

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**[LAND DIVISION]**  
**CIVIL APPEAL NO.HCT-00-LD-CA-0073-2020**  
*(Appeal from the judgment of His Worship Dr. Mushabe Alex Karocho, Chief Magistrate, Civil Suit No.393 of 2011, Chief Magistrate's Court of Mengo at Mengo delivered on the 11 September 2020)*

**KAKOOZA HUSSEIN:..... APPELLANT**

***VERSUS***

- 1. LULIIBE CHARLES**
- 2. MADINA KYOLABA**
- 3. AISHA NAGADYA**
- 4. ROSE NANYONGA**
- 5. EDWARD NSEREKO SEBULIBA:..... RESPONDENTS**

**BEFORE: HON. JUSTICE BERNARD NAMANYA**

**JUDGMENT**

**Introduction:**

1. This is an appeal against the judgment of His Worship Dr. Mushabe Alex Karocho, Chief Magistrate, who delivered his judgment on the 11 September 2020 in favour of the respondents who were the defendants. The background of this appeal is that, the appellant in the lower court, sued the respondents for trespassing on an access road to his land situated at Kasubi Zone IV. Among the other orders, he sought a declaration that he is entitled to an access road running from Masiro Road to his home. The appellant's case is that he purchased a piece of land located at Kasubi Zone IV from the late Nalongo Nanyonga on the 23 September 1991, who gave him an access road to his land. It is claimed that after the death of the late Nalongo Nanyonga, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents sold part of the land inherited from the late Nalongo Nanyonga to the 1<sup>st</sup> respondent on the 18 February 2009. It is further claimed that around October 2010, the 1<sup>st</sup> respondent erected a gate across the

access road, and blocked the appellant from accessing his home through the access road, allegedly given to him by the late Nalongo Nanyonga.

2. On their part, the respondents denied that an access road exists on the land as claimed by the appellant. It is claimed that although the late Nalongo Nanyonga sold land to the appellant, it was without an access road, and that she only promised an access road to the appellant which promise was not fulfilled during her life time. It is the 1<sup>st</sup> respondent's case that by the time he purchased land from the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents, the contested access road was occupied by a tenant, Mrs. Teddy Mbiire, who was running a bar and restaurant in the area, for five years during which time, there was no access road to the appellant's home, and that the appellant was not using it as an access road.

**The decision of the lower court:**

3. The learned Trial Magistrate considered the dispute between the parties regarding an access road to the appellant's house, and held as follows:

*"It is noted that the plaintiff's access road was supposed to pass by Wamala's hedge as per his agreement but this was just a promise. There is no evidence that the same was fulfilled by Nalongo. According to PE4, PW2 wrote to the management of Kasubi Secondary School for permission to extend her occupation of the said portion. At the visit in locus, court observed that the plaintiff actually had an access road that goes through Sendi Road. On the other hand, there was no established access road because where the same is claimed actually goes through the buildings constructed by the 1<sup>st</sup> defendant. In conclusion, on a balance of probabilities, the defendants have proved that no access road existed in the said portion at the time the 1<sup>st</sup> defendant*

*purchased his plot as claimed by the plaintiff. Issue 1 is answered in the negative.”*

**Representation:**

4. At the hearing of the appeal, the appellant was represented by Mr. Kakooza Shamim of M/s JM Musisi Advocates, while the respondents were represented by Mr. Ambrose Tebyasa of M/s Ambrose Tebyasa & Co. Advocates.

**Duty of the first appellate court:**

5. This court is mindful of the duty of the first appellate court to subject the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-appraisal, before coming to its own conclusion. While doing so, the first appellate court must keep in mind that, unlike the trial court, it had no chance of seeing and hearing the witnesses, while they testified, and therefore had no benefit of assessing the demeanor of the witnesses. To this effect, the first appellate court must be guided by the impression made on the judicial officer who saw the witnesses. *See the case of Fr. Narsensio Begumisa & 2 Others vs Eric Tibebaga, Supreme Court Civil Appeal No.17 of 2002 (Coram: Oder, Tsekooko, Karokora, Mulenga & Kato JJ.S.C).*
6. This court conducted a locus in quo visit to the suit land on the 30 May 2024 in accordance with the provisions of *Practice Direction No. 1 of 2007 on the Issue of Orders Relating to Registered Land which affect or impact on the Tenants by Occupancy*. This was the second locus in quo visit to the disputed land in addition to the one conducted by the lower court on the 25 September 2019. The admission of further evidence at the appellate court level was necessary to enable the court to appreciate the dispute between the parties regarding the access road, and is in line with the principles of law that allow

an appellate court to admit new evidence from the parties as was held in the case of *Makubuya v. Muwanga (Civil Application No. 133 of 2014) [2014] UGCA 82 (per Hon. Justice Richard Buteera)*.

**The decision of this court:**

7. The sole question for decision by this court is whether an access road exists as claimed by the appellant.
  
8. This question can be resolved by examining the agreement dated 23 September 1991, by which the appellant purchased a plot of land from the late Nalongo Nanyonga. That agreement was admitted in evidence by the lower court as Exh.P1. It is claimed by the appellant that in addition to the purchase of the plot of land, on which he later built a house, the late Nalongo Nanyonga also granted him an access road. The relevant parts of Exh.P1 provide as follows:

*“I NALONGO NANYONGA of KASUBI ZONE IV have sold to MR. HUSSEIN KAKOOZA of NALUVULE a Plot curved from my Kibanja located behind my kitchen. On the lower part, it borders with Mama Kawooya’s hedge. In the west, it borders with Mrs. Mukuye’s hedge. In the East it borders with my latrine and it curves up to the Lusambya tree. I have sold it to him at Ug. Shs. 750,000/= and he has paid me Ug. Shs. 650,000/=. He will pay me the balance of Ug. Shs. 100,000/= immediately after I have removed the remains of the person buried in the Plot. I have promised to give him a road access, stretching from Masiro Road running along Widow Wamala’s hedge up to his Plot. It is confirmed that this is where it is supposed to pass. I have made this agreement for him when I am of sound mind and when I die,*



*nobody shall have the authority to remove him from the plot.”*  
*(underlining is mine for emphasis)*

9. Having analysed the sale agreement dated 23 September 1991, the learned Trial Magistrate concluded that although the late Nalongo Nanyongo made a promise of an access road to the appellant, that promise was never fulfilled, and that in fact, by the time the 1<sup>st</sup> respondent purchased other plots of land neighbouring the appellant from the 2<sup>nd</sup> to the 5<sup>th</sup> respondents in 2009, there was no access road to the appellant’s premises.

10. The appellant testified that he owns the contested access road stating that:

*“9. That as the plot I bought was at the back of her plot and could not be accessed without passing through her compound, she had to provide me with an access road.*

*10. That the access road was 13 feet wide and 118 in length and was to run from my plot to MASIRO ROAD and she built a house to indicate the access road between her first house and the new house. Under it, is a water pipe I laid connecting to water mains...*

*12. That between 1998 – 2004 my import business was very vibrant and I used to import 40 feet containers of goods and off load them into my house and the semi trailers carrying the containers accessed my house through that access road.”*

11. The appellant’s case that there is an access road on the route between the two plots of the 1<sup>st</sup> respondent was also supported by his wife, PW4 (Nalwoga Margaret), and PW5 (Mwanje Juseph).

12. According to the 1<sup>st</sup> respondent (DW5), there was no access road when he purchased the land from the children of the late Nalongo Nanyonga. He

testified that he purchased the land in 2009, and that there was no access road to the appellant's house but only a bar and restaurant operated by Mrs. Teddy Mbiire. That after he purchased the land, Mrs. Teddy Mbiire requested for a grace period of 3 months from Kasubi Secondary School to get alternative accommodation.

13. DW1 (Livingstone Senyondo) was aged 82 years at the time of testifying before the lower court. He testified that the 1<sup>st</sup> respondent initially rented his premises and later purchased the Kibanja on which he built a school. According to DW1, at the time that the 1<sup>st</sup> respondent purchased the Kibanja, there was no access road through the disputed land. He stated that the appellant has an alternative access road which does not go through the disputed land.

14. DW2 (Edward Nsereko Sebuliba) was aged 54 years at time of his testimony to the lower court. He is a son of the late Nalongo Nanyonga. He testified that the late Nalongo Nanyonga sold a plot of land to the appellant but not an access road through the disputed land. According to him, the late Nalongo Nanyonga only promised the appellant an access road but she died before fulfilling the promise. He testified that the disputed land is located in an area that used to be his mother's compound and is currently occupied by a school. According to him, the appellant was supposed to use another access road via Sendi Road. DW2 however, admits that during the time when the appellant constructed his house, he used a footpath through the late Nalongo Nanyonga's compound. He testified that:

*"...the time he used our compound to offload his building materials, vehicles were only forced to go through a footpath that we used then but it was not a recognized community footpath nor (sic) an access road."*



15. DW3 (Lunkuse Catherine) was a neighbour of the late Nalongo Nanyonga and testified that there has never been an access road on the disputed land. She claims that since her childhood days, the appellant is able to use another access road that connects to Sendi Road. She denied that the appellant has ever used the contested access road to offload building materials for his house.
16. DW4 (Mubiru Dickson) is a son in law to the late Nalongo Nanyonga. He testified that the access road that the late Nalongo Nanyonga gave to the appellant is the one on the road that connects to Sendi Road, which he claims was blocked by the appellant. According to him, the late Nalongo Nanyonga never gave the appellant an access road on the part claimed by the appellant. He testified that Widow Wamala (whose land is now occupied by the 1<sup>st</sup> respondent having bought it) and Nalongo Nanyonga (whose land was bought by the 1<sup>st</sup> respondent) shared a common boundary and that there was no access road between the two plots of land.
17. The question for me to consider and resolve, is whether the conclusion reached by the learned Trial Magistrate is correct. A plain reading of the terms of the sale agreement between the late Nalongo Nanyonga and the appellant shows that the late Nalongo Nanyonga promised an access road to the appellant, and described the path of the access road in the following words: *“I have promised to give him an access road, stretching from the Masiro Road running along Widow Wamala’s hedge up to his Plot.”*. She then added the following important words: *“It is confirmed that this is where it is supposed to pass.”* The path or route of the access road described by the late Nalongo Nanyonga is the one claimed by the appellant. It appears that the 1<sup>st</sup> respondent subsequently acquired Widow Wamala’s plot that is mentioned in the 1991 Agreement, Exh.P1 (see page 58 of the record of proceedings). With these words, can one say that the late Nalongo Nanyonga only promised an



access road to the appellant but did not fulfil the promise? Why did the late Nalongo Nanyonga use the words, “*it is confirmed*”?

18. The next question for me to consider is whether the access road actually existed on the ground prior to the coming of the 1<sup>st</sup> respondent, by conduct of the parties. That can be discerned from the oral testimonies of PW2, PW3 and PW5. It is the law that if a written contract is silent on a matter that is material to both parties, then oral evidence is admissible to provide clarity to the contract, and give meaning to the contractual relationship between the parties. See *General Industries (U) Ltd v. Non. Performing Assets Recovery Trust (Civil Appeal No. 5 of 1998) [1999] UGSC 8 (Coram: Oder, J.S.C., Karokora, J.S.C., Mulenga, J.S.C., Kanyeihamba, J.S.C., Kikonyogo, J.S.C); and Section 92(b) of the Evidence Act (Cap 6).*

19. In the case of *Okema v. Okumu Anor (Civil Appeal No 084 of 2018) 2019 UGHCCD 87 (per Justice Stephen Mubiru)* it was held that:

*“A Court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words and not to contradict or vary them. If those conditions are satisfied, then resort to extrinsic evidence is made as a matter of construction... When extrinsic evidence is admissible, courts generally receive any competent evidence that may bear on the parties' actual or probable intent. Accordingly, courts evaluate the facts and circumstances surrounding the execution and performance of the agreement in order to make a determination as to the parties' intent...In the instant case, the transaction related to a specific parcel of land but by a mistake of omission, the document does not reflect the parties' agreement as to the boundaries of the parcel of land, hence extrinsic evidence was*



*admissible by way of corrective interpretation for the determination of the location of the boundary, in respect of which the appellant's agreement was totally silent...One source of extrinsic evidence of boundaries may be by way of a visit to the locus in quo... evidence of boundaries may be established by the parties' course of conduct following the agreement or in the performance of the contract...admissible extrinsic evidence has been held to include the conduct of the parties subsequent to the conveyance..."*

20. Accordingly, the oral evidence of PW2, PW3 and PW5 is admissible to provide clarity on the positioning, route and measurements of the access road granted by the late Nalongo Nanyonga to the appellant. Why is positioning of the access road necessary? Because it is claimed by the respondents, that the appellant was given an access road on a different route from that claimed by the appellant, running from Masiro Road to Sendi Road. The locus in quo visit I conducted, established that the appellant does not have access to his house as claimed by the respondents. The alleged Sendi Road access road does not reach the appellant's house. Consideration of measurements of the access road is necessary because the 1991 agreement, despite granting an access road to the appellant, did not specify the measurements.

21. PW2 (George Emmy Kyambadde), aged 56 years at the time of testifying in the lower court, witnessed the sale agreement dated 23 September 1991. He gave evidence to support the appellant's case that an access road was granted by the late Nalongo Nanyonga at the time of the sale. He testified that the access road was used for some time to ferry imported goods to his home, and that the access road could be used by trailers, lorries and other vehicles. PW2 further testified that, the appellant constructed a house on the plot of land he

purchased from the late Nalongo Nanyonga; that he used to access his house through the disputed land; and that the access road was blocked when the children of the late Nalongo Nanyonga sold their late mother's land to the 1<sup>st</sup> respondent. The evidence of PW2 was not rebutted during cross examination.

22. PW3 (Mrs. Teddy Mbiire) was aged 45 years at the time of testifying in the lower court and is a teacher. She is a former tenant of a house belonging to Alice Karuhanga, adjacent to the disputed land. She testified that she rented space from the 2<sup>nd</sup> respondent to operate a bar and restaurant in the area. According to her, there was an access road through the route claimed by the appellant. It was mainly used by pedestrians and occasionally by the appellant using a motor vehicle. When she conceived the idea of fencing off the area to include the access road, as part of her restaurant and bar business, she was advised by her landlord, Madina Kyolaba (2<sup>nd</sup> respondent) to discuss the matter with the appellant who owned the access road. This evidence is proof that Madina Kyolaba (2<sup>nd</sup> respondent) had no control over the land through which the access road passed. This is why Madina Kyolaba advised PW3 to negotiate directly with the appellant. PW3 negotiated and agreed with the appellant to use the access road as an additional space for the bar and restaurant, and to only erect temporary gates. According to PW3, the temporary structures that she erected to operate a bar and restaurant did not block the access road and it remained open, to be used by the appellant as and when he wished. During cross examination, the evidence of PW3 was not rebutted by the respondents. For example, the respondents did not call evidence from Madina Kyolaba (2<sup>nd</sup> respondent) to challenge the narration of PW3 that Madina Kyolaba sent her to the appellant to negotiate with him for the use of access road because it is him that had control over the access road, and not the respondents.



23. I believe the evidence of PW3 (Mrs. Teddy Mbiire) because it was not rebutted by the respondents in the lower court. It is the law that if evidence is adduced, and is not rebutted by the opposite party, it is deemed to be credible and probably true. *See the cases of Nabagesera & 3 Others v. Attorney General & Anor [2014] UGSC 403; and Brown v. Ojijo (Civil Suit 228 of 2017) [2023] UGHCCD 173.* PW3 further testified (at page 32 of the record of proceedings) as follows:

*“It used to be an open space with a road in the middle, I requested Kyolaba to close off the place, but she told me that the road was an access for Kakooza to his home and she directed me to the new park where he was working. I met Kakooza at the new park and we agreed that I put temporary gates on either side and I would open for him and close when he passes and I continue with my bar business.”*

24. On the contrary, the evidence by the 2<sup>nd</sup> to the 5<sup>th</sup> respondents that there is no access road as claimed by the appellant is not credible because the evidence on court record proves that for a period of about 18 years (i.e., from 1991 to 2009) there was no dispute on the existence of an access road through the route claimed by the appellant. It is only when the 2<sup>nd</sup> to the 5<sup>th</sup> respondents sold land previously owned by their mother, the late Nalongo Nanyonga to the 1<sup>st</sup> respondent, that the dispute arose. It seems to me therefore, that the 2<sup>nd</sup> to the 5<sup>th</sup> respondents wrongfully included the access road claimed by the appellant in the sale to the 1<sup>st</sup> respondent, prompting the current dispute. To enable the ends of justice to be met, this must be corrected. The 2<sup>nd</sup> to the 5<sup>th</sup> respondents could not legally sell land occupied by the access road that was already granted by the late Nalongo Nanyonga to the appellant.



25. In my opinion, the evidence of PW3 (Mrs. Teddy Mbiire) that there was an access road on the route claimed by the appellant to his house is compelling. Her testimony is simply an account of what she saw while she lived in the area, and operated a bar and restaurant. She seems to me to be a neutral witness who simply gave an account of what she saw. The appellant's case is further strengthened by PW2 (George Emmy Kyambadde) who witnessed the sale agreement between the appellant and the late Nalongo Nanyonga, and confirmed that the late Nalongo Nanyonga indeed granted an access road to the appellant. Finally, there is the sale agreement dated 23 September 1991 in which the late Nalongo Nanyonga actually confirmed that she had granted an access road to the appellant. With due respect, I do not agree with the learned Trial Magistrate that the access road was just a promise that was not fulfilled by the late Nalongo Nanyonga. The access road was promised and confirmed by the late Nalongo Nanyonga, and the sale agreement is clear on that (see Exh.P1, sale agreement dated 23 September 1991). In my opinion, despite the lack of exact measurements of the access road, a plain reading of the sale agreement shows that the late Nalongo Nanyonga sold a piece of land to the appellant together with an access road. As I have already decided, this is a case where extrinsic evidence is admissible to determine the exact measurements of the access road. In this respect, it is noted that the deed plan attached to Exh.P7, opening boundary report dated 13 October 2017 carried out by PW5 (Mwanje Juseph) shows the measurements of the access road.

**Final order of the court:**

26. In conclusion, this appeal is allowed with the following orders and declarations:

- 1). That the Judgment of His Worship Dr. Mushabe Alex Karocho, Chief Magistrate, in Civil Suit No.393 of 2011, Chief Magistrate's Court of Mengo at Mengo delivered on the 11 September 2020 is set aside.

- 2). That the appellant is entitled to an access road running from Masiro Road in Kasubi to his home, measuring 0.014 acres, and other particulars described in Exh.P7, opening boundary report dated 13 October 2017 authored by Mwanje Juseph.
- 3). That the respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba) are trespassers on the access road.
- 4). That the respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba) shall vacate the access road and remove any illegal buildings by the 30 June 2024.
- 5). That if the respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba) fail to vacate the access road as ordered, they shall be evicted in accordance with *The Constitution (Land Evictions) (Practice) Directions, 2021*.
- 6). That a permanent injunction is issued restraining respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba), their agents, servants, workmen and all those claiming under them and/or deriving authority from them, from trespassing, encroaching, interfering and/or in any way dealing with the access road.
- 7). That the respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba) shall pay general damages of Ushs 5,000,000 (Uganda shillings five million) to the appellant.
- 8). That the respondents (Luliibe Charles, Madina Kyolaba, Aisha Nagadya, Rose Nanyonga, and Edward Nsereko Sebuliba) shall pay the costs of this appeal, and the costs of the suit in the lower court.



***IT IS SO ORDERED.***

A handwritten signature in black ink, appearing to read "Bernard Namanya", with a long horizontal flourish extending to the right.

***BERNARD NAMANYA***

***JUDGE***

***10 June 2024***

**10 June 2024**

**Attendance for delivery of the Judgment**

Kakooza Shamim	Counsel for the appellant
The appellant is in court	
The 1 <sup>st</sup> 2 <sup>nd</sup> 3 <sup>rd</sup> and 5 <sup>th</sup> respondents are in court	
Allena Kanyakire	Court Clerk

**Kakooza Shamim:**

We are ready to receive the judgment.

**Court:**

Judgment delivered in open chambers.



**BERNARD NAMANYA  
JUDGE**

**10 June 2024**

**12:35pm**