

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

C.A. No. 209/99(F)

K. M. Podinona

D.C.Bandarawela No. 150/L

Palugama, Keppitipola

Plaintiff

Vs

1. K.G.Podiappuhamy (decd)

1a. H.M.Kumarihamy and 6 others

2. K. G. Chandradasa

All of Palugama, Keppitipola

Defendants

AND NOW BETWEEN

1a. H.M.Kumarihamy and 6 others

K.G. Chandradasa

All of Palugama, Keppitipola

Defendant-Appellants

Vs

K. M Podinona

Palugama, Keppitipola

Plaintiff-Respondent

BEFORE Deepali Wijesundera J.,

M. M. A. Gaffoor J.,

COUNSEL Nilusha Dheeraseskera for the 1(a) to 1(f) and 2<sup>nd</sup> Defendant  
Appellants

Respondent is absent and unrepresented

ARGUED ON : 16.03.2016

DECIDED ON : 10.06.2016

Gaffoor J.,

The Plaintiff has filed this action for a declaration of title to the land morefully described in the schedule to the Plaint and for ejectment of the Defendants therefrom and for damages. The details of the devolution of title is given by the Plaintiff in her amended Plaint dated 13.12.1984.

According to the Plaintiff's pedigree, the subject matter of the action comprising of 3 lots, bearing Nos. 449, 450 and 45, which were originally belonged to the State and later was granted to three persons, namely, Hitihamy Mudiyansele Kuma, Hitihamy Mudiyansele Banda and Hitihamy Mudiyansele Ranmenika respectively ( P1).

The said H.M. Kuma (owner of Lot 449) and her 5 children sold and transferred their rights together with H. M. Banda (owner of Lot 450 also transferred his rights) by Deed No. 26439 dated 18.10.1967 to the Plaintiff. Ranmenika who was entitled to Lot 451 alleged to have transferred her lot also to the Plaintiff by deed No. 433 dated 10.12.1972 and thus the Plaintiff has

become entitled to the entirety of the corpus, which is morefully described in the schedule to the Plaint. The Plaintiff, further says in her Plaint that in June 1973, the original Defendants unlawfully and forcibly entered into the land in dispute and have been in possession thereof to the loss and damage of the Plaintiff and therefore she claimed Rs. 600/- as damages per month with other relief. The Defendant while denying the averments in the Plaint state in their amended answer dated 15.01.1981 that the land in dispute belonged to their mother by Deed No. 4506 dated 9.3.1930 and after her death the Defendants became entitled to the said land which they are possessing since March 1930 upto now. The Defendants categorically deny that (i) they forcibly entered into the land in June 1973 and (ii) that deed No. 433 referred to in the Plaint is a genuine deed and state that the signature appears in the deed is a forgery and therefore ask for dismissal of the Plaint and the cancellation of Deed No. 433 on the ground of forgery.

According to the documentary evidence led in this case, the Plaintiff Podi Nona became entitled to the subject matter of the action by two deeds, namely, Deed No. 26439 dated 18.10.1967 (P2) and Deed No. 433 dated 10.12.1972 (P3). Out of these two deeds, she has bought 39 perches (Lots 449 and 450) by P2 and 14 perches by P3, both comprising an extent of 53 perches (or 1 rood and 13 perches). But the schedule to the Plaint speaks of only 39 perches and not 53 perches. Plan No. 194 dated 24.7.1992 made by P.W. Nandasena, Licensed Surveyor, marked P4, describes Lot 1 as the land in dispute and the extent is shown as 39 perches. Hence, it is clear that the land in dispute contains only 39 perches and not 53 perches.

Although the Plaintiff became entitled to 39 perches by Lots 449, 450 by deed P2, yet she became entitled only to 25 perches because according to P1, the extent of 449 is 12 perches and the extent of 450 is 13 perches. Lot 451 is 14 perches, when this is added to 449 and 450 makes the total extent 39 perches. As such the land described in the schedule to the Plaint has been correctly identified by the surveyor as Lot 1 in his Plan marked P4.

The primary allegation against the execution of Deed No.433 (P3) by the Defendants was that it was not signed by their mother Ranmenika and it was a forgery. The transferor in this deed is Ranmenika and the transferor has put her thumb impression (P3 ) on it. The Notary, Malwattage Jayarane Peiris, in her evidence says that "I do not know the executants but I knew both witnesses who said they know the executant Ranmenika." This evidence though not contradicted by the Defendants, does not prove the execution of the Deed No. 437 in terms of Section 68 of the Evidence Ordinance.

Since the Notary has said that she did not know the executant Ranmenika personally. the question arises whether the thumb impression on P3 is that of Ranmenika or not. If that is not the thumb impression of Ranmenika, then the execution is in doubt.

In the case of Lawrence Marian vs Soosai Jesuthasan, 54 CLW 31, Sinnathamby J., said "A document affecting land is executed before a Notary to comply with the provisions of the Ordinance No. 7 of 1840, and that fact alone does not make the Notary an attesting witness. To become an attesting witness a Notary must personally know the executant and be in a position to bear

witness to the fact that the signature on the deed executed before him is the signature of the executant.”

According to the evidence led in this case, Ranmenika who is the executant in Deed No. 433 was unable to walk and was bed-ridden due to paralysis. Therefore she could not have gone to the Notary’s office to sign the Deed (P3). As it is, there is suspicion whether the thumb impression appears in P3 , can be that of Ranmenika. Hence, Deed No. 433 (P3) cannot be taken to have been duly executed in terms of section 68 of the Evidence Ordinance.

Deed No. 26437 (P2) has not been proved. When this Deed was produced, it was produced, it was admitted subject ‘subject to proof’. The Plaintiff has not taken any steps to prove this deed. Therefore this Deed stands not proved, and thus the Plaintiffs title deeds P2 and P3 are not sufficiently proved to have passed title to the Plaintiff.

In a rei-vindication action the Plaintiff must have title. Once the Plaintiff proves his title satisfactorily only the burden will shift on to the Defendant to prove his possession lawfully. If the Plaintiff fails, his action to be dismissed however, weak the Defendant’s case is to be.

I hold, therefore that the Plaintiff has failed to prove her title and therefore her action stands dismissed.

It is to be noted that since the lodging of the appeal, the Plaintiff was absent and not represented though several notices were issued by the registry of this Court. Taking the position into account I do not want to impose any cost

in this case. I allow this appeal and set aside the judgment of the lower court without costs.

**JUDGE OF THE COURT OF APPEAL**

**Wijesundera J.,**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**