

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

**C.A. No. 880/97(F)**

**R. Nelson Seneviratne**

**Detawala, Kegalle**

**D.C.Kegalle No. 23453/P**

**Plaintiff Appellant**

**vs**

**T.A.S.Sampath Sugathadasa**

**50 Detawala, Kegalle**

**Substituted- 3<sup>rd</sup> Defendant**

**Respondent**

**V.Padmini Nissanka**

**Dattawala, Kegalla**

**2(A)(A) Defendant Respondent**

**N. D. Nissanka**

**Dattawala, Kegalla**

**2(A)(B) Defendant Respondent**

**G.P. Nissanka**

**Detawala, Kegalla**

**2(A)(C) Defendant Respondent**

**BEFORE : Deepali Wijesundera J.,  
M. M.A. Gaffoor J.,**

**COUNSEL :** Ershana Ariaratnam for the Plaintiff-Appellant  
Bimal Rajapakse with D.Kuruppu for the 3rd Defendant  
Respondent  
Nizam Kariapper with M.I.M .Iynullah, M.C.M.Nawaz,  
S.M.S.S.Sanfara for the sub.2(A)(A),2A(B), 2A(C) Defendant  
Respondents

**ARGUED ON :** 07.09.2015

**DECIDED ON :** 03.02.2016

**Gaffoor J.,**

The Plaintiff Appellant (hereinafter referred to as “the Appellant”) filed this action seeking to partition the land called “Kukuldeniyahena” alias “Alawathupitihahena” bounded on the North by Alawatupitihahena, East by Punchirala Aranthikawa Kukuldeniya hena, South by a Kumbura Kukuldeniya Asswedduma Ela and West by Ranhamy Pedige Hena, which land is morefully described in the schedule to the Plaint.

After the plaint has been filed, a lispens has been registered in Folio No.151/194B at the Land Registry, Kegalle (see J.E of 17.06.1982). This is the same folio in which the prior registration had been effected in respect of the land described in the schedule (see page 304 of the appeal brief).

A commission has been issued to Surveyor K.K. Baddewela, whose plan No. 4359 dated 3.12 1982 and his report are filed of record marked “X” and X1”

respectively. In the said Plan X, the land morefully described in the schedule to the Plaint has been clearly identified by the Surveyor as the land called Kukuldeniyahena alias Alawatupitiahena. This is the land which the Plaintiff seeks to partition between him and the 1<sup>st</sup> Defendant.

Originally the Plaintiff has filed this action against the 1<sup>st</sup> Defendant who is named as Ilangakone Pathiranalage Dilini Seneviratne. When land was surveyed on 26.11.1982, one Nissanka Arachchilage Ukkubanda appeared before the Surveyor and claimed that he is in possession of the land and he who started plantations on it and he is the owner of Lots 1, 2 and 3 in Plan "X". The said Ukkubanda was added as the 2<sup>nd</sup> Defendant, who has filed his Statement of Claim on 25.04.1988 in which he has described a land totally different from the land depicted in Plan X. When he filed an amended Statement of Claim on 11.05.1987, no schedule is given in the amended Statement of Claim.(see page 63 and 65 of the appeal brief).

The said Ukkubanda, in his original Statement of Claim has given a schedule of a larger land and asked for a survey of this larger land. Upon his application a second commission has been issued to Surveyor A.C.P. Gunasekera, whose plan and report are marked as "Y" and "Y1" and filed of record. According to the Report "Y1", the Surveyor states that the land was surveyed on the boundaries shown by the 2<sup>nd</sup> Defendant.

After the larger land has been surveyed and the Plan "Y" and Report "Y1" are filed of record, the Court must have made order for a lispens to be registered in respect of the larger land.

Section 19(2)(b) of the Partition Law states :

*"(b) where any Defendant seeks to have a larger land made the subject matter of the action as provided in paragraph (a) of this sub-section, the Court shall specify the party to the action by whom and the date on or before which an application for the registration of the action as a lispens affecting such larger land shall be filed in Court."*

Paragraph (c) of sub-section (2) of Section 19 states :

*"where a party specified under paragraph (b) of this sub-section fails to comply with the requirements of that paragraph, the Court shall make order rejecting the claim to make the larger land the subject matter of this action."*

Upon a perusal of the appeal brief, the above procedure has not been followed. It appears that only the land described in the plaint has been registered as a lispens and not the land described in the Statement of Claim of the 2<sup>nd</sup> Defendant, which is depicted as lots 1 and 2 in Plan "Y" and is not registered as a lispens. This omission vitiates the final and conclusive character of the decree entered in this case.

The partition under the Partition Act No. 16 of 1951 and under the present Partition Law No. 21 of 1977, in both statutes, registration of lispens

under Section 13 is compulsory. When the 2<sup>nd</sup> Defendant seeks a larger land to be partitioned as shown in his Statement of Claim, his statement should be treated as a Plaint under the Partition Law and he should file a lispensens as stated in Section 6 of the Partition Law No. 21 of 1977.

In this case the Plaintiff has not amended his Plaint to include the land claimed by the 2<sup>nd</sup> Defendant as the corpus to be partitioned. Nor the court ordered a lispensens to be filed by the 2<sup>nd</sup> Defendant in respect of the land sought by him to be the land that is to be partitioned. Hence, the trial Judge has been misdirected himself as to the procedure followed in this case under the law. Failure to register a fresh lispensens is a grave omission.

Section 48(1) of the Partition Law describes thus : *“omission or defect of procedure shall include ;*

- a) Failure to issue summons on a party;
- b) Failure to substitute the heir or legal representative of a party who died;
- c) Failure to appoint a guardian ad litem for a minor who is a party;

Notwithstanding the omission of failure mentioned above, the finality of the decree is conclusive against any party. But failure to register a lispensens is not a failure or defect coming under the above omissions or failure.

In the case of Uberis vs Jayawardena, 62 NLR 217, Basnayake C.J., held that *“an action in respect of one land cannot be converted into an action in respect of another land by an amendment of pleadings.”*

*Pulle J., observed: “when a plaint in a partition action is amended so as to substitute a new corpus for the one described in the first plaint, a fresh lispensens would be necessary.”*

As stated above, when the lispensence affecting the larger land is not tendered by the 2<sup>nd</sup> Defendant for due registration, the Court should have acted under Section 19(2) of the Partition Law and rejected the application for partition of a larger land and proceeded with the plaint and the Plan “X” filed in respect of the land described in the Plaint, which is depicted as 1, 2 and 3 in Plan “X” of Surveyor Baddewela. The Court should have excluded the Plan “Y” and the Report “Y1” and investigated the title of the Plaintiff and the 1<sup>st</sup> Defendant and entered judgment accordingly. The 2<sup>nd</sup> Defendant should have been ordered to seek his remedy in a different action, which the trial Judge failed to do. Non observation of the essential steps render the judgment entered in this case void and I therefore set aside the judgment entered in this case. Even with hardships that have to be undergone by the parties, the correct procedure should be adopted in this case.

**I allow the appeal and send the case back to the District Court for trial to proceed from after filing of the Plan "X".**

**Appellant entitled to costs in the action.**

**JUDGE OF THE COURT OF APPEAL**

**Wijesundera J.,**

**I agree.**

**JUDGE OF THE COURT OF APPEAL.**