

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA**

Mallika Arachchige Don Irin
No. 475/2, Polhena, Kelaniya.

27th DEFENDANT-APPELLANT

Nissangalage Saranapala Almeida
No. 19, Kirulapona Station Road,
Nugegoda.

C.A 835/93(F)
D.C. Colombo 14453/P

28th DEFENDANT-APPELLANT

Kanthy Almeida
Rohan Almeida
Ajith Almeida

All of Polhena, Kelaniya.

**29th TO 31st DEFENDANTS-
APPELLANTS**

Vs.

Lal Jayantha Narangoda,
No. 111, Temple Road, Nawala.

PLAINTIFF-RESPONDENT

1A. Masarachchige Somawathie Nanayakkara
No. 15, Kirulapona Station Road,
Nugegoda.

**(SUBSTITUTED 1st DEFENDANT-
RESPONDENT)**

And others

BEFORE: Anil Gooneratne J.

COUNSEL: Palitha Kumarasinghe P.C with Kamran Aziz
for 28th Defendant-Appellant

R. Suwadaratne with M. Gunawansa
for Plaintiff-Respondent

L.M.G. Cabral for 16th Defendant-Respondent

ARGUED ON: 14.03.2011

**WRITTEN SUBMISSIONS
FILED ON:** 28.03.2011

DECIDED ON: 05.05.2011

GOONERATNE J.

This is a partition suit. On 19.12.2008, the Court of Appeal on the application of the 28th Defendant-Appellant permitted the said party to the partition appeal to withdraw his appeal. There are several others who have preferred appeals to this court. In the said order of 19.12.2008 it is

recorded that the counsel for 28th Defendant-Appellant had submitted to court that the 28th Defendant-Appellant is claiming lot 'E' in plan 2794 marked 'X' which lot does not fall within the corpus to the partition case. When the above application was made for withdrawal counsel for 1A Defendant-Respondent, Plaintiff-Respondent and 3A, 15A, 13th – 20th Defendant-Respondents, 6th, 11th, 12th, 24th & 26th Defendant-Respondents did not object to such application. As such court recorded the following:

- (a) Having considered the application of Mr. K. Azeez and Mr. S. Jayatilleke, we permit the 28th Defendant-Respondent to withdraw the respective appeal.
- (b) Hence the appeal of the 28th Defendant-Respondent is withdrawn and hereby dismissed without costs.

Copy of the above order sent to the Registrar of the District Court.

28th Defendant-Respondent should be corrected to read as 28th Defendant-Appellant.

Thereafter almost 2 years later motions dated February 2011 & March 2011 was filed in this court (without an explanation for delay etc). The said motions reads inter alia as follows:

1. And whereas, the 28th Defendant-Appellant has been referred inadvertently as the 28th Defendant-Respondent and the 27th, 29th, 30th and 31st Defendants-Appellants have inadvertently been referred to as the 27th, 29th, 30th, and 31st Defendants-Respondents in the said order.
2. And whereas, the said case minute is evidently contrary to the order of Your Lordships Court on 19th December 2008, having particular regard to the fact that the 27th, 29th, 30th and 31st Defendants-Appellants did not at any stage withdraw

their respective appeals, which are yet to be heard, adjudicated and determined by Your Lordships Court.

3. And whereas, the 28th Defendant-Appellant now respectfully moves to correct the case minute made on 19th December 2008, so as to make it consistent with the order of Your Lordships Court made on the said date. The 28th Defendant-Appellant also moves that Your Lordships Court be now pleased to add the 28th Defendant-Appellant as the 28th Defendant-Respondent in this appeal.

The Plaintiff-Respondent objects to the above motion of the 28th Defendant-Appellant and state that 28th Defendant-Appellant has no locus-standi or a legal right to file motion as on the application of the 28th Defendant-Appellant to withdraw the appeal was considered and court made order dismissing the appeal and the other Appellants did not indicate a desire to continue with their appeals. As such other Appellants are estopped in law in seeking any order to re-open the said appeal. Further by document X1 of 29.6.2009, 28th Defendant-Appellant moved the District Court to release him from the partition case and accordingly the learned District Judge had made order. Plaintiff-Respondent by document marked X2, X3 (enclosure of A to C) also brings to the notice of this court that 28th Defendant-Appellant had moved the District Court to exclude lot 'E' in plan No. 2794 (X). The District Judge has by order of 12.1.2011 refused such application. It is the position of the Plaintiff-Respondent that the 28th Defendant-Appellant has suppressed the above facts to this court.

1A Defendant-Respondent objects to any move on the part of the 28th Defendant-Appellant and stress that 28th Defendant-Appellant has no locus-standi to move, any application to this court. The 16th Defendant-Respondent clarify the position of lot 'B' and 'E' of the preliminary plan. Lot 'E' is part of lot 'B' and state that the 28th Defendant-Appellant has no status to make an application to this court.

In terms of the motion filed of record by the 28th Defendant-Appellant, it is stated that the said Appellant has been inadvertently referred to as the 28th Defendant-Respondent. So are the 27th & 29th to 31st Defendant-Respondents. Such an obvious mistake has to be corrected , as no harm would be caused to any party. It is also stated in the said motion that the case minute contains mistakes and is contrary to the order made by court. It is the order made by court that is relevant, which needs to be adopted and followed, and not the case minute. Very often in very many proceedings recorded in the Court of Appeal there are mistakes. Judges cannot at every stage of the proceedings keep on correcting same. What is important is the order made by court which should be flawless. In the case in hand any error in the case minute which does not tally with the order of court dated 19.12.2008 would be inapplicable and any error committed consequent to the order and an error in the case minute resulted, an injury being caused to

any party has to be rectified. But this would not mean that a party should be permitted to take undue advantage of the situation and seek to get more than what is required by law.

The 28th Defendant-Appellant has withdrawn his appeal, and accordingly this court made order. Therefore 28th Defendant-Appellant cannot be permitted to prejudice the case of any other party since as the 28th Defendant-Appellant is concerned he would have no right or status to urge his case any further and the order of 19.12.2008 (order of dismissal) is a final order as far as the 28th Defendant-Appellant is concerned. 28th Defendant-Appellant's applications to have himself added is rejected.

Plaintiff-Respondent argue that at the time of withdrawal of the appeal by the 28th Defendant-Appellant, the other Appellants to the appeal did not indicate a desire to pursue their respective appeals and as such the remaining Appellants are estopped and cannot pursue their appeals.

However the available material do not suggest that the other Appellants have failed to prosecute their respective appeals. It would be an injustice to rely on the principle of estoppel to shut them out of this case, before the Court of Appeal.

You cannot under the law of estoppel claim to estop a person only to the extent to which his implied representations have damaged you.

Nor can a person against whom an estoppel is asserted claim to have his responsibility so limited. Estoppel means that a person has so acted that he shall not be allowed to show the truth at all 23 N.L.R at 133. In the context of the case in hand this court cannot deny a proper hearing of the appeal. Estoppel cannot be extended in the circumstances of this case, to deprive an Appellant of a hearing.

In the above circumstances and subject to observations made by this court application to be added by 28th Defendant-Appellant as 28th Defendant-Respondent is refused and rejected. I direct the Registrar of this court to list the appeals of 28th & 29th to 31st Defendants-Appellants for hearing. I also direct the Registrar to forward this order to the Registrar of the District Court of Colombo.

JUDGE OF THE COURT OF APPEAL