

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

**Case No: CA 39/99(F)**

DC (Mathugama) Case No. 2492/P

Kuruppu Arachchige Ebrahim Appuhamy  
C/O Wimalasena,  
Godemandiya,  
Bulathsinghala.

And Others.

**Plaintiffs**

**Vs.**

Dona Madurawathi Kuruppu  
Godemandiya,  
Bulathsinghala.  
And 19 Others

**Defendants**

**AND NOW BETWEEN**

Kuruppu Arachchige Ebrahim Appuhamy  
C/O Wimalasena,  
Godemandiya,  
Bulathsinghala.

**Plaintiff – Appellant**

Weeragala Kalubowilage Don Piyatissa  
Gammadapitiya,  
Bulathsinghala.

And 19 Others

**Defendants-Respondents**

**C.A.39/99 (F)****D.C Matugama 2492/P**Before : A.W.A Salam, JCounsel : Sanjeewa Ranaweera for the Plaintiff-  
Appellant.Indunil Bandara for the 19<sup>th</sup> Defendant-  
Respondent.Argued &  
Decided on : 06.02.2013.

\*\*\*\*\*

**A.W.A Salam J.**

This is an appeal preferred by the 5<sup>th</sup>/14<sup>th</sup> (a) Defendant Respondent against the judgment and Interlocutory decree dated 11.12.1998 directing that the land depicted in plan "X" (Plan No: 620 dated 09.08.1994 made by G. Adikaram) be partitioned amongst the co-owners who were declared entitled to undivided shares.

The corpus is said to have been depicted in the said preliminary plan. The said plan "X" showed a land in extent of 3 Acres- 3 Roods and 1.4 perches whereas in the schedule to the plaint and the lis pendens, the land has been described as in extent of 4 Acres and 3 Roods. The difference in extent

between the land described in the plaint and depicted in the plan "X" is almost 158.6 perches. The surveyor in explaining the discrepancy in the extent has stated that the substantial reduction could be attributed to the village council road which had come later into existence. However, as stated by the surveyor, he has not given the extent of the village council roads but roughly stated that the road in question may be in extent of 35- 37 perches. Even if this statement is accepted as correct, yet there is a difference of 3 Roods in extent that has not been explained by the surveyor.

As a matter of fact, the 5<sup>th</sup> Defendant and the surveyor have stated specifically that the land sought to be partitioned is not the one described in the plaint. The latter has specifically taken up the position that the land described in the plaint has not been surveyed. Counsel for the appellant drew the attention of court to a list of witness filed on behalf of the 5<sup>th</sup> Defendant in which he has listed the Survey General's plan which depicts the land in question as in extent of 4 Acres and 3 Roods.

The learned counsel for the 19<sup>th</sup> Defendant –Respondent concedes that there has been a substantial discrepancy with

regard to the extent of the land and that this is a fit case to be sent back for re-trial.

Relying on the judgment reported in 60 NLR page 337 (Brampi Appuhamy Vs. Menis Appuhamy), I am also of the view that a substantial miscarriage of justice had taken place as a result of the learned District Judge not paying due attention to the reduction of the extent of the land, before he took up the matter for trial. In the circumstances, the appeal preferred by the 5<sup>th</sup> / 14(a) Defendant -Appellant is allowed and the judgment and interlocutory decree are set aside with the direction that the Learned District Judge takes appropriate steps under the Partition Law to have the commission issued to the Surveyor General to identify the land in the first instance and then proceed to trial if necessary. There shall be no costs.

**JUDGE OF THE COURT OF APPEAL**

Vkg/-