THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

CIVIL APPEAL No. 3 OF 2013

(Arising from Makindye Chief Magistrate's Court Misc. Applica. No. 322 of 2011)

CHARLES KATUMWA ..... APPELLANT

VERSUS

HAJI SAIDI BAALE ..... RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

JUDGMENT

This appeal arises from the ruling and orders of the Chief Magistrate Makindye Court, wherein the Respondent herein was the Applicant, and the Appellant herein was the Respondent. The Applicant therein had sought orders of Court that he was, by an agreement entered between the Respondent therein and him, entitled to an access road passing through the Respondent's land to his residential premises. The suit was brought by way of an application, supported by affidavit evidence; to which the Respondent therein swore affidavit in rebuttal. The suit was heard based entirely on the affidavit evidence. After submissions from Counsels for the parties, Court disposed of the matter in a brief ruling wherein it ordered as follows; that: –

1. The Applicant and the Respondent should share the access road as it was provided for in the agreement of sale.

2. The Respondent is hereby ordered to clear the access road to its original status at the time of purchase so that the Applicant can conveniently access his residence.

The Appellant is aggrieved with the findings and orders; hence, the instant appeal, which has listed seven grounds, in the memorandum of appeal, as follows: –

1. The trial Chief Magistrate erred in law and fact in failing to evaluate evidence on record that the application raised proprietary claims over land which could not be dealt with in the application.

2. The trial Chief Magistrate erred in law and fact to hold that the land on which the Respondent constructed his residential home was purchased from the appellant; which was not true.

3. The trial Chief Magistrate erred in law and fact by holding that the Appellant sold the whole plot of land to the Respondent and bound to provide an access road; hence arriving at a wrong conclusion.

4. The trial Magistrate erred in law and fact when she held that the Appellant blocked the access road by making developments thereon; hence arriving at a wrong decision.

5. The trial Magistrate erred when she ignored the Appellant's offer to purchase the whole plot of land with developments thereon to the Respondent.

6. The trial Magistrate erred when she relied on a vague sale agreement and sketch plan; thereby arriving at a wrong decision.

7. The trial Magistrate erred in law and fact by failing to find that the Respondent never followed the proper procedure to apply for an access road under the Road Access Act.

The Appellant then prays that the appeal be allowed, the ruling and orders of the trial Court be set aside, and costs of the appeal and of the Court below be awarded to him. Counsel for the Appellant however argued only grounds 1 and 7 of the appeal; contending that the determination of Ground No. 7 of the appeal would

dispose of the other grounds of the appeal. This Court will accordingly deal with the two grounds submitted on since, indeed, their determination disposes of the appeal conclusively.

As a first appellate Court, I am bound to reconsider the evidence afresh; and make my own conclusions there from. In doing this, I am aware that as an appellate Court, I did not observe the witnesses testify; hence, I am ill placed to comment on the demeanour of witnesses who testified in Court. While this principle binds me as an appellate Court, I take cognizance of the fact that in the instant case, the evidence in contention herein was entirely affidavit evidence. Accordingly, there is nothing that the trial Court exclusively benefited from which this Court did not. As for the evaluation of the evidence adduced, it is not that the trial Court must reproduce the entire evidence adduced before it. Rather, what it needs do is to consider the relevant evidence to enable it decide the matter in contention.

The unrefuted evidence adduced before Court is that the Respondent bought a piece of land from the Appellant. The written agreement provided that the two would jointly utilize one access road, passing on the Appellant's land, to their respective premises. The issue of the Respondent's proprietary interest in the access road does not arise, as the contract did not grant the Respondent any proprietary interest there on. The contract provided for the joint use of an access road passing through the Appellant's land. The proprietary interest in the access road would naturally repose in the Appellant. It was up to the Appellant to determine where on his land the access road would pass; as long as it would afford the Respondent access to the land he had acquired from the Appellant by purchase.

However, the Appellant now contends that what they agreed on was a pathway. Further, in denying that he provided for an access road, the Appellant contends that at the time of the agreement there already existed a pathway from Lubega Road to the Respondent's residence. The Respondent, for his part, contends that, for quite

some time, the parties adhered to the terms of the agreement; and he peacefully used the access road agreed upon in the contract of sale to reach his residence, until the Appellant blocked it by the construction of structures thereon. To resolve this contention, one needs not go beyond the provision of the sale agreement put in evidence. It speaks for itself. It refers to an access road; and not a pathway. There is certainly a world of difference between a pathway and a road.

Second, the agreement does not refer to two access roads or an existing pathway as an alternative to the access road. Third, if at the time of the agreement an alternative pathway existed, then it would still strengthen the Respondent's contention that the provision for an access road, as an integral part of the contract, was so done on the understanding that it would accommodate the use of a motor vehicle; which a pathway was ill suited for. Either way then, the persuasive contention is that what the parties agreed upon in the contract of sale of land to the Respondent was an access road; and not a pathway, contrary to what the Appellant would want Court to believe.

Since the parties had concluded a contract, with clear terms, there was no need for the Respondent to bring the action under the provisions of the Access of Road Act at all; which would only have been necessary if the parties had failed to reach an agreement on an access road to the Respondent's residence. The dispute between the parties after the conclusion of the contract, and which is now before Court, is plainly one of breach of contract; and so, the Respondent was justified in coming to Court for determination by way of an application in the manner he did. In any case, if the Appellant disputed any part of the affidavit evidence, he was at liberty to cross–examine the Respondent there on. This, he chose not to. He only swore affidavit evidence in rebuttal of certain matters.

In the result, I find that this appeal is without any merit whatever. The trial learned Chief Magistrate was justified in coming to the finding that the Appellant has acted

in breach of the contract he had entered into with the Respondent providing for an access road. For this reason, I hereby uphold the orders she made for the joint use of the access road by the parties hereto; and for the Appellant to open the access road they agreed upon in the contract of sale of land to the Respondent, to enable the Respondent access his residence. Accordingly, I dismiss this appeal; with costs to the Respondent.

Alfonse Chigamoy Owiny – Dollo

JUDGE

02 – 02 – 2015