

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

C.A. No. 532/95 (F)
D.C. Kalutara Case No. 5796/P

1. Illekuttige Benjamin Lukas Severianus Fernando.
Fernando Place, Graceland, Beruwala
2. Grace Evegyn Perera,
31/ 1, 1st Lane,
Moratuwa
3. Illekuttige Laura Elizabeth Wijeratne,
Dharmarama Road, Wellawatta
4. Illekuttige Millie Margret Dias,
Waidya Road, Dehiwala
5. Illekuttige Stela Philomina Fernando,
60/1, Cotta Road, Borella

Plaintiffs-Appellants

-VS-

1. Illekuttige Manuel Fernando,
'Madona', Thalamulla, Kalutara
 2. Illekuttige Mandalin Fernando
'Richly', Katukurunda, Kalutara
 3. Illekuttige Noel Fernando,
Uyana, Moratuwa
 - 3(a). Illekuttige Rosmary Peiris
 4. Illekuttige Pelari Gunawardena,
Galle Road, Thalamulla, Kalutara
 - 4(a). Comadamperuge J.V.Gunawardena,
'Geraldin', Thalamulla, Kalutara
 5. Illekuttige Francis Fernando,
'Bonhur', 1st Lane, Moratumulla, Moratuwa
 6. Illekuttige Merl Fernando,
'Lakshini', Charles Place, Lunawa
 7. Silvi Fernando,
Sumudu Mawatha, Moratumulla,
 8. Weerawarnakurukulasuriya Busabaduge
Richard Fernando
 - 8(a). Weerawarnakurukulasuriya Busabaduge
Shirani Josephine Fernando
'Richly', Katukurunda, Kalutara
- Substituted 8th (a) Defendant-Respondent**
9. Weerawarnakurukulasuriya Busabaduge
Shirani Josephine Fernando
Richly', Katukurunda, Kalutara

Defendants-Respondents

Counsel: C. Laduwahetti for the Plaintiffs/Appellants

Harsha Soza P.C. with D.Kalubowila for the

2nd 8(a) and 9th Defendants/Respondents.

Arguments: 24-06-2009

Written Submissions: 25-8-2009 (Plaintiffs/Appellants)

23-09-2009 (2nd, 8(a) and 9th Defendants/Respondents)

Before: Rohini Marasinghe J

Judgment: 28-01-2011

CA 932-95

The Plaintiffs/Appellants filed a partition action to partition the land called "Maluwelawatta" The said land is depicted in the plan bearing No: 458 dated

23-4-1991. The defendant/respondent by their statement of claims sought the dismissal of the action. After trial the action was dismissed. The plaintiffs appealed.

The following facts were recorded as admissions at the trial;

1. The land in suit is depicted as lots 1,2,3,5 and 7 in the plan No: 458.
2. One Lucas Fernando was the original owner of the property in issue.
3. The said Lucas Fernando left a Last Will bearing No: 3985.
4. In the case bearing No: 1373 probate was granted to one Anthony Fernando.

The facts of this case were briefly as follows;

The said Lucas Fernando had three children namely, Anthony, Martin and Sarpeenu. The 1st to 5th plaintiffs are the children of the said Sarpeenu. The 1st defendant is a child of the said Anthony. The plaintiffs claimed the property in suit as the heirs of said Sarpeenu. The contentions of the plaintiffs' were;

The grandfather of the plaintiffs was the said Lucas. The said Lucas had 1/4th share in the land in suit. The plaintiffs claimed that 1/5th share out of the 1/4th

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share in the property in suit on the basis that it was bequeathed by the Last Will of the said Lucas to Sarpeenu. The said Sarpeenu was the father of the plaintiffs. The 1st defendant, on the other hand claimed that in the Last Will of the said Lucas, all the immoveable properties were bequeathed to the said Anthony. The said Anthony was the father of the 1st defendant. The 1st defendant further stated that the pecuniary benefits mentioned in the said Last Will were distributed amongst the heirs of the said Lucas according to the terms in the said Last Will.

The land to be partitioned was a distinct portion of a larger land. In the preliminary plan 458 which is marked as "X", the Northern boundary and the Western boundary are part of "Maluwelawatte".

The attention of the court had been drawn to the documents marked as P3 and P4. The said Sarpeenu had died intestate. The widow had made an application for the letters of Administration. The document P3 constitutes the letters of Administration issued to the widow of the said Sarpeenu. The document P4 was the Inventory and Final Accounts filed in the testamentary action of the said Sarpeenu. In the said Inventory two lands called "Maluwelawatte" are listed. On that basis the plaintiff contended that the

land in suit belonged to the Intestate Estate of the said Sarpeenu. The respondents' contention on this point was that the said lands were different lands. The defendants alleged that the lands referred to in the testamentary action of Sarpeenu as "Mauwelawatte" should not be considered as the land referred to in the Last Will of the said Lucas.

I have examined the document marked as P3. The document P3 is dated 24-8-1934. In the said document there are persons listed as creditors. The document was not verified on oath and no receipts have been filed. The consent of the parties to the final account was also not filed. Consequently, I am unable to accept the document P3 as the correct Final Account of the Intestate Estate of the said Sarpeenu.

The Inventory and the Final Accounts filed by the said Anthony in the testamentary action of the said Lucas was also filed as 8V1. The document 8V1 was entered in February 1923. In that document the property in suit is depicted in the schedule "E". In the document the item No: 7 refers to this property and states "Value of property reserved for heirs as per schedule "E". Consequently, as seen by this document 8V4 the property in suit is not listed as an immoveable property to be distributed amongst the heirs. The value of the property was required to be paid to the heirs on the terms mentioned in the

said Last Will. There is also no reference in the Last Will to show that the testator had intended the sale of the property in question. The Last Will clearly stated that the testator only intended the value of the property to be distributed as mentioned in the Last Will. The testator had mentioned in the Last Will the exact amounts that testator had considered as the value of the property in issue that should be distributed to the other heirs. Accordingly, the value had been paid and the heirs have accepted the money. The acceptance of the money and the heirs consent to the final account filed by the said Anthony in the testamentary case of Lucas had been marked in evidence at the trial. The learned trial judge had accepted the document as proof of acknowledgment by the heirs that the Last Will of the said Lucas had been properly dealt with by the administrator. I am of the view that the Trial Judge had approached the issue correctly. The matter has been sufficiently dealt with at the trial. I see no reason to interfere with that decision. The judgment is affirmed. The appeal is dismissed.

Rohini Marasinghe J

Judge of the Court of Appeal.