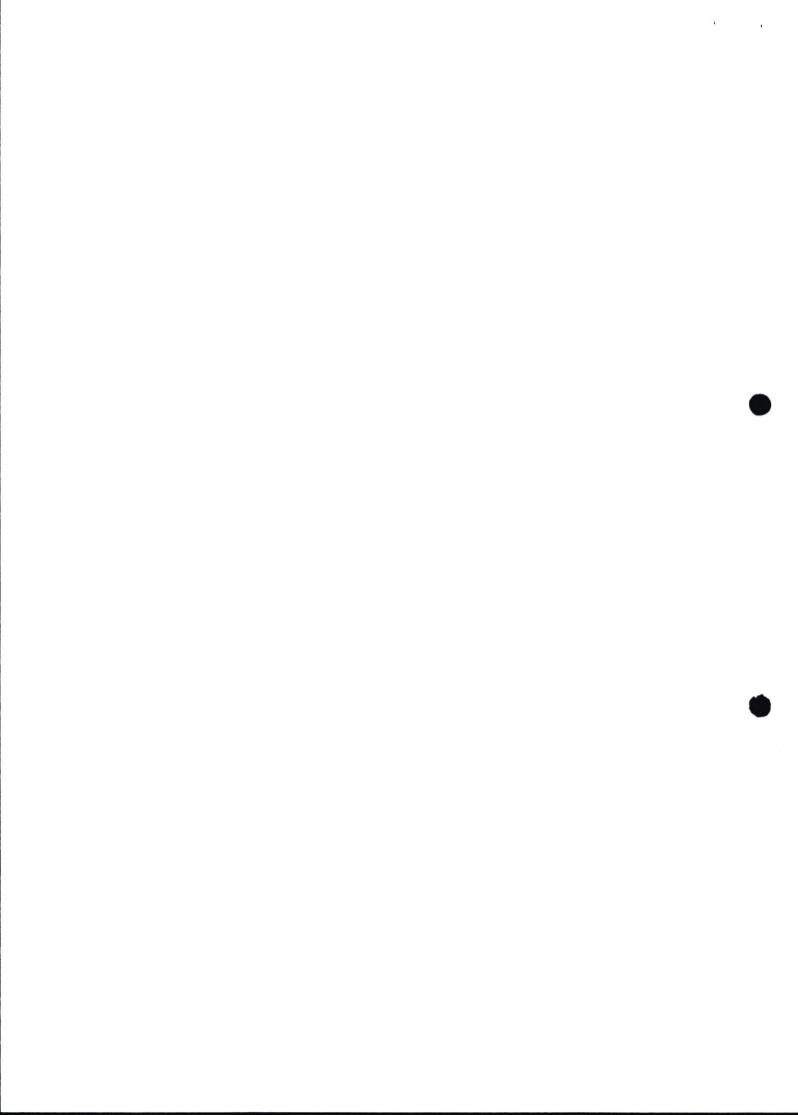
**1SSUE 2** . Whether the plaintiffs have a right of easement over the suit land.

On this issue the plaintiffs' counsel submitted that the plaintiffs are entitled to an easement of passage relying on decided cases to explain the meaning of an easement and the necessary requirement for an easement to exist. He further submitted relying on the evidence of pw1, pw3& pw4 arguing that the defendants have closed a shorter route through their land there by making the plaintiffs take a longer route to reach their homes yet there has been an uninterrupted usage of an access route through the suit property with the defendants consent and their late mother's acquiescence there by creating an easement by prescription. As to support his position, we cited the case of Stewart Gawaya VS KCCA & ANOR CS NO 214 of 20 21. That the plaintiffs have accessed their homes and other essential services through a longer route which is not lawful. Counsel further relied on exhibit PE5 which contains evidence of a locus visit by the registrar that confirmed a blocked road with concrete poles, chain link, wooden eucalyptus poles, barbed wire and marram arguing that there existed an acdess road



through the defendant's property and prayed that court finds that the plaintiffs are entitled to an easement of access through the bottom edge of the defendant's property.

On the other hand counsel for the defendants submitted that the plaintiffs have no right of easement on the suit land since there is no gazzeted road on the said land and that the plaintiffs are purely making an attempt to trespass on the defendants land for their private convenience as evidenced by evidence of DW2 in cross examination. That the purported easement of right of way on an access road over the defendant's property is wrong in law and if allowed is a direct affront to the defendant's right of property as enshrined in the constitution. Their action is an attempt to establish a right of way over the defendants land when they actually have access to their respective homes in an alternative route. The defendants counsel further argued that he agrees with the plaintiffs submissions on the definition of an easement but argues that in this case there is no dominant tenement and servient tenement since the plaintiff do not own any land near the Suitland. That the defendant's plot 3532 does not confer a practical benefit on any of the plots belonging to the plaintiff because as per the plaint they have roads in front of them. That the plaintiffs cannot enjoy the right of access without due compensation under article 26 of the constitution which the plaintiffs seek to dodge.



#### BURDEN OF PROOF.

Dealing with the burden of proof, the law is clearly stated in section 100 of the Evidence Act which reads: -

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof is on that person."

Section 102 of that Act clarifies further: -

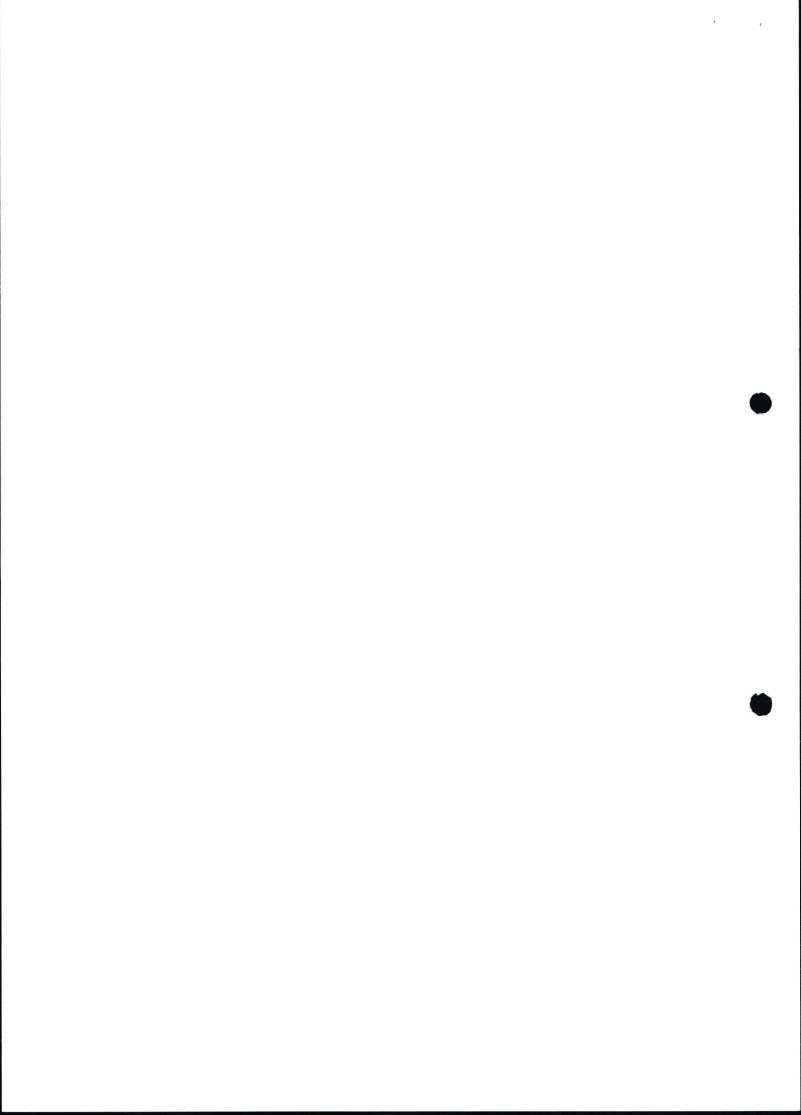
"The burden of proof as to any particular fact lies on that person who wishes court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

Therefore the burden of proof in this case is on the plaintiffs to prove their case on the balance of probabilities.

The plaintiffs called 4 witnesses and closed their case while the defendants called 2 witnesses.

PW1 testified that plaintiffs un justifiably closed an access road which had existed over time and inconvenienced them as he has to use a longer route. In cross examination he confirmed that the access road passed through the plaintiffs' father's land and that they did not pay any

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compensation for it. Further that his claim stems from the fact that the alleged access road existed so long and was rather convenient for him to access all public facilities compared to the alternative route which is quite longer than the access road which was closed by the plaintiffs after the death of their father. His evidence was corroborated by PW2, PW3&4 who confirmed that no compensations were made for the said access road. They added that the alternative road is quite longer than the access road being claimed in this suit.

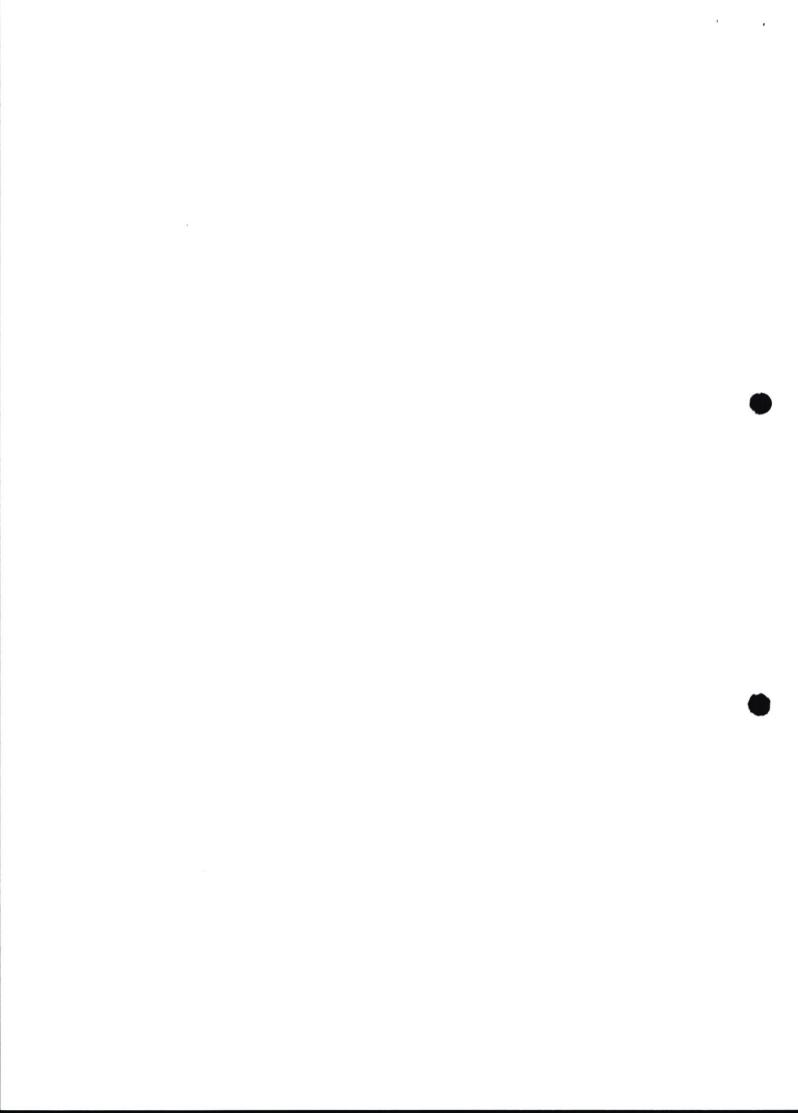
On the other hand, DW1, testified that the alleged access route was none existent legally and that the alleged access road passed through his late father's land with no justification.

In cross examination he confirmed that the Suitland belonged to his late father who protested trespassers to his land all the time. That all the plaintiffs have access routes to their respective homes. His evidence was corroborated by DW2.

From the evidence on record, the plaintiffs' claim is an easement based on long usage but no evidence was led to show how it was acquired. Upon cross examination, the 1<sup>st</sup> plaintiff clearly stated that he is interested in a free access road since some people also pass through his land as well.

A right of way is recognized by section 8 of the Roads Access Act Cap

16 of 2019 which is to the effect to that;-



# 8. Right of way.

When a road of access has been constructed—

- (a) The applicant or his or her servants;
- (b) Any other person lawfully going to or from the applicant's land;

or

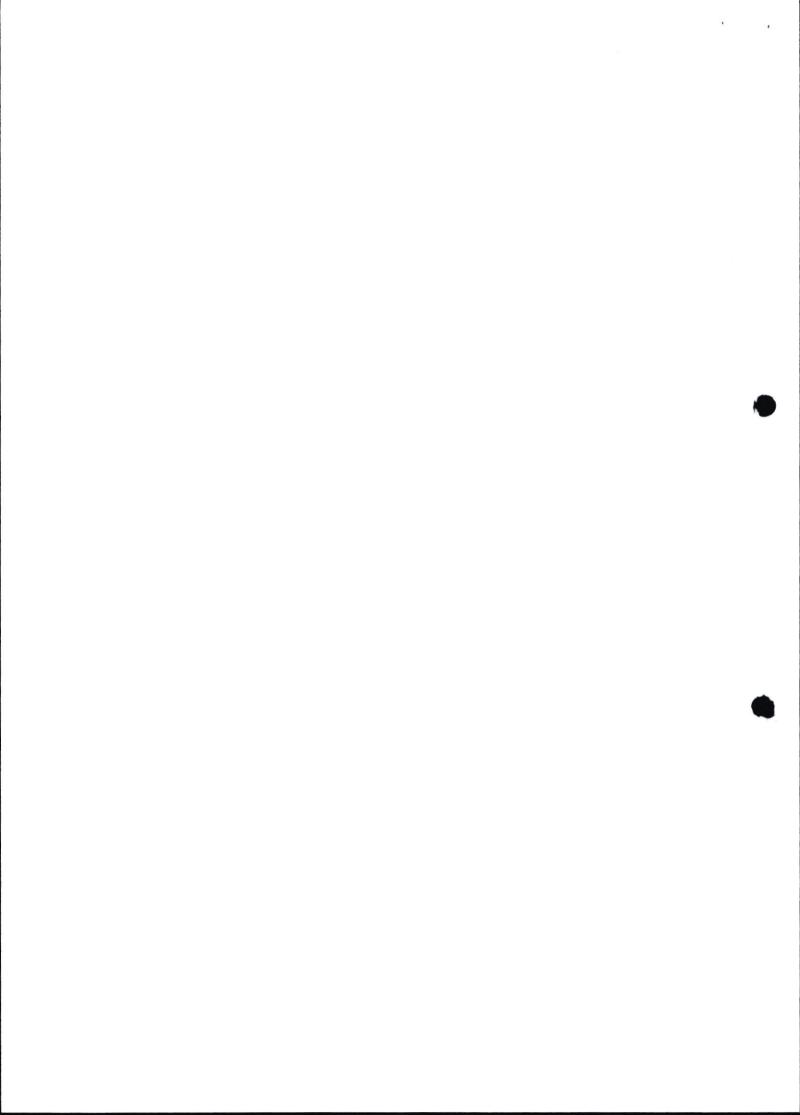
(c) His or her successors in title, shall have leave, at all times, to use the road of access.

However, the above right accrues by following due process which is provided by law. Court in the case of SENGABI VS NAKIYINGI CA NO 59 OF 2017 was very clear on a similar issue and stated that creation of access roads is a matter of law or negotiations of the parties.

Clearly an access road cannot be imputed by conduct or long usage alone. The access to roads act under section 2 lays down the procedure of acquiring an access and I will quote it verbatim.

# 2. 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 or she may apply to the land tribungl for leave to

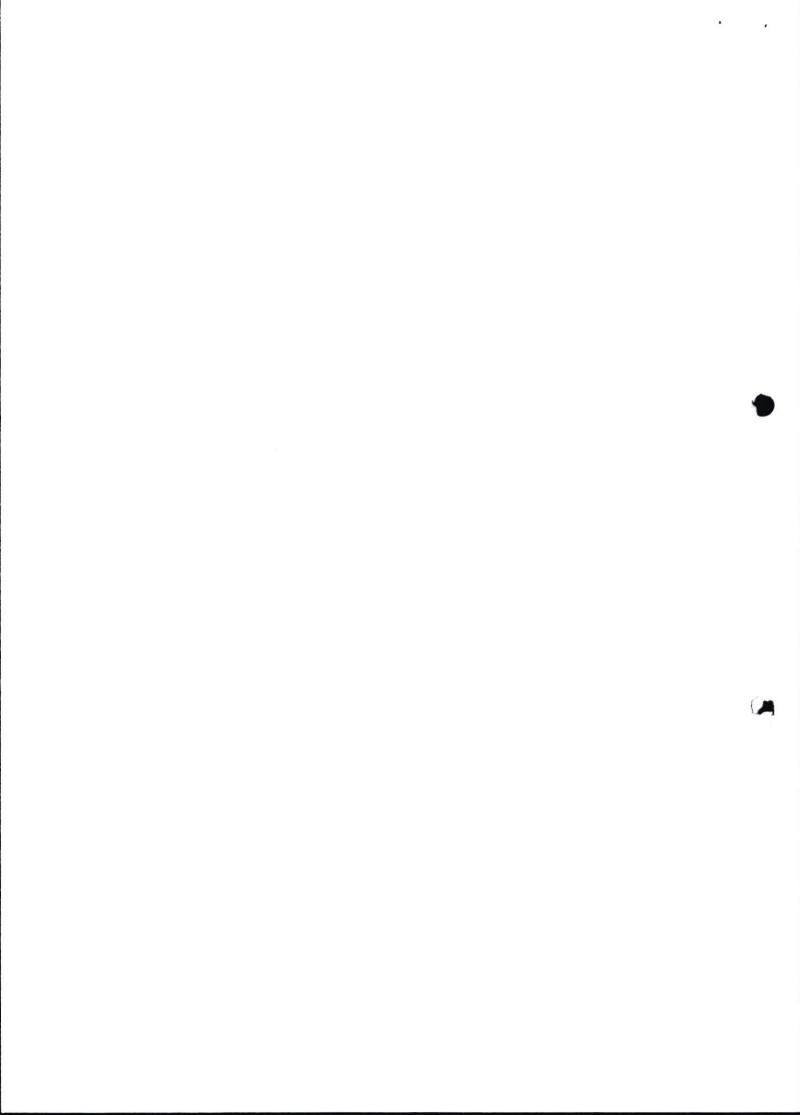


construct a road of access over any lands lying between his or her land and the public highway.

- (2) An application for leave to construct a road of access shall—
- (a) Be in the form set out in the Schedule to this Act; and
- (b) Be accompanied by a sketch or plan showing approximately the course and direction of the proposed road of access and the present means of access, if any, to the public highway.
- (3) Where the applicant is unable to make the sketch or plan referred to in subsection (2) without entering upon the land over which he or she

desires to construct the road of access, he or she may apply to the land tribunal for leave to enter upon that land for the purpose of making the sketch or plan; and the land tribunal, after hearing objections, if any, may make an order entitling the applicant to enter upon the land.

- 3. Service of notice on owner of land affected.
- (1) On receiving an application for leave to construct a road of access, the land tribunal shall cause a notice to be served upon the owner of any lands over which the proposed road of access is to be constructed calling upon him or her to show cause, within one month, why leave to construct the proposed road of access should not be granted.



From the above law it is clear how one can acquire an access road through some one's land.

In this case, there is no evidence on record to that such an access road existed on tittle of the defendants' father or that the plaintiffs paid or had negotiations over the same alleged access road. This was confirmed by all plaintiffs in there evidence. It is illogical to assume that one can acquire an interest of whatever kind over any one's land and worse still a registered owner without a legal basis just for personal interests. That would be outright impunity in my view.

infarct to state it clearly even if the plaintiffs had no alternative route, it's not automatic that this would be entitled to remedies in this court without conforming to the procedure set out in section 2 of the access to roads act above for the tribunal to rule out. The plaintiffs cannot get a free access road. If still interested they are free to negotiate with the land owners. The blockage by the defendants as found out by locus visit evidence can be said to be illegal as they were protecting their property. I therefore find that no access road existed legally. This issue is answered in the negative.

# **ISSUE 3**

What are the remedies available to the parties?

The plaintiffs sought for the following remedies.

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- 1. Declaration that an access road be opened.
- 2. Permanent injunction.
- 3. General damages
- 4. Punitive damages.

The principles governing the above remedies notwithstanding, I have already found that no access road existed legally. I therefore find that the plaintiffs are not entitled to the remedies sought.

#### 5. Costs

Section 27 of the civil procedure Act provides costs are discretionally and normally follow the events. Although the defendants have been successful in this case, the plaintiffs genuinely believed in having an access road. They filed this suit on a belief which was genuine although contrary to the law. This court will not condemn them in costs since they were trying to enforce public rights.

In the result, this suit is dismissed without costs.

TADEO ASHMWE.

**JUDGE** 

31/10/2022.

