

UGANDA / JUDGMENT

Kwebeiha v Babirye and 4 Others (Civil Suit 216 of 2017) [2024] UGHCLD 110 (26 April 2024) [2024] UGHCLD 110

COURT

HC: Land Division (Uganda)

BEFORE

Keitirima, J

CASE / FILE NUMBER

Civil Suit 216 of 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL SUIT NO.0216 OF 2017

FRED KWEBEIIHA ::::::::::::::: PLAINTIFF

VERSUS

1. SARAH BABIRYE 2. SARAH NAKABO 3. CEDRIC LWANGA 4. CHARLES LWANGA 5. NOBLE
START HOMES LIMITED

. DEFENDANTS

BEFORE HON. JUSTICE JOHN EUDES KEITIRIMA

JUDGMENT

1]. The Plaintiff's claim against the defendants jointly and severally is for a declaration that the defendants are trespassers on his land comprised in Kyadondo Block 220 Plots 293, 294 and 296 land at Kiwatule, an order of permanent injunction, mesne profits, general damages and costs of the suit.

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2]. The plaintiff's cause of action as stated in his plaint is as follows; -

- The plaintiff is a registered proprietor of land comprised in \$(i)\$ Kyadondo Block 220, Plots 293, 294, 296, 320, 1754 and 1755 situate at Kiwatule having acquired the same sometime in the year 1992.
- That at the time of purchase, the said plots including the \$(ii)\$ neighboring plots 227 and 235 were vacant and undeveloped with no access roads.
- That the plaintiff has at all material times since the year 1992 \$(iii)\$ been in occupation of the suit premises and has lived thereon with his family and carried out several developments uninterrupted.
- That sometime in 2009, the plaintiff was approached by the \$(iv)\$ defendants through the 4th defendant who requested the plaintiff for an access route through his plots 293 and 294 in order to ferry building and construction materials to the \$1^{st}\$, \$2^{nd}\$, \$3^{rd}\$ and \$4^{th}\$ defendants' plots 227 and 235 respectively.

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- That following the above request, the plaintiff advised the \$(v)\$ defendants that there were conditions to be agreed upon and fulfilled in order to grant an access through his plots 293 and 294 among others which included payment of a consideration of three hundred thousand \$(300,000/=)\$ per annum and not using heavy machinery and equipment over the access road at least less than 15 tons capacity for a limited period of 5 years and that a review of the license be done on request.
- That the plaintiff went ahead to reduce the proposed terms into \$(vi)\$ writing and the draft copy of the document was sent to the defendants through the 4th defendant who received the same on the 29th day of December 2009.
- (vii) That upon receipt of the said document, the defendants never made any response to the same despite several phone calls from the plaintiff reminding them of the same.
- (viii) That the plaintiff was surprised to see the defendants ferrying construction materials using heavy machinery passing through

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his plot 293 and 294 to their construction sites on plots 227 and 235 when the said proposed terms had not been agreed upon.

- That the plaintiff communicated to the defendants to stop passing \$(ix)\$ through his land without permission but the defendants ignored all the communication from the plaintiff and continued trespassing on the same.

- That in order to have the matter amicably resolved, the plaintiff \$(x)\$ and the defendants represented by the 4th defendant had a meeting sometime in December 2015 and at the said meeting the plaintiff proposed new terms that were agreed upon in order for the defendants to have any access road through the plaintiff's plots 293 and 294.
- That the plaintiff also went ahead to reduce the terms into a \$(xi)\$ memorandum of understanding and when the same was sent to the defendants they informed the plaintiff that they needed more time to consider the offer and come up with an appropriate response.

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- (xii) That after a month and three weeks without any response the plaintiff through his lawyers Kakuru & Co. Advocates wrote a letter to the defendants stopping them from further trespassing through the plaintiff's property and advised the defendants to look for an alternative route.
- (xiii) That despite the said letter, the defendants ignored the same but continued passing through the plaintiff's land without any authority or permission.
- (xiv) That the plaintiff made complaints to KCCA Nakawa Physical Planning Division and when KCCA authorities visited the suit premises to look into the matter, they ascertained that the defendants' plots 227 and 235 had no provision for an access route but had instead misguided the KCCA Physical planning department in presenting development plans for plot 277 and 235 indicating access routes when in actual sense there had never been any approved access road.

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- (xv) That the defendants were stopped from further continuing with any construction on plots 227 and 235 till when the matter would be finally investigated and dealt with.
- (xvi) That the KCCA physical planning department also went ahead to engage both the plaintiff and the defendants in a meeting to have the matter amicably resolved but the same yielded nothing as the defendants were not willing to compensate the plaintiff in order to have an access road through his land.
- (xvii) That despite the KCCA orders stopping the defendants from further construction and ferrying building materials through the plaintiff's land, the defendants ignored the same and resorted to night constructions and the structures which were at foundation level at the time have now been roofed.
- That the defendants continued trespassing on the suit property (xviii) using heavy machinery in ferrying materials to their site and it cause cracks in the plaintiff's residential house's walls and noise from the passing trucks has disturbed the plaintiff's peace and that of his family from enjoying quiet possession of his property.

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- (xix) That the defendants have also constructed commercial units on their premises and attracted a lot of tenants hence increasing the number of trespassers on the plaintiff's property.
- (xx) The plaintiff contends that the defendants' actions amount to trespass on his property comprised on Block 220 plots 293 and 294 land at Kiwatule. The plaintiff listed the particulars of the defendants' trespass as follows; -
 - Entering and using the plaintiff's land as an access route to their (a) respective plots without permission.
 - Continued use of the plaintiff's land as an access route up to to- (b) date despite communication from the plaintiff stopping them.
- (xxi) The plaintiff contends that he has suffered loss and damages owing to the defendants' illegal acts of trespass in that the same has frustrated his business plans of expanding his hotel business and hence seeks general damages and an order of a permanent injunction.

(xxii) The plaintiff further contends that the defendants have illegally made use and are benefiting from the continued use of the

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plaintiff's land at the expense of the plaintiff and his family members and shall seek for mesne profits.

The plaintiff further contends that the defendants' actions and (xxiii) conduct were deliberately undertaken to defeat the plaintiff's interest in the suit land and constitute infringement on the plaintiff's rights to the suit property for which the plaintiff shall seek for exemplary and/or punitive damages as against all the defendants.

The plaintiff prays for judgment seeking for the said remedies and costs of the suit.

3]. In their written statement of defence the defendants stated inter alia;

- That they deny the plaintiff's claim and that the plaintiff is not (i) entitled to any reliefs claimed by him.
- That the terms and conditions of the plaintiff were (ii) unreasonable, exploitative and intended to exhaust the defendants and unjustly enrich the plaintiff.

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- The defendants contend that there was an original planned (iii) access road to their plots of land comprised in Kyadondo Block 220 plots 227, 235, 326 and 293 at the time of acquiring them and through physical search the plaintiff confirmed the presence of the access road.

- The defendants contend that before buying their land, the 4th \$(iv)\$ defendant consulted the plaintiff if the vendor was genuine and whether the access roads were present and the plaintiff confirmed that the access road was in existence.
- That to the defendants' dismay, the plaintiff turned around and \$(v)\$ started inconveniencing the defendants from time to time writing endless letters and exorbitant agreements and reporting the defendants to various authorities which caused them so much stress, mental anguish, loss of peace and quiet enjoyment of their land.
- The defendants contended that there was no evidence to prove \$(vi)\$ the unavailability of the access road and that KCCA approved

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the presence of the access road and hence they have a right of access to their land.

- The defendants further contended that there was an original \$(vii)\$ access road to their plots of land which consists of 16 homesteads and that they have always been willing to reach an amicable agreement but the plaintiff makes it difficult through his exorbitant terms and conditions.
- That the plaintiff on 4th November 2016 blocked the access (viii) road by delivering thereon hard rocks and these could be the ones causing cracks as alleged because no truck as alleged can utilize the road.
- That the plaintiff is not entitled to any damages and the \$(ix)\$ plaintiff wants to unjustly enrich himself and that it is the plaintiff who is benefitting from the access road by constructing two kiosks thereon and also blocking it off with hard rocks.

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- The defendants further claim that the plaintiff's prayers are \$(x)\$ frivolous and baseless and therefore not entitled to any of the remedies.
- That the suit is an abuse of court process and should be \$(xi)\$ dismissed with costs.

4]. In their joint scheduling memorandum, the parties raised the following issues for determination;

- 1. Whether there is a planned access road on the plaintiff's land comprised in Kyadondo Block 220, plots 293, 294 and 296 at Kiwatule.
- 2. Whether the defendants are trespassers on the said plaintiff's land.
- 3. Remedies available to the parties.

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I will resolve issue one and two concurrently as they are related.

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Plaintiff's evidence

5]. The plaintiff stated that he was the registered proprietor of the land comprised in Kyadondo Block 220 plots 293, 296, 294 at Kiwatule having purchased the same from a one Zerida Basalwa. The certificates of title were tendered in court and marked as exhibits P.1, P.2 and P.3.

6]. The plaintiff contended that at the time he purchased the said pieces of land the area was vacant with overgrown bushes and scanty tress save for plot 170 which was occupied by Gertrude Kajumba and plot 263 was occupied by Olive Kimuli, Plot 247 was occupied by Joy Kahwa and plot 277 occupied by the defendants was occupied by Mzee Lubega.

7]. The Plaintiff stated that the adjoining plots do not show any access roads in the area. The copies of title of the said plots of land were tendered in court and marked as exhibits P.6 and P.7. The plaintiff further contended that there were no planned or demarcated access roads at the time save for Kaduyu road that passed through his plot 320 and Ssebowa road from Kinyarwanda village to which he would use to access the plot 326.

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8]. The Plaintiff stated that he then improvised a temporary access road from Kadunyu road through Plot 320/296 where he has a hotel to access his residential house on plot 293 and 294. That all the plots adjacent to his plot 326 including that of the defendants would only be accessed through Ssebowa road but not through his mentioned plots.

9]. The plaintiff further stated that sometime back in 1997, the access road from Ssebowa road was blocked by the residents who later occupied those places hindering access to his plot 326. That as a result of the closing off Ssebowa access road, sometime in 1999 he acquired a piece of land from his immediate neighbor a one Anywar William who sold to him part of his Plot 319 where he created an access road to his plots 326, 294 and 293 where his residential house is situated.

10]. The plaintiff further stated that sometime in 2006 he was approached by a one Mary Bitekerezo his immediate neighbor at the south who requested him to have access through his plot 326 to her home. That he agreed with Mrs. Bitekerezo and she took part of his plot 326 in exchange

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of a piece of land from her plot \$305/327\$ and as a result plot 326 was subdivided to create plots 1754 and 1755.

11]. The plaintiff further stated that sometime in 2009 he was approached by the 4th defendant who informed him that he had acquired the neighboring plot 277 and as such wanted access through his plot 293, 294 and 320 to access his plot 277. That at the time he informed the 4th defendant that his plots were too small and reducing them would hinder his future development plans of expanding his hotel business and as such couldn't grant him an access through his plots.

12]. The plaintiff stated that he then advised the 4th defendant to look for an alternative elsewhere but agreed that he would temporarily allow him to use Plot 293 to access his plot 277 on certain terms and conditions as he approached other neighbors for a permanent solution. That he then drafted a document containing the said terms and conditions and served it on the 4th defendant who acknowledged receipt of the same on the 29th thereof. The made response December 2009 any but never

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communication to that effect was tendered in court and marked as exhibit \$P.10.\$

13]. The plaintiff contended that before the said terms could be agreed upon, the defendants started trespassing on his land by using heavy trucks and excavators to ferry building materials through his property comprised in Kyadondo Block 220 Plots 293 and 294. That when he approached the 4th defendant about the trespass, he ignored him and continued passing through his land without his consent.

14]. The plaintiff stated that he made several complaints to KCCA Nakawa physical planning division about the defendant's illegal actions on his property and they visited the site and ascertained that the construction site on plot 277 and 235 respectively had no approved building plans and a proper access road.

15]. The plaintiff stated that the defendants were issued with a notice to stop further construction by KCCA pending investigations into the mater but the defendants ignored the same and instead resorted to night constructions. That the defendants have constructed several commercial

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units on their premises and attracted a lot of tenants which has increased the number of trespassers on his property.

16]. The plaintiff contended that the walls to his residential house have been cracked by heavy vibrations from the defendants' heavy machinery ferrying construction materials through his property adjacent to his bedroom window and that the defendants' continued trespass on his property has also hindered the expansion of his hotel business and denied him the right to use his property.

17]. The plaintiff contended that there has never been any planned or demarcated road on his property leading to the defendants plots 277 and 235 as is clearly demonstrated by the cadastral map/survey maps of the area and all deed plans for all his plots. The cadastral map was tendered in court and marked as exhibit P.17.

18]. The plaintiff stated that in a bid to have a claim of right over his land, the defendants with the 4th defendant swearing an affidavit as company secretary of the 5th defendant deposed and asserted that there was a duly planned and gazetted road over his land and through an application which

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had been brought under the Access to Road Act was dismissed. The application and order were tendered in court and marked as exhibits P.18 and P.19 respectively.

19]. The plaintiff further contended that he has suffered a lot of inconvenience, loss and damage by the conduct of the defendants and on the 2nd May 2017 after the defendants losing the said suit brought goons who maliciously vandalized the wall fence to his hotel thereby threatening the security of his family. The photograph of the vandalized wall was tendered in court and marked as exhibit P.20.

The plaintiff prayed that this court grants him the orders as prayed for in his plaint.

20]. The plaintiff's witness Ssebulime Musisi Edward herein after referred to as "PW2" stated that he was the former LC.2 Chairman Kiwatule and had lived in Kazinga Zone for almost 56 years and hence was well aware and conversant with issues surrounding the access road between the plaintiff and the 4th defendant.

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21]. PW2 stated that at the time the plaintiff bought his land, the only road in the area was Kaduyu road and from Kaduyu road there was a small road to Kinyarwanda village. That at the time the plaintiff bought land, there was no access road passing through his land to any neighboring plots. He contended that the access road that is alleged to have been on the plaintiff's land has never been in place.

22]. PW2 stated that being the L. C II Chairperson of the area, the same issue has come up before him on several occasions and that there has never been any gazetted or planned access road through the plaintiff's land to the defendant's property.

23]. The plaintiff's third witness Gertrude B. Kajumba hereinafter referred to as 'PW3' stated that she was the registered proprietor of Block 220 Plot 170 and an immediate neighbor to the plaintiff. That her plots share a boundary wall with the plaintiff's plots 296 and 320.

24]. PW3 stated that she was registered as the proprietor of plot 170 on the 31st July 1990 whereupon she started constructing her residential house. PW3 contended that at the time she acquired Plot 170, there was

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no access road passing through the plaintiff's land and the only road that was in place was Kaduyu road. That all the neighboring plots were still vacant and bushy.

25]. PW3 further testified that before she constructed her house there was a foot path that passed through her land from Kaduyu road and it was the same foot path that her neighbors at the south always used to access Kaduyu road. That the said foot path was later closed when she constructed and fenced off her house. PW3 contended that there has never been any access road passing through the plaintiff's land to the plot currently owned by the defendants.

26]. The plaintiff's 4th witness Ignatius Tumukunde who will hereinafter be referred to as "PW4 stated" that he was a registered land surveyor trading as Fransil Group Ltd. He stated that he received instructions from the plaintiff to inspect, survey and open up boundaries and ascertain the access roads on the properties comprised in Kyadondo Blok 220 plots 293, 294, 296 and 320 at Kiwatule and whether the existing access road

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that leads to the neighboring plots encroaches on the above mentioned plots.

27]. PW4 stated that he and his team then opened up the boundaries and he produced a cadastral boundary opening survey report dated June 2021 which report had the following findings; -

- That all the four plots comprised in Kyadondo Block 220 plots (i) 293, 294, 296 and 320 exist on the ground and that the plot dimensions, size and shape on the ground conform to what is on the cadastral print in the titles.
- (ii) That there is an access road passing through the middle of both plots 293 and 294 leading to the neighboring plots 235 and 277.
- (iii) That the said access road does not appear on the cadastral sheet nor does it appear on the KCCA topographical maps.
- That the road encroached areas on plots 293 and 294 were (iv) computed to be 0.022 acres and 0.004 acres respectively and hence the total encroached area was 0.026 acres.

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That plots 296 and 320 are encroached on by Kaduyu road by (v) 12.81 and 12.21 square meters respectively.

Defendant's Evidence

28]. The defendant's witness Angwar William hereinafter referred to as "DW1" testified that he bought property near the suit land in 1992 but had started living nearby since 1971.

29]. DW1 stated that the access road in question existed at the time of his purchase and used to see it since his childhood as an access road taking Dr. Lubega to his home. That in 2009 the plaintiff closed the original access road that served the residents and constructed another one through his land and renamed it Fox Close 1.

30]. DW1 further stated that in 2017 the plaintiff then blocked the then existing access road the point where it passes through his land without leaving the users of the said access road with an alternative access road.

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That the access road users contacted KCCA which came and reopened the access road and also convened a meeting for all the residents which he attended.

31]. DW4 stated that KCCA forcefully reopened the access road and attempted to re-open the old access route but failed because of the hard concrete and columns which the plaintiff had erected in the old access route.

32]. The 2nd defendants witness Hajjati Nuruu Mbogga hereinafter referred to as "DW2" stated inter that when she married Abdul Mbogga in 1983 they moved to the area near the suit land. That at the time they moved to the area, the place was not yet developed but the access road in question existed.

32]. DW2 stated that all the people in the area used the said access road to get to their respective lands and one such family was that of Dr. Lubega who had his matrimonial home in the plot currently occupied by the defendants.

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33]. DW2 stated that it was the family of Dr. Lubega led by his daughter Zeldah Basalwa which sold the disputed land to both the plaintiff and the defendants and all the neighboring plots to that access road.

34]. DW2 further stated that the plaintiff shifted the access road sometime in 2009 and provided an alternative access road through his land. That in 2017 the plaintiff attempted to block the access road claiming he had provided an alternative access road.

35]. DW2 stated that the users of the access road then contacted KCCA which came and re-opened the access road and also convened a meeting for all the residents which she also attended and informed KCCA about the existence of the old access road. That when they attempted to re-open the old access road they failed because of the hard concrete and columns which the plaintiff had erected on the old access route.

36]. The 3rd defendant's witness was Semakula Stanely who will hereinafter be referred to as "DW3" stated that he settled on the suit

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land in 1991 and an original access road was in place. That the plaintiff closed the old access road and opened a new one in 2009 through his land.

37]. DW3 stated that the users of the old access road led by Charles Lwanga resisted to this change and they sought the assistance of the then RCC a one Bamwine who convened a meeting with the stakeholders and convinced the users of the access road to accept the change since it had provided an alternative access which would lead to their homes and that the change was not subject to any cost or condition placed on them in order to use it.

38]. DW3 further stated that sometime in 2017 the plaintiff blocked the access road he had created with rocks of stone and erected a gate. That Charles Lwanga came and reported the matter to him as he was the area chairperson and he advised him to report the matter to Police and KCCA.

39]. DW3 further stated that police came that day at around 8.30 p.m. and unblocked the road because the people were stranded with no way

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to access their homes and properties. That the following day the users of the access road also contacted KCCA which came and re-opened the access road and also convened a meeting for all the residents which he attended and he informed KCCA about the existence of the old access road and the new access road that was created by the plaintiff.

40]. DW3 further stated that as a result of the meeting, KCCA forcefully re-opened the access road and attempted to re-open the old access road but failed because of the hard concrete and columns which the plaintiff had erected on the old access route.

41]. The fourth defendant's witness was Walakira Ismail who will hereinafter be referred to as "DW4" stated that he knew the suit land well since he was born in the area in 1978. He stated that the plaintiff purchased land in their area around 1992 and was a potter when the plaintiff's house was being constructed.

42]. DW4 stated that all the construction materials were transported using the original access road. That at the time of purchase, he was a neighbor to the plaintiff and the access road existed during his days as

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a child and was being used by their family and that of Lubega who had his home on the plot currently occupied by the defendants.

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43]. DW4 stated that in 2009 the plaintiff without consulting the neighboring residents and users of the access road constructed another access road through his land. That the plaintiff then attempted to block the then existing access road saying that he had provided the people who were using that road with an alternative access road.

44]. DW4 further stated that in 2017 the plaintiff attempted to block the alternative access road and the users of the road contacted KCCA which came and re-opened the access road. That KCCA also convened a meeting for all the residents and as a result KCCA forcefully reopened the access road and also attempted to open the old access route but failed because of the hard concrete and columns which the plaintiff had erected on the old access route.

45]. Charles Lwanga who is defendant No.4 and who will hereinafter be referred to as "DW5" stated that he is the registered owner of Block 220 plots 235, 277, 264 and 235 land at Kiwatule. He also stated that

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he represented the \$1^{st}\$, \$2^{nd}\$, and \$3^{rd}\$ defendants and was the director of the 5th defendant.

46]. DW5 stated that he bought his said land in 2003 and before the purchase as part of due diligence he approached the plaintiff and asked him about the vendor and the status of the access roads to the land he intended to buy. That the plaintiff told him that there was an access road to the land he was purchasing.

47]. DW5 stated that after the purchase, he went to KCCA offices for official verification and he obtained a copy of the cadastral map for the area and a copy of the topographical map showing the existent approved roads at the time. That he then processed the approval of his plans from KCCA which was granted in 2004. That his approved plans clearly showed all the access roads to his property.

48]. DW5 stated that when he was constructing his building, he used the same access road to construct and finish his building in 2004 and all utilities lines like water and electricity were provided to his property

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via the same access road and that all the installations are still intact along this approved access road.

49]. DW5 contended that there was no alternative for the access road to these properties because all the neighboring plots were already developed and they did so with the status quo in place.

50]. DW5 further stated that sometime in 2009 the plaintiff without consulting the neighboring residents and the users of the access road, constructed another access road through his land and blocked the existing access road. That he told them to use the alternative access road he had provided. That they resisted the plaintiff's maneuvers and told him they could not abandon a planned existing access road in favour of a none gazetted access road.

51]. DW5 further stated that they reported the matter to the RCC of Kampala who convened a meeting at site and convinced them to concede since the plaintiff had unconditionally provided an alternative access road. That after three months, the plaintiff wrote to them

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requiring them to pay rent fees for the newly created access road which they resisted.

52]. DW5 further stated that on 17th February 2016 the plaintiff closed the alternative access road he had provided locking up 20 families with nowhere to pass and they reported the matter to police which ordered him to re-open the same. That on 6th March 2017 the plaintiff again blocked the road and they invited KCCA which came and broke all the structures he had built on the road.

53]. DW5 contended that the plaintiff's blockage of the access road leaves them with no alternative unless he re-opens the old access road.

Counsel for the plaintiff and counsel for the defendants filed written submissions the details of which are on record and which I will consider in determining this matter.

Decision of Court on Issues One and two

54]. It is an agreed fact that the plaintiff is the registered proprietor of land comprised in Kyadondo Block 220 plots 293, 294, 296, 320, 1754 and 1755 situate at Kiwatule having acquired the same in the year 1992. The defendants are the owners of plots 227, 235 and 326 comprised in Kyadondo Block 220.

55]. The evidence on record as even established from the locus in quo shows that there is an access road passing through the middle of both plots 293 and 294 leading to the neighboring plots of 235 and 277. This was confirmed by the plaintiff's witness, DW4 who indicated it in his report as shown in exhibit P.24.

56]. The evidence on record also shows that this access road was a creation of the plaintiff. The plaintiff stated this in his evidence. The plaintiff acknowledges that the 4th defendant approached him to use the access road and told him there were terms and conditions if he were to grant the 4th defendant access through his plots. The terms and

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conditions that the plaintiff had set were reduced into writing and were tendered in court and marked as exhibit P.9

57]. These terms were resisted by the defendants because they claimed they had an access road which the plaintiff blocked and created the one of which he was setting conditions for use. Indeed, at the locus in quo the court was able to see the access that was blocked which now has a perimeter wall. The perimeter wall belongs to the plaintiff which gives credence to the defendants' evidence that it was the plaintiff who blocked this access road.

58]. The access road in contention is what the plaintiff and defendants are using to access their premises. This is confirmed by PW4's report which indicates that the access road passes through the middle of both plots 293 and 294 leading to the neighboring plots 235 and 277. The neighboring plots belong to the defendant.

59]. According to the evidence of PW4 who is a registered Land Surveyor, the said access road did not appear on the cadastral sheet nor did it appear on the KCCA topographical maps. The onus was

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therefore on the defendants who claimed that the access road was gazetted to prove so. This could have easily been done by bring an official from the controlling authority in this case KCCA to testify to that effect.

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60]. Section 103 of the Evidence Act Cap 6 provides that "the burden of proof as to any particular fact lies on that person who wishes the 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".

61]. The above notwithstanding, when PW2 who was the area LC 2 chairman was cross examined as to when the defendants started using the disputed road he stated that they started using the road ever since they bought their land. This evidence by implication indicates that the access road existed before the defendants bought their land.

62]. Therefore, even if there was no planned access road as the plaintiff claims, the defendants would still be entitled to use the current access road as it exists since it was the only available access road to their plots.

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63]. In the case of Barclays Bank versus Patel (1970) E. A 88, the respondent did not have access to any public road and there was no road of access registered against the title to the appellant's plot. The court held that "a way of necessity arose by operation of law on the subdivision of the property and would continue to exist for as long as the necessity existed notwithstanding that it was not referred to in the certificate of title to the servient tenement"

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64]. The disputed access road could also be referred to as an easement. An easement is a right attached to a particular piece of land that entitles the owner of that land either to use the land of another person in a particular manner or to restrict that other person's use of his or her land to a certain extent, see E. H Burn, *Cheshire and Burn's Modern Law of Real Property* (14th ed, London, Butterworths 1988), P.490.

65]. In this case the easement arose by way of necessity and cannot be defeated by asserting title to the adjoining land as the plaintiff is trying to do in this case. It is the only way available to the defendants' premises and there is no alternative. Creation of an alternative would

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come at a very great expense to the defendants as the other adjoining lands are now developed as this court was able to establish when it visited the locus in quo.

66]. The test frequently applied to determine whether a reasonable necessity exists is an economic test, which is the expense of creating another access that would cause hardship to the owner of the servient land. A way of necessity is an implied easement. The doctrine is based upon public policy which is favorable to the full utilization of the land and that the parties do not intend to render the adjoining land unfit for occupancy.

67]. I therefore find that the defendants are not trespassers on the said disputed access road as they have a right of access to the disputed road out of necessity.

Issue 3: Remedies available to the Parties.

The Plaintiff has therefore failed to prove his case on the balance of probabilities and the case will be dismissed with no order as to costs. The costs will not be awarded because this court is enjoined to promote

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reconciliation between parties who are neighbours and considering that the plaintiff is the one that provided the access road that the defendants are now benefitting from.

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Hon. Justice John Eudes Keitirima.

26/04/2024

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