

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

CA No.410/98 (F)

D.C.Kuliyapitiya No.9026/P

Samarappuli Mudiyansele Gunasekara
Keethalahitiyawa,
Yakwila.

Appellant

Vs.

R.A.Wijith Premalal
Madigepola,
Yakwila.

Respondent

C.A.No.410/98 (F)

D.C.Kuliyapitiya No.9026/P

Before : K.T.Chitrasiri,J.

Counsel : M.C.Jayaratne with M.D.G.Bandara for the
Substituted-Plaintiff-Appellant.

P.M.Gunawardena for the 1st and 2nd Defendant-
Respondents

Argued and
Decided on : 18.02.2013.

K.T.Chitrasiri,J.

This is an appeal seeking to set aside the judgment dated 16/6/1998 of the learned District Judge of Kuliyapitiya. By that Judgment, learned Judge dismissed the plaint dated 07/4/1980.

Learned District Judge had raised two issues which bear the numbers 9 and 10, while writing the judgment. She has answered those two issues in favour of the defendants and then she has dismissed the plaint.

Both counsel concede that a trial Judge has the power to frame issues even while writing a judgment in terms of Section 149 of the Civil Procedure Code. Therefore, nothing is wrong in framing these two issues while writing the judgment.

However, learned Counsel for the appellant brings to the notice of Court that the learned District Judge has answered the first issue affirmatively and accordingly she had decided that the land sought to be partitioned is depicted in plan 1565 dated 21/2/1989 which was marked X at the trial. Having decided so and accepting the corpus without a dispute, she has again raised two issues to determine whether the land sought to be partitioned had been properly identified with reference to a plan.

In fact the plan marked X, is the plan to show the corpus. Therefore, learned District Judge is wrong when she, on her own, framed two issues on the basis that the land to be partitioned was not shown with reference to a plan, after concluding the hearing of the case. Learned Counsel for the defendant-respondent has no submissions to make on this point.

Having considered the above, it is clear that the learned District Judge is wrong when she framed the two issues, in the manner

that it was framed having concluded the trial on the basis of the plan 1565 marked X. Moreover, the parties were not given an opportunity even to make submissions on those two issues framed by the Court itself. Therefore I am of the opinion that it is wrong to dismiss the action on the basis of the answers given to the two issues framed by the judge herself while writing the judgment having answered the first issue affirmatively.

For the aforesaid reasons, I set aside the judgment dated 16/6/1998 of the learned District Judge of Kuliypitiya. However, the learned District Judge who is now functioning as the District Judge of Kuliypitya is free to adopt the evidence that had already been recorded and to deliver the judgment accordingly, if both parties so agree. Appeal allowed. No costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

WC/-