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

Wickremaarachchige Mallikaka Ranatunga

Udawatta, Batuwana, Niyadurupola.

Substituted Plaintiff-Respondent

C.A.Appeal NO.841/99 F

D.C.Kegalle Case No 3465/L

Vs

1(i) Dewalayage Emalin of

Kumburegama Palambure,

Niyandurupola.

1(ii) Wahumpurage Sunil Premathilaka

Kumburegama Palambure,

Niyandurupola.

1(iii) Wahumpurage Wimalatissa of

Kumburegama, Palambure,

Niyandurupola.

1(iv) Wahumpurage Lionel

Wickremaratne of

Kumburegama Palambure,

Niyandurupola.

Substituted Defendants-Respondents

Wahumpurage Wimalatissa of

Kumburegama, Palambure,

Niyandurupola.

1(iii) Substituted Defendant-Appellant

Before: H.N.J.Perera, J.

Counsel: M.S.M.Kamil for the Substituted 1(iii) Defendant-Appellant

Anura P.B.Herath for the Substituted Plaintiff-Respondent

Argued: 28.06.2013 & 12.07.2013

Written Submissions: 26.04.2013/05.08.2013

Decided: 21.10.2013

H.N.J.Perera, J.

The plaint in this case was filed in August 1990 seeking a declaration of title to a portion of a land described in the schedule to the plaint, ejectment of the defendant from the said portion and for damages and costs.

The plaintiff has in paragraph 2, 3 and 4 in the plaint pleaded title to the land called warellahena in extent 1 acre and 13 perches. It was also pleaded that the defendant-appellant had encroached upon a

portion 0f the said land. In paragraph 5 of the plaint the encroached portion has been described with reference to a plan. The plaintiff marked the plan No 809 as X in evidence and also called the maker of the said document surveyor D.Ratnayake to prove the same.

In the instant case, the plaint contains an averment that the original owner of this land was Wahumpurage Adiliya and after his death Wahumpurage Dina who succeeded him transferred his rights by deed No 10526 dated 17.01.1958 to the plaintiff-respondent.

The defendant-appellant himself claimed title to the said portion of land on a chain of title set out in his answer. The District Judge held in favour of the plaintiff.

The main contention of the Counsel for the defendant-appellant is that without pleading declaration of title to the entirety of the corpus, plaintiff cannot plead title to a part of it and eject the defendant there from. This court observes that the plaintiff in this case has pleaded and proved title to the land described in the schedule to the plaint but has not prayed for a declaration of title to the entire land that is described in the schedule to the plaint. Instead he has prayed that he be declared owner to the portion of land encroached by the defendant-appellant in this case. He has failed to identify the said portion by way of a schedule to the plaint.

It is useful at this stage to consider the provisions of section 41 of the Civil Procedure Code. It states:

"When the claim made in the action is for some specific portion of land, or for some share or interest in a specific portion of land, then the portion of land must be described in the plaint so far as possible by reference to a sufficient sketch, map, or plan to be appended to the plaint, and not by name only."

Section 46 (2) of the Civil Procedure Code states that a court may refuse to entertain a plaint when first filed and return the same for amendment then and there if it is found that the plaint did not state correctly several particulars required by the earlier sections to be specified therein, which includes the provisions of section 41 above – mentioned.

In this case the plaintiff –respondent has complied with section 41 of the Civil Procedure Court by describing the said portion of land with reference to a plan. In paragraph 5 of the plaint the plaintiff has described the portion encroached by the defendant with reference to plan No 809 marked as X in evidence.

It is submitted on behalf of the defendant that the judgment is contrary to the plaint, the evidence of the plaintiff and the surveyor. It is also submitted that the surveyor in giving evidence stated to court that he prepared the plan X by visiting the said land and that plan Y was prepared without visiting the land and also that both plans was made by him by comparing a photocopy of original plan which is not a certified copy by the relevant authority and further that it has not been signed. And further the said two plans X and Y are not similar and even the extent shown are also different and surveyor's evidence in court was very vague and even the learned additional district Judge correctly observed so in the judgment. Therefore it is the contention of the Counsel for the defendant-appellant that the evidence of the surveyor should not have been accepted by court as independent evidence to grant a judgment in favour of the plaintiff.

Therefore the real question this court has to decide in this case is whether the plaintiff-respondent has correctly identified the said portion of land possessed by the defendant–appellant. For this

purpose the plaintiff-respondent has marked and produced two plans X and Y1 made by the surveyor and also had led the surveyor's evidence at the trial. It is to be noted that the learned District Judge has analysed the surveyor's evidence in detail and has come to the conclusion that he cannot rely on the evidence given by the surveyor. The learned judge has stated that the boundaries shown in the schedule to the plaint in fact do not tally with that shown in the two plans and has expressed his doubts as to whether the land described in the schedule to the plaint has been properly surveyed and depicted in the said plans. The surveyor has also stated to court that these plans were made by him by comparing a photocopy of the plan 4098 marked P1 which was not certified. In Gunasekera Vs Punchimenika and others [2002] 2 Sri L.R. 43 Wigneswaran, J has observed that for superimposition purposes Photostat copies are to be avoided since they lack accuracy. The learned trial Judge has observed that the northern boundary in the schedule to the plaint has not been identified either in plan X or Y. The northern boundary in plan 4089 lot No 3 has not been identified in Plan X or Y. And even the western boundary depicted in plan No 4098 lot No 1 too has not been identified either in plan X or Y. In other words the land which the plaintiff sought to obtain declaration of title and ejectment of the defendant has not been properly identified.

Therefore this court is of the view that the plaintiff-respondent in this case has failed to properly identify the portion in dispute which is in the possession of the defendant-appellant, and to prove that the defendant is in possession of a portion of the land depicted in the schedule to the plaint to the satisfaction of court and the learned District judge should have dismissed the plaintiff's action on that ground alone.

An appellate Court is bound to correct errors committed by the trial Judge whilst being mindful of the principle that an Appellate Court should be slow to disturb the finding of a fact by a trial Judge who had the benefit of observing the witness.

In Benmax Vs Austin Motor Co LTD 1955 AELR [Vol 1]327 it was held:

An appellate Court, on an appeal from a case tried before a judge alone, should not lightly differ from a finding of the trial Judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an Appellate Court is in as good a position to evaluate the evidence as the trial Judge, and should from its own independent opinion, though it will give weight to the opinion of the trial Judge.

For the reasons aforementioned I set aside the judgment of the District Court of Kegalle dated 15.09.1999 and dismiss the plaintiff-respondent's action. This appeal is accordingly allowed. I make no order as to costs.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL