

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

C.A. Application No.439/98-F

DC Homagama Case No. 658/L

AND BETWEEN

1. Gamage Kusumalatha Perera
 2. Gamage Swarnalatha Perera
- Both of 486, Makumbura
Pannipitiya.

Defendants- Appellants

Vs

1. Pushpa Damayanthi Ranasinghe
Of No. 43, Makumbura Road,
Pannipitiya.
2. Anoma Priyanthi Ranasinge
Of "Gemini", Thanthrimulla
Panadura.
3. Jayasiri Padma Kumara Ranasinghe
Of No. 43/3, Makumbura Road,
Pannipitiya.
4. Chandrani Jesmi Ranasinghe
Of No. 76/1, Anderson Road,
Kalubowila, Dehiwala.

Substituted Plaintiffs-Respondents

BEFORE

: Deepali Wijesundera J.

M.M.A. Gaffoor J.

COUNSEL

: Nihal Jayamanna PC with

Noorani Amarasinghe for the

Defendants-Appellants

Anuruddha Dharmaratne with

Shiran Smaranayake for for the

Plaintiff-Respondents.

ARGUED ON

: 06th July, 2015.

DECIDED ON

: 27th November, 2015.

Deepali Wijesundera J.

The plaintiff respondents instituted an action against the defendant appellants seeking a declaration of title to the land described in the schedule to the plaint and ejectment of the defendant appellants. After trial the learned District Judge has delivered the judgment on 03/03/1998. Being aggrieved by the said judgment the defendant appellants have filed the instant application.

The appellant's learned counsel argued that the case in the District Court commenced before one District Judge and concluded by

another. When the learned District Judge who delivered the judgment heard the case on 26/06/1997 it was recorded that the parties agree to adopt the evidence so far given and to proceed with further trial. The appellants stated that the defendants were unrepresented by counsel on that day and though it was recorded that both defendants are agreeing to adopt evidence and are signing the record only one defendant has signed the record (*JE of 26/06/97*). The surveyor's evidence had been recorded that day and he has not been cross examined by the defense. Thereafter the plaintiff has closed his case and the defense was called on the same day. The second defendant has given just one sentence of evidence and has been cross examined by the plaintiff's counsel. The defendant's case was concluded.

The argument of the appellant was that the district Judge should have given a date for the defendants to cross examine the expert witness the surveyor and granted a date for the defendants case which is the usual procedure in any civil case. The appellant stated that the District Judge has not given thought to the maxim "*Actus Curie nimenem Gravabit*".

The appellant cited the judgment in **Manamperi Somawathie and buwaneswari 1990 1 SLR 223** and stated that when there is a

proxy given to an attorney-at-law it remained valid until the party dies or till the action is concluded by judgment therefore all acts in a trial should be done by the Attorney. He also cited the judgments in **Seelawathi vs Jayasinghe (1985) 2 SLR 266** and also **Jinadasa and another vs Sam Silva and others (1994) 1 SLR 232** which have no relevance to the instant application.

The appellant also stated the trial in the District Court was postponed several times due to various reasons for which they were not responsible. (*JE 25 to JE 35*).

The appellant further argued that the action filed by the respondents in an action for declaration of title and ejectment and that he has to prove his title to the land and if he fails to do so the action should necessarily fail and that the plaintiff (the defendant) had nothing to prove until the plaintiff (defendant) had discharged his burden of proof and cited the judgment in **Loku Menika and others vs Gunasekera (1997) 2 SLR 287**. It was stated in this above judgment that the plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must in court prove that title against the defendants in the action. The defendant need not prove anything still less his own

title. The same principle was discussed in **D.A. Wanigaratne vs Juwanis Appuhamy 65 NLR 167**.

The counsel for the plaintiff respondents in his submission stated that on 26/06/1997 the defendants agreed to the adoption of proceedings and both defendants have signed the case record and that though they said only one defendant signed the record it is not so on perusal of the case record. (in page 28 of the Appeal Brief). The respondents stated the appellants never objected to this adoption of the proceeding in the district Court and that in their submission after the conclusion of the trial no mention is made on this.

The respondents citing the judgment in **Malani vs Somapala and another 2000 (2) SLR 196** stated that if a party wishes to contradict the record he ought to file the necessary papers before the court of first instance and thereafter canvass the order before the Court of Appeal. The respondents stated that the appellants having willingly taken part in the legal machinery now cannot object to the conduct of the trial. He stated that the appellants said position is merely an afterthought and that he is estopped from taking up any objection due to their own conduct.

On perusal of the journal entries of the District Court case record It can be seen that on 26/06/97 the day further hearing of the District Court case was resumed the defendants have agreed to adopt the proceeding and one defendant has signed the case record the other defendant has not signed but both have agreed to adopt the proceedings. As stated by the appellants the defendants were not represented by counsel. Surveyor's evidence has gone in unchallenged. The appellants in their final submissions have not taken up the position that the defendants were unrepresented by counsel when the defendants gave evidence. In their submissions dated 29/07/1997 no mention is made to this effect.

The appellants stated that the title deeds of the respondents were not proved in the District Court. It is not so, the learned District Judge in her judgment refers to the said deeds which were proved by calling evidence. The District Judge did not fail to examine the title of the plaintiff respondents concentrate on the weakness of the defense as stated by the appellants. The learned District Judge has carefully analysed the title of the plaintiff respondents.

Most of the judgments cited by the appellants in support of their arguments are totally irrelevant to the instant application. The appellants

having neglected their rights to defend their title is now trying to bring in new material to justify their negligence. The maxim "*Actus Curie Nimenem Gravabit*" - An act of the court shall prejudice no man applies to the plaintiffs as well as the defendant. The negligence of the defendant should not prejudice the rights of the plaintiff. In the instant case the plaintiff has given evidence and called expert evidence as well as documentary evidence some of which has gone in unchallenged by the defense which is not the plaintiff's fault.

For the afore stated reasons I see no reason to allow the application of the appellant. The appeal of the appellant is dismissed with costs fixed at Rs. 10,000/=. The judgment of the District Court dated 03/03/1998 is affirmed.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gafforr J.

I agree.

JUDGE OF THE COURT OF APPEAL