

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL APPEAL NO. 59 OF 2018
(ARISING FROM MAKINDYE CMC CIVIL SUIT NO.16 OF
2017)

SENGABI
CHRISTOPHER:.....APPL
ICANT

VERSUS

NAKIYINGI
IMELDA:.....RESPON
DENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

This is an appeal from the judgment and orders of His Worship Gakyaro Mpiirwe Allan; Magistrate Grade I of Makindye Chief Magistrates Court delivered on 4th June 2018, arising from Makindye CMC Civil Suit No.16 of 2017

1. The learned trial Magistrate erred in law when he held that the Plaintiff/Appellant had trespassed and blocked an access road serving the Defendant/Respondent plot 7099 by construction of his part of his house on the said access road, connecting from Bunamwaya Kajjansi Road to the Defendant's premises.

2. The learned trial Magistrate erred in law and fact when he declared the Defendant to have an access road via the Plaintiff's plot No. 7862.
3. The learned trial Magistrate erred in law and fact when he ordered for the demolition of the Plaintiff's house by the Defendant.
4. The learned trial Magistrate erred in law and fact when he awarded excessive general and punitive damages against the Plaintiff/Appellant.
5. The learned trial Magistrate conducted a *locus* visit in contravention of the procedures governing *locus* visit.

The Appellant prayed for costs in the High Court and the Court below.

Both counsel filed written submissions.

I will resolve the above grounds as herebelow:

The duty of this Court as a first Appellate

The duty of a first Appellate Court is to re-appraise or re-evaluate evidences as a whole and come to its own conclusion bearing in mind that it has neither seen nor heard the witness and should make due allowance in that regard.

The Supreme Court has re-echoed the above principles in a number of cases like **Uganda Revenue Authority versus Rwakasanje Azariu & 2 Ors; CACA No. 8/2007; further**

Narsensio Begumisa and 3 Ors versus Eric Kibebaga; SCCA No. 17 of 2002 and Banco Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1998 MY LORD; IN YOUR DRAFT ON PAGE (J2) IN THE CITED CASES; YOU STATED; Arabe Espanol versus Bank of Uganda; SCCA No. 08 of 1985. I HAVE CHECKED THE INTERNET IN THE DECIDED CASES AND HAVE NOT FOUND (1985), INSTEAD THERE IS (08/1998 SAME CASE (PLEASE CLARIFY)

I therefore have the duty to re-appraise the evidence reach my own conclusions thereon subject to the caution that I did not see, hear, or observe the witness. The evidence on record was given through witness statements; and all witnesses, were duly cross examined on their evidence.

The Plaintiff's case by the plaint was that he is the lawful owner of the suitland bought from the late Kyeyune formerly part of Block 265 Plot 7100 in the names of Kyeyune Samuel. Kyeyune executed a transfer instruments in respect of the said land in favour of the Plaintiff. The land was surveyed and plotted as plot 7862. In 2008, the Defendant contacted the Plaintiff claiming she had an access road on stated on the said plot.

A complaint was heard by the Local Council and was dismissed. Against him. The Defendant has since interfered with the Plaintiff's quite use and enjoyment of his land, claiming an access road, yet none doth exist on plot 7100; hence this suit.

In defence, the Defendant/counter claimant refuted the above claims. She claimed she bought from the late Samuel Kyeyune

who processed her a Title Deed for Kyadondo Block 265 Plot 7099 at Bunamwaya, which demarcated an access road for her use; but the Plaintiff went ahead and blocked the same.

The issues were:

1. Who is the rightful owner of the suit land,
2. Whether the Defendant/counter claimant has any access road on the said suit land,
3. Whether the Plaintiff/counter Defendant trespassed on the access road.
4. Remedies.

The Plaintiff called evidence through;

- PW1; SSENGABI CHRISTOPHER,
- PW2; SERUNJOGI MICHEAL,
- PW3; NSUBUGA ALLEN,
- PW4; MUYANJA DAVID,
- PW5; NANTUME JULIET

The defence evidence was through;

- DW1 IMELDA NAKIYINGI,
- DW2; KISITU SEMPALA CHRISTOPHER,

Exhibits were also recorded. The evidence was recorded by statements and during cross examination, the following was revealed.

According to PW1; Ssengabi Christopher; by the time he bought the land, the Defendant was already in her portion which she acquired in 1997.

He stated that in 2006 when the Defendant complained about an access road, he investigated the complaint and went to Kyeyune (former owner) and to Entebbe Land Survey Department and was satisfied that there was an access road. He further stated that the title he saw in 2008 had no access road for any of them, but the Defendant appears to have created an access road thereon; which is the subject reference of PID No.5; (letters to Staff Surveyor of Wakiso District. (pg. 6-8) of proceedings).

PW2; Serunjogi Michael, clarified in cross examination that he never saw a road on the titled land; the Plaintiff bought from Kyeyune. He said there was no road from the road to the Defendants' property and the access road stops at the Plaintiff's house (pg. 10-13 of proceedings).

PW3; Nsubuga Allen clarified that there was no access road from the main road to the house of the Defendant and that there was no access road to the Defendant's plot and the main road to the Plaintiff's plot and the main road to the Plaintiff's house, was made by the Plaintiff (pg.14 of the typed proceedings).

PW4; Muyanja David, states on pg. 17-18 of the typed record of proceedings on cross examination that there was nothing to show that there was an access road on the title of Kyeyune

which he sold to the Plaintiff. He confirmed that Kyeyune wrote to the Land Office informing them that there is an access road on the titled sold to the Plaintiff. He also informed Court that the access road the Defendant uses is from her home to the main road and is in good condition.

PW5; Nantume Juliet; confirmed that a Surveyor Sali who created Defendant's title is the one who created for her the access road on her title, but it was not there when the Plaintiff bought on/from Kyeyune's title (pg.20).

The defence in evidence in cross examination revealed, through DW1; Imelda Nakiyingi that Kyeyune never sold her an access road (pg.25 top).

She said that she faces the side of the gate and there is an access road leading to her gate, but it is difficult and long to reach her home as some cars use the upper side, but the Plaintiff built there a house.

She said that the access road was given to her by Kyeyune to plot 7099, but the access road is in Kyeyune Samuel's plot 7100. She said that the Plaintiff began building on the plot in 2008, but when she reported to the LCI, LCII and LCIII, she was not assisted.

DW2; Kisitu Sempala Christopher, said on (pg. 28) that on the Defendant's land which Kyeyune sold to her, there was a foot path, but now it can be used by the car. She said that DEXI

does not mention an access road, but he had showed it to her as a friend. The Court visited *locus* and made observations.

In his Judgment, the learned trial Magistrate found that the Defendant is protected under Section 59 of the Registration of Titles Act. He therefore believed the Defendant's case and found evidence of the Plaintiff unreliable and a hoax. He resolved all the issues in favour of the Defendant; hence this appeal.

In their submissions, the Appellants argued all the grounds chronologically thought the Respondents' Counsel argued GI, 2, 4 and 5 respectively.

I will make the findings on each ground.

Ground I:

The issue before Court was whether the Appellant trespassed and blocked an access road:

The evidence as reviewed above is consistently clear that at the time of selling the plots of land by Kyeyune, no access road was in existence. Both plots were sold as plots and the reference to DEX4 which is a land title for plot 7099 is superfluous. No evidence was conclusively led in Court by any of the witnesses to show that the said road existed at the time of sale.

Actually PW1, PW2, PW3, PW4 and PW5, all clearly stated so, even in cross examination as shown in my analysis of the evidence. DW1 and WD2 said they created the said dotted

lines to show this access road on the title, but DW2 said it was not part of it at the time of the said sale though Kyeyune had shown it to her as a friend. The Court visited *locus*. The record of the Court at *locus* simply shows a note by Court that;

- “1. Originally, there was an access road after Samuel’s shop before the Plaintiff created the new access road,
2. The Defendant’s home access blocked by the Plaintiff’s house”

The *onus* of proof in Civil Suits is on he who alleges the existence of a fact to prove it. (See Section 106 of the Evidence Act). There is no such proof anywhere on record to prove the observations that appear in the learned trial Magistrate’s judgment or observations above at the *locus*.

The creation of an access road is always a matter of law or negotiations of the parties.

No evidence was led in Court by either the City Engineer or the authorized Municipal Officer with a master plan of the area to show the proper zoning and mapping of the area indicating water ways, access roads etc. There being no such evidence on record, the rest is speculative.

In his submissions, Counsel for the Defence relied on the principle of “constructive or implied notice”, under the Token System of land registration. He relied on the case of ***Hunt versus Luck (1901) ICH 45*** to argue that ‘the Appellant did

not conduct any due diligence to establish if there was an access road; thereby imputing that the Appellant willfully trespassed on the said access road by blocking it’.

Counsel for the Appellant referred to the testimony of the Respondents herself to rebuilt the said argument on ground that the alleged surveyor Sali; created the access road on the Appellant’s plot long after she, (Respondents) had bought the said plot, and was only trying to title the same.

I do find that the argument above is inapplicable to these facts since the facts shows that no access road was in existence on the ground or in print by both parties.

In conclusion, I agree with the Appellants that the findings of the learned trial Magistrate were erroneous and are not supported by the evidence on record. This issue terminates in the affirmative.

Issue 2 and 3;

These are determined by the findings under issue I. The law as in **Justine E M N Lutaya versus; Civil Appeal No. 11/2002;** Court held that;

“Trespass to land occurs when a person makes an unauthorised entry upon land and thereby interferes, or portends to interfere with the possession of land”.

There was no access road so there was no trespass committed by the Plaintiff as found by the learned trial Magistrate. The

Respondent has an alternative access road on the lower end where her gate is (according to the evidence on record).

The alleged access road on the upper end is on land plotted as plot 7100 and belonging to the Plaintiff. The Plaintiff had constructed a house on his own part of the land on plot 7100 – so it is wrong and unreasonable for the learned trial Magistrate to order its demolition on account of a nonexistent access road. I find the issue in favour of the Appellant.

Ground 4 cannot stand in view of the findings above. It's found that there were no general damages recoverable by the Respondent.

Ground 5

The procedure at a visit on *locus* is contained in the Practice Direction No. 1/2017, this has been subjected to the Case Law and the position is that though not mandatory, Courts should interest themselves in visiting *locus* in land matters.

Secondly once such a visit is done, then the procedure as laid down in the Practice direction must be followed. For this case, there is no proceedings showing who said what. A visit to *locus* is not a fishing expedition for evidence. Only the evidence already on record is supposed to be further clarified by the visit on *locus*.

Looking at the entire record, there is no evidence that the learned trial Magistrate followed the said procedure. I agree

with the Appellant that this failure occasioned a miscarriage of justice. I do uphold this ground.

In the result therefore, I find that this appeal succeeds on all the grounds, the lower Court judgement is set aside and replaced with a finding for the Plaintiff in the lower Court with costs here and below.

I so order.

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Henry I. Kawesa

JUDGE

29/05/2019

29/05/2019:

Kenneth Kajeke for the Appellant.

Katongole for the Respondent.

Appellant present.

Respondent present.

Court:

Judgment is delivered to the parties above.

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Henry I. Kawesa

JUDGE

29/05/2019

Right of Appeal explained.

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Henry I. Kawesa

JUDGE

29/05/2019