CLEVER GARIKAI TSIKWA
versus
STEPHEN NYAGURA
and
MOLLY LAURENCIA TANYARADZWA
and
THE REGISTRAR OF DEED N.O

HIGH COURT OF ZIMBABWE
MWAYERA J
MUTARE, 25 March 2021 and 29 April 2021

Opposed Application

A Gurira, for the applicant
B Maruva Assisted by Ms *T. B Vhiri*

MWAYERA J: The applicant approached the court seeking a servitude of a right of way to access his plot which is land locked. The respondents opposed the application on the basis that the applicant already has access to his plot through another plot namely Plot 1 and further that the applicant is seeking a permanent benefit but has not offered compensation which is associated with such nature of permanent benefit.

The issue that falls for determination in this matter is whether or not the applicant is entitled to the servitude of a right of way.

It is imperative that the factual background of the matter be highlighted. The applicant was allocated a piece of immovable property in 2006 under the Land Reform Programme. He was allocated Plot 4 of Rufaro Farm measuring 35 hectares in extend. The first and second respondents are the owners of Plot 2 of Rufaro Farm in equal and undivided shares. They are holders of a Deed of Transfer for the farm, deed number 03062/2004. The applicant having obtained a certificate of occupation in 2006 took occupation of plot 4 of Rufaro Farm which plot is landlocked and inaccessible from the main Rusape Nyanga Road. To access his plot the applicant has to pass through Plot 1 or Plot 2.

The applicant and respondents failed to amicably resolve the issue of passage hence the application. The applicant argued that the best route to his plot would be through the first and second respondents' plot. Passage through route on Plot 1 is inconvenient as it entailed passing through the other's door step whereas passage through the respondents' plot is convenient as it

only requires the respondents to move their gate inwards for about 6 metres to allow access to the applicant's plot via the fireguard. The applicant offered to erect the gate at its own expense. The respondents in turn argued that the applicant already has access through Plot 1 and should not seek to change route on basis of convenience but necessity.

It is settled that for the remedy of servitude of right of way to be granted there are requirements which the dominant owner must establish. Firstly that the dominant owner is landlocked and secondly that it is necessary to be accorded the servitude right of way. *Van Ransburg* v *Coetzee* 1979 (4) SA 655 (a case cited by both counsel). There are factors which fall for consideration in assessing whether or not there is necessity for the right of way. The land in question has to be land locked. The tenement that is dominant and servient must be owned by different people. The properties must be immovable and in particular land. The servient and dominant tenements must be neighbouring properties. The utility must be capable of being transferred and the benefit must be permanent in nature. In the present case it is not in contention that the properties are neighbouring properties and that the applicant's property is landlocked. That the benefit sought is permanent also does not seem to be in dispute. The servitude of right of way sought appears capable of being transferred. The argument by the respondents is that the applicant is not seeking right of way out of necessity but for convenience. Mr *Maruva* referred the court to the case of *Sanders N.O* v *Edwards N.O* HC SA A36/2002 and also *Lentz* v *Mulling* 1921 EDC 268274. In the case of *Lentz* the court stated that:

> "It is not admissible for the dominant owner to claim a right of way of necessity over the servient tenement. If he already enjoys access to the public road via an existing road over neighbouring properties which he uses without objection"

Mr *Maruva* for the respondents argued that the applicant cannot claim a right of way of necessity where he already has a way through Plot 1. The argument that such passage through Plot 1 brings about hardship to the owners because it passes through the doorstep and flower beds does not constitute necessity. In the case of *Aventura* v *Jackson* 2007 (5) SA 497 (SCA) 500A NUGENT JA stated as follows on defining necessity:

> "Necessity means that the right of way must be the only reasonable sufficient means of gaining access to the landlocked tenement but not just convenient means of doing so." (Underlining my emphasis)

The respondent argued that in the circumstances of this matter the applicant is seeking a right of necessity of way where he already has access through Plot 1. The applicant is simply requesting to be granted a way he views as more convenient than the passage route or way he

already has. In the case of *English* v *J. M Heirmse Investments and Others* 2007 (3) SA 415 N 419 B the court stated:

> '…the right of necessity cannot be claimed based on the mere fact that an existing route is simply no longer or less convenient than the way sought."

The respondents argued that in the present case the applicant has been using Plot 1 to access his plot for several years. The applicant appears to have been motivated by the fact that Plot 1 is less convenient because he passes through the owner's door step or house entrance. The applicant is accessing its plot but raises issue that the route is cumbersome as it passes through the owner of Plot 1's door step. The applicant in turn suggests that if it accesses through Plot 2 of the respondents then it would divert to the fireguard enroute to its plot without getting to the respondents' door step. This scenario connotes opting for a more convenient route arising out of necessity. The questions that calls for answer is whether convenience and necessity are one and the same or whether they ought to be converged depending with the circumstances.

At this stage it is important to highlight that the applicant makes it clear that upon entry into the respondents' plot for about 6 metres it will divert to the fireguard to access applicant's plot. Whereas entry through Plot 1 would entail encroaching on the flower beds and doorstep of the owners. According to the applicant, Plot 1 has since been fenced barring passage through. The respondents have in turn locked their gate thus rendering the applicant's landlocked plot inaccessible. What the applicant seeks is the passage by Plot 2 that is the respondent's plot and this would not create an undesirable picture of the applicant seeking access to his land locked property through more than one intervening properties. Multiple entry in my view would cause chaos and lead to onerous servitude of way being imposed on all neighbouring properties to access the applicant's property not out of necessity but out of choice and convenience with the liberty of choosing the better route. The purpose of the servitude of right of way is in simple terms to allow landlocked property owner to access his property through the reasonable route. Considering the definition of a servitude it would not be proper to grant several right of way or grant a servitude of right of way where the applicant already has access to his property and there is no objection from the property owner whose property the applicant is accessing his property. The applicant in this case is not seeking for several right of way.

In this case the fact that the applicant's land is land locked makes it imperative that an access route is required. The applicant requires passage route to access its landlocked property. The passage to enable access is indispensable considering the fact that the applicant's land is landlocked. The other suggested way of entry through Plot 1 involving encroaching on the

owners doorstep appears not feasible thus boosting the necessity of access through Plot 2. The difficulty occasioned by access through Plot 1 further boost the necessity of obtaining a right of access through the only reasonable way. In my view it is not only convenient but necessary that the applicant gets the right of way to access its landlocked plot as there is no other existing adequate way. The route via Plot 1 is not available and has been displayed as inadequate.

A servitude is defined by Buckland (1921) in "*A Textbook of Roman Law from August to Justririan*"

> "A servitude was essentially a right or group of rights forming part of dominium, but separated from it and rested in some other person other than the *dominius*. From another point of view it was a burden on ownership, a *lus in rem* in another person to which the owner must submit"

R. W Lee (1915) in a textbook of Roman – Dutch Law defines servitudes thus:

> "A servitude is a real right enjoyed by one person over or in respect of the property of another whereby, the latter is required to suffer the former to do, or himself to abstain from doing, something upon such property for the former's advantage"

In this case the applicant cannot operate without getting right of way from the neighbouring plots. It is apparent the degree of interference on property and privacy on Plot 1 comparatively creates necessity to seek passage through the only reasonable and feasible route through Plot 2 that is respondent's property. In an event Plot 1 by fencing has already barred the applicant giving rise to the present application.

What runs through the definition of a servitude is clarity that another person has a right in the property of another for necessity. Examples of servitudes being right of way as in present case, the water right, rights of pastures and right of cutting wood. The servitude right certainly does not take away or diminish the real right of the owner. The right of way has to be granted only when it is a necessity. In this case considering the common cause aspects particularly that the applicant's land is land locked it is absolutely necessary that the right of way should be availed. The right of way is required and that fact is indispensable. The applicant in this case is land locked and can only practically access land for agricultural purposes through neighbouring Plots. The applicant is entitled to the servitude of right of way see *Jackson* v *Aventura Ltd* 2007 (5) SA 497 and also *Sanders N. O and another* v *Edwards N. O and Others* 2003 (5) SA 8. It is settled that the right of necessity as a praedial servitude must be established in respect of two pieces of land namely the dominant tenement and the servient tenement. Both lands must be owned by different persons as in this case. The properties must be neighbouring properties as it is in this case, the applicant's Plot and respondent's plots are neighbouring

pieces of land. From the circumstances the applicant's argument is that it is necessary that he be given the right of way servitude through respondents' Plot so that he may proceed to his landlocked Plot without difficulty to himself and the owner of Plot 1 since the right of way via the latter is cumbersome and inconvenient as it passes through the owners doorstep much to the chagrin of the owner and also applicant. In other words the suggested available way which applicant argues about was given temporarily as it is inadequate and causes undue hardship and inconvenience to access the land locked land from the public main road. *See Van Ransburg* v *Coetzee supra*. The undue hardship and the fact that the land is landlocked make it indispensable that a right of way arising from necessity has to be granted. The applicant argues that it is not only convenient but necessary that the right of way servitude be granted, since the situation presented speaks volumes to necessity see *Van Rensburg* v *Coetzee* 1979 (4) SA 655A. I must hasten to mention that the necessity of the way sought by the applicant is more pronounced by the fact that it is the only reasonable and feasible route. See *Aventura v Jackson* (*supra*). The route via the respondent's gate diverting to the fire guard appears to be the only reasonable access to the landlocked property without occasioning undue hardship on the property owners. The claim for right of way through Plot 2 is not motivated by mischief but by necessity. The respondents lock their gate barring the applicant access to his landlocked property. Plot 1 had availed way temporally as this route was inadequate and it occasioned unreasonable hardship by passage through the door step. Owners of Plot 2, the respondents fenced and locked their gate leaving applicant with no route to access his Plot. It was not only necessary but imperative that applicant approached the court seeking a servitude of right of way which is ordinarily created by operation of law. Once property is landlocked the servient tenement's property will be burdened by giving right of way of necessity. In situations where parties do not agree then the courts intervene. Once all the requirements of servitude of right of way are met then the court may direct the route to be traversed. In this case it has been shown on a balance of probabilities that;

1. The applicant's land that is the dominant tenement is land locked.
2. There are two tenement that is the dominant tenement and servient tenement owned by different people.
3. The two properties are immovable properties
4. The servient and dominant tenement are neighbouring properties.
5. The utility is capable of being transferred

6. The benefit sought is permanent in nature.

All the requirements have been met and the applicant is willing to erect the gate at its own expense. The other route from the main road to the applicant's property through Plot 1 is untenable as it is not only bringing undue hardship to the applicant but the owner of property and as at the time of hearing the way was not available thus boosting the necessity of the only viable route through Plot 2 that is respondent's property. The request of right of way is not calculated to have multiple entries and thus impose unreasonable and onerous servitude on many properties but is designed out of necessity to access the applicant's landlocked property through the only feasible route through Plot 2.

Considering the background to the matter and circumstances of this matter there is no justification in awarding costs.

Accordingly it is ordered that:

1. The applicant be and is hereby granted right of way to Plot 4 Rufaro Farm of Juliusdale situated in the District of Inyanga through Lot 2 of Rufaro Farm of Juliusdale situated in the District of Inyanga and held by first and second respondents. In an undivided share held under Deed of Transfer Number 03062/2004.
2. The first and second respondents are hereby ordered to allow the applicant at his own expense to move their gate further inwards by 6 meters from its current position to allow the Applicant and his assignees- to enter the fireguard and have access to Plot 4 of Rufaro Farm, Juliusdale, situated in District of Inyanga. The right of access shall only be to have access of the main road which is Rusape – Nyanga Highway and Plot 4 Rufaro Farm of Juliusdale situated in Nyanga District.
3. The route or way is to be cleared at applicant's own expense.
4. Each party is to bear its costs.

Gurira & Associates, Applicant's legal practitioners
Zuze Law Chambers, 1st & 2nd respondent legal practitioners