

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

Lokukankanamage Clemant
Harischandra Peiris,
Pushpagara,
Aluthgama.

Plaintiff

C.A. No. 509 / 2000 F

Vs.

D.C. Kalutara No. 3804 / L

Hewawasam Sarukkalige Allen Peiris,
"Vijitha"
No. 3 / 6, Bandaranaike Mawatha,
Katubedda,
Moratuwa.

Defendant

And Now Between

Lokukankanamage Clemant
Harischandra Peiris,
Pushpagara,
Aluthgama.

Plaintiff-Appellant

Vs

Hewawasam Sarukkalige Allen Peiris,
"Vijitha"
No. 3 / 6, Bandaranaike Mawatha,
Katubedda,
Moratuwa.

Defendant -Respondent

BEFORE : UPALY ABEYRATHNE, J.

COUNSEL : H. Vithanachchi with Santha Karunadasa for the
Plaintiff Appellant.

Athula Perera with Hasitha Amarasinghe for the
Defendant Respondent

ARGUED ON : 20.03.2012

DECIDED ON : 06.02.2013

UPALY ABEYRATHNE, J.

The Plaintiff Appellant (hereinafter referred to as the Appellant) instituted an action against the Defendant Respondent (hereinafter referred to as the Respondent) in the District Court of Kalutara seeking inter alia a declaration of title to lot 'A' depicted in Plan bearing No. 346 made by C. S. Jayawickrema Licensed Surveyor. The Appellant in his plaint has further averred that he had become the owner of the said lot 'A' in terms of the decree entered in case No 628/L District Court, Kalutara and the Respondent was forcibly attempting to go through said Lot 'A' in order to gain access to her house situated in Lot 1A in Plan No 1095 which had been made in case No2058/P District Court, Kalutara.

The Respondent in his amended answer pleaded that he has acquired servitude of right of way over said Lot 'A' in Plan No 346 to gain access to Galle Road from her land.

The case proceeded to trial upon 19 issues. The learned District Judge after trial delivered judgment in favour of the Respondent. Being aggrieved by the said judgment dated 25.07.2000 the Appellant has preferred the instant appeal to this court.

It is common ground that the Appellant has secured his title to lot 'A' depicted in Plan No 346 upon the decree entered in case No 628/L District Court, Kalutara. It has not been subject to an appeal. The Respondent has not claimed title to said Lot 'A'. Hence it is safe to conclude that the Appellant was the lawful owner of the said Lot 'A' and he is entitled to a decree of declaration of title.

Now it has to be considered that whether the Respondent has acquired servitude of right of way over the said Lot 'A'. The Respondent's position was that Lot '1A' depicted in aforesaid Plan No. 1095 has been using since 1934 as a road way to enter into Lot '2A' depicted in said Plan No 1095. The Respondent has raised issue No 4 on the said basis. Said Plan No 1095 was the final Plan of Partition made in case No 2058/P, District Court, Kalutara. According to the said Partition Plan Lot 1A, 1B and 1C had been allotted to the plaintiff of the said Partition Action No 2058/P. Also, according to the said Partition Plan Lot 4 was a common reservation for a path 8 feet wide and 13 feet wide at the corner. Also the said Partition Plan bears the fact that the land had been partitioned on 30th October 1975. In the said premise it is unbelievable that the said Lot 1A has been using as a road way since 1934 as claimed by the Respondent.

The Respondent in his evidence stated that since 1945 there was a 10 feet wide road way to come to his house from Galle Road. He further said in evidence that from 1967 Aluthgama Post Office was located at his house and lorries belongs to the Postal Department came to said Post Office through the said

10 feet wide road way. Said evidence of the Respondent has not been proved by the evidence of the Respondent's witnesses. Benedic Perera was a witness called by the Respondent. In his evidence Benedic Perera said that He was the officer in relation to the buildings attached to the Postal Department and Aluthgama Post Office had been located at a private building from 1967 to 1987. He said there was no documentation available in the file with regard to a roadway. He further said that he visited this building in 1990 and there was a road way about 05 feet wide. It is apparent from the said evidence that the witness had no knowledge about a roadway during the period from 1967 to 1987.

Upon an application made by the Respondent a commission had been issued to Wimal Seneviratne, Licenced Surveyor to prepare a plan depicting lot 3 in final plan No 1095 of partition action No 2057. But the Surveyor Seneviratne has admitted in his evidence that he had not gone through the said final Plan No 1095 in preparing his plan to depict said lot 3 in Plan No 1095.

In the said circumstances it appears to me that the learned Additional District Judge has answered the issues without having due consideration of the said evidence led in this case. Therefore I set aside the judgment of the learned District Judge dated 25.07.2000 and allow the appeal of the Appellant with costs. I dismiss the claim in reconvention of the Respondent.

Appeal allowed.

Judge of the Court of Appeal