THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL NO. 0082 OF 2022

(ARISING FROM CIVIL SUIT NO. 20 OF 2020 NAKAWA)

NSUBUGA BLASIO ..... APPELLANT

VERSUS

KAMUGISHA VINCENT ..... RESPONDENT

JUDGMENT

BEFORE. HON. LADY JUSTICE ELIZABETH JANE ALIVIDZA

Representation

The Appellant is represented by M/s Tumusiime, Irumba & Co. Advocates and the Respondent is represented by M/S Tummwesigye Louis & Co Advocates.

Introduction

This Appeal arises from the judgment and orders of Her Worship Akullo Elizabeth Ogwal of Chief Magistrate's Court of Nakawa delivered on the 27th March 2022.

The Appellant being dissatisfied with the decision of Her Worship Akullo Elizabeth Ogwal raised the following grounds;

1. The learned trial magistrate erred in law and fact when she held that the adjudged access road measuring 14 ft. does not form part of the defendant's land comprised in Block 216 plot 3105 situated in Kulambiro-Kisaasi in Kampala.

2. The learned trial magistrate erred in law and fact when she held that that defendant had illegally included in his certificate of title the access road.

3. The learned trial magistrate erred in law and fact when she ordered that the adjudged access road measuring 14 ft be separated from the defendant's title in respect of land comprised in Block 216 Plot 3105.

Background.

The Respondent/Plaintiff sued the Appellant/Defendant in the lower Court vide Civil Suit No. 20 of 2020 for declarations that the suit access road measuring approximately 14 feet doesn't form part of the Appellant's land, a permanent injunction, general damages and costs.

The Respondent asserts that he bought the suit access road from a one Hajjati Farida Kibira Semakula on the 5/04/ 1999 who was then the owner of Block 216 plot 900 before the Appellant. He immediately graded it and began using it before tarmacking it. In March 2001, when the Appellant bought part of Block 216 plot 900 from the Hajjat Kibira, it impliedly included the suit access road. That during transfer, the Appellant transferred the whole portion including the access road onto his title.

The lower Court case arose when the Respondent tried to re-tarmac the road and was stopped by the Appellant who demanded payment under claim that the suit access road belonged to him since it was on the Appellant's certificate of title. Failure to reach an understanding made the Respondent file a suit in the lower Court.

The lower Court visited locus visit on 2/02/ 2022. On Court record, it was noted as follows;

- That there existed the disputed access road measuring 14ft and both the Appellant and the Respondent bought their pieces of land from the same seller a one Hajjat Kibira.
- That the access road runs from the main road towards the Respondent's house and touches the wall fence of the Appellant.
- That no rubbish was witnessed on the road.

Court also noted that the sale agreement of the Appellant does not indicate the 36 decimals/14 feet from the seller but instead the 1999 sales agreement shows a sale of the access road before the Appellant took possession in 2001.

The evidence of the Hajat Kibira was taken, she testified as PW1 and stated that she sold the access road to the Respondent. The sketch map and attendance were taken. Court lastly observed that there is a pavement that had been constructed for a trench on the Appellant's side on part of land about 1 feet and 10 inch where the access road ends from the Respondent's land. The Appellant's wall was pouring dirty water on the access road where the Court sat.

In her judgment, the learned Chief Magistrate mentioned that while at locus, Court noted that the access road is purely a private road leading or giving access from the main Kulambiro ring to the home of the Respondent, whose gate is almost to opposite that of the Appellant and it closes up to another last plot facing the Jinja Road Northern by-pass highway. The access road does not in any way join to the main public road as the Defendant indicates in part of his written submissions.

The learned Trial Magistrate after hearing both parties found in favor of the Respondent and declared that the adjudged access road measuring 14 feet does not form part of the Appellant's land comprised in Block 216 plot 3105 situated in Kulambiro- Kisaasi in Kampala.

She ordered for a permanent injunction to issue restraining the Appellant, his agents, servants, assignees, successors in title and tenants from littering and/or blocking the adjudged access road, awarded general damages and costs to the respondent as well.

The Appellant then filed this Appeal in this Court.

The Role of the Appellant Court

This being a first Appeal, this Court is under an obligation to re-hear the case by subjecting the evidence presented to the trial Court to a fresh and exhaustive scrutiny and re-appraisal before coming to its own conclusion. This duty is well explained in *Father* Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236 as thus;

"It is a well-settled principle that on a first appeal, the parties are entitled to obtain from the appeal court its own decision on issues of fact as well as of law. Although in a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions."

The parties are entitled to obtain from the Appeal Court its own decision on issues of fact as well as of law [See *Pandya v. R [1957] EA. 336*. It is incumbent on this Court therefore to weigh the conflicting evidence and draw its own inferences and conclusions in order to come to its own decision on issues of fact as well as of law and remembering to make due allowance for the fact that it has neither seen nor heard the witnesses.

The Appellate Court is confined to the evidence on record. Accordingly, the view of the trial court as to where credibility lies is entitled to great weight. However, the Appellate Court may interfere with a finding of fact if the trial Court is shown to have overlooked any material feature in the evidence of a witness or if the balance of probabilities as to the credibility of the witness is inclined against the opinion of the trial Court.

Burden and Standard of proof

The burden of proof is upon the Plaintiffs to prove their case on a balance of probabilities. *Section 101, 102 and 103 of the Evidence Act* provide that he who asserts a fact must prove it. Whoever desires any court to give the judgment as to any legal rights or liability dependent on the existence of the fact which he or she asserts must prove that fact exists.

The Court has to be satisfied that the Plaintiff has furnished evidence whose level of probity is such that a reasonable man might hold that, the more probable conclusion is that for which the Plaintiff contends, since the standards of proof is on the balance of probabilities /preponderance of evidence (see *Lancaster Vs Blackwell Colliery Co. Ltd 1982 WC Rep 345 and SebulibaVs Cooperative Bank Ltd (1982) HCB130)*

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The cardinal principle in civil cases is embedded under *Section 101(1) of the Evidence Act* that whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts are in existence. It is further a cardinal principle of law that in civil suits all evidence is proved on a balance of probabilities. *See the cases of Miller V Minister of Pensions [1947] 2 All.E.R 372* and *Katumba V Kenya Airways, Civil Appeal 9 of 2008 (SCU)*

Court is not bound necessarily to follow the trial Magistrate's findings of fact if it appears either that the lower Court clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on demeanor of a witness is inconsistent with the evidence in the case generally.

Counsel filed written submissions that I have carefully considered.

I will go on to resolve the grounds as raised by the Appellant concurrently since they revolve around the same issue.

Analytically, all the three grounds rotate around ownership/entitlement of the suit access road and resolving ownerships culminates all else.

The Appellant's Counsel submitted that the Appellant purchased his land inclusive of the said access road from the then registered proprietor Hajjat Kibira measuring approximately 0.147 hectares and was part of Block 216 though later subdivided into two plots [3104 and 3105] with the Appellant registering 3105 under his names inclusive of the said access road.

Counsel quoted PW1-Hajjat Kibira who stated in her statement that initially, the land she occupied was family land until 2001 when she gained sole proprietorship implying that she couldn't have given the respondent a better title in 1999 than what she had [the *Nemo dat quod non habet* principle]. That meant that the sale of 1999 was *void ab nitio.*

In response, the Respondent's Counsel submitted that the Respondent bought the access road from PW1 in 1999 from her land i.e Block 216 plot 900 before being subdivided into plot 3104 and 3105 as for 3105 to be purchased by the Appellant. That the Respondent then used the access road until 2002 when PW1 sold her land to the Appellant and when given the title to subdivide off his part. That the Appellant included the access road on his title. That efforts to revamp the access road by the Respondent became futile when the Appellant claimed that the road was his unless the Respondent paid for it. This disagreement caused the Respondent to file the suit in the lower Court.

Looking at the evidence, PW1 testified that she sold land to both the parties. That she sold it to him at 250,000/= measuring 14 feet and the Respondent tarmacked it. [sale agreement was exhibited]. That she then later met the Appellant in 2001and when selling him the land, they moved along with the area chairman and Appellant's lawyer to ascertain the boundaries and that the suit access road was on the eastern side of the Appellant's land. That the Appellant developed his portion leaving the Respondent's access road untouched and intact as a boundary.

I found this to be a reliable witness since she finally confirmed that the suit access road was not part of the portion of her land that she sold to the Appellant even though it wasn't subdivided from the mother title.

I am also persuaded by the sale agreement of 5th April 1999. It did clearly state that the seller was selling part of her land embedded on plot 900 measuring 14 feet from Kulambiro main road up to the Respondent's house.

In her testimony, PW1 who sold to both parties admits that in selling off her plot 900 after subdivision, she forgot to cut the access road she had sold to the Respondent.

As earlier noted, when court visited locus, it put on record that the suit access road led to specifically the Respondent's home and not any further and it had

been in existence for some time because even the tarmac was wearing out. This makes the evidence of the Respondent credible.

Counsel for the Appellant in his submission pointed this court to look at the fact that he owns a title which the seller got only in 2001 after she had sold kibanja interest in the access road to the Respondent meaning he owned the proprietorship of the access road and the respondent can't claim the same.

I find this farfetched just like the Respondent can at this point reiterate with adverse possession that since 1999 to 2020 when the lower Court suit came up he had enjoyed quiet possession on the Appellant's land so the latter cannot claim otherwise? I will not dwell much on that.

This Court cannot ignore the existence of a valid land sale agreement between PW1 and PW2 concerning the access road which the Appellant did not either dispute or challenge successfully. PW1 admitted in Court that not cutting off the Respondent's access road from her portion before selling to the Appellant was an oversight.

Counsel for the Appellant in referring to the principal of Nemo dat quod non habet submitted that it can be inferred from the evidence of PW1 that by 1999 PW1 did not have capacity to sale the land on plot 900 to the Respondent because the land constituted family land. That PW1 attained sole proprietorship of the said; land in 2001 and it was the time that she had legal capacity to pass on interest to another person which she subsequently did when she passed the land to the Appellant therefore the sale of the access road to the Respondent was void ab initio because PW1 did not pass on any legal interest to the Respondent as regards the access road.

The Respondent in his submissions submitted that PW1 Farida Semakula Kibira's name appears on the suit land's mother title PEX5 as the third last registered proprietor having been entered on the register on the 9/11/1995 therefore it cannot be said that she did not own the suit land at the time she sold to the Respondent.

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The Respondent further submitted that Faridah Semakula Kibira was the owner of the suit land having inherited it from her father together with her siblings. The Respondent in his testimony stated that PW1's other siblings who appear on the mother title as tenants in common were aware of the sale of the access road to him and have never raised any objection to the same. That PW1 had authority to sell the suit access road.

I note that the Appellant did not raise the issue as to whether the Respondent got a good title to the access road or not in the lower Court. The principle of Nemo dat quod non habet [No one gives who possess not] appears to be an afterthought. In other words, a transferor cannot give a better title to property than he or she possesses. Appellant contends that the Respondent did not attain good title to the access road from Faridah Semakula Kibira.

I am not persuaded by this argument especially since the evidence is clear that PW1 rightfully sold the access road to the Respondent.

It is my conclusion that the lower Court rightfully found the case in favor of the Respondent.

Therefore this Appeal is disallowed. All grounds of Appeal have no merit. The judgment of the lower Court is upheld.

Since the parties are neighbors and this dispute have been pending for so long, I am reluctant to award costs so as to repair the relationship between the parties. Hopefully this matter will end here.

I so order

Elizabeth Jane Alividza

Judge

24th August 2023