

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

In the matter of an Appeal to the Court of Appeal
of the Democratic Socialist Republic of Sri
Lanka.

Yaddehi Gedara Jayadara (Deceased) of
Guruwela, Ukuwela, Matale.

PLAINTIFF

C.A. Case No. 1323/1999 (F)

D.C. Matale Case No. 4163/L

Damunugaha Kumbure Gedara Gunapala of
Gunawela, Ukuwela, Matale.

Substituted PLAINTIFF

-Vs-

1. Pahala Kodituwakkukara Gedara Dingiri
2. Pahala Kodituwakkukara Chandrasena
3. B.G. Kiribandu
4. B.G. Gamini

All of Gunawela, Ukuwela, Matale.

DEFENDANTS

AND NOW BETWEEN

1. Pahala Kodituwakkukara Gedara Dingiri
(Deceased)

1A. Nuwarapaksha Gedara Chandrawathie

No. 29, Guruwela North,

Ukuwela.

IB. Pahala Kodituwakkukara Gedara Chandima Sandamali Chandrasena of Katugaha, Pokunugala, Ussapitiya.

1C. Pahala Kodituwakkukara Gedara Sampath Sri Chandana Kumara Kodituwakku

No. 29, Guruwela North,

Ukuwela.

ID. Pahala Kodituwakkukara Chandrasena (Deceased) of Guruwela, Ukuwela, Matale.

2. Pahala Kodituwakkukara Chandrasena

2A. Nuwarapaksha Gedara Chandrawathie

No. 29, Guruwela North,

Ukuwela.

2B. Pahala Kodituwakkukara Gedara Chandima Sandamali Chandrasena of Katugaha, Pokunugala, Ussapitiya.

2C. Pahala Kodituwakkukara Gedara Sampath Sri Chandana Kumara Kodituwakku

No. 29, Guruwela North,

Ukuwela.

2D. Pahala Kodituwakkukara Gedara Ishara Chathuranganie Chandrasena

No. 29, Guruwela North,

Ukuwela.

DEFENDANT-APPELLANTS

-Vs-

Damunugaha Kumbure Gedara Gunapala of Gunawela, Ukuwela, Matale.

Substituted PLAINTIFF-RESPONDENT

1A. Yaddahi gedara Jayawthahie

1B. Damunugaha Kumbure Gedara Neranjala
Niroshanie

1C. Damunugaha Kumbure Gedara Shyamalie
Dharshika

1D. Damunugaha Kumbure Gedara Nayani
Prabodini

All of No. 100/2, Guruwela North, Ukuwela.

1A to 1D Substituted PLAINTIFF-
RESPONDENTS

3. B.G. Kiribandu

4. B.G. Gamini

Both of Guruwela, Ukuwela, Matale.

3RD & 4TH DEFENDANT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Upendra Walgampaya for the 1A to 1D & 2A to
2D Defendant-Appellants.

1A to 1D and 2A to 2D Defendant-Respondents
absent and unrepresented.

Argued on : 07.09.2015 & 13.01.2016

Decided on : 29.05.2017

A.H.M.D. Nawaz, J.

The Original Plaintiff (now deceased) instituted the present action by Plaint dated 18.06.1990 against the now deceased 1st and 2nd Defendants seeking, *inter alia*, a declaration that the Plaintiff is a co-owner of the land described in the schedule to the

Plaint and that he is the owner of the premises and cultivation thereon; ejectment of the 1st and 2nd Defendants therefrom and to be placed in peaceful possession thereof and interim injunction preventing the 1st and 2nd Defendants from causing any loss/damage to the said land and premises.

In the said Complaint it was pleaded, *inter alia*, that:-

- i. one Berakara Gedara Kaluwa being the original owner of the land in suit sold and transferred same to one Berakara Gedara Ukku on Deed No.12496 dated 05.12.1911 attested by S.M.P. Wijayatilake, Notary Public who in turn transferred an undivided ½ share each to one Suramba and one Gunaya on Deed No.11366 dated 20.10.1941 attested by P. De S. Jayawardane, Notary Public.
- ii. the said Gunaya by Deed No. 9144 dated 22.06.1974 attested by A.L. Samarasekera, Notary Public transferred his undivided ½ share to one Asilin who by Deed No. 9387 dated 04.03.1974 attested by A.L. Samarasekera, Notary Public transferred same to the Plaintiff.

The Plaintiff's position therefore is that he had been an owner of an undivided ½ share in the subject-matter when the 1st and 2nd Defendants unlawfully entered the said Land and cut down a breadfruit tree. The Plaintiff also pleaded that the said dispute was referred to the Primary Court of Palapathwela in Case No. 2872 and the 1st and 2nd Defendants were placed in possession of the subject-matter. The Plaintiff described the subject-matter of the action as being in an extent of about five nelliess *kurakkan* sowing.

At the interim injunction inquiry, the 1st and 2nd Defendants filed their Statement of Objections dated 03.07.1990 and stated, *inter alia*, that they have no dispute with regard to the land described in the schedule to the Complaint but that the Plaintiff is in fact disputing the Defendant's right to the land described in the schedule to the Statement of Objections which the Defendant claims. The said land of the Defendants is in extent 5 *pelas* paddy sowing. The Plaintiff later chose not to pursue the application for an interim injunction - vide J.E. No. 9 dated 15.01.1991 at page 33.

By an answer dated 02.04.1991, the 1st and 2nd Defendants took up the position that although the Plaintiff was entitled to an undivided ½ share in the land described in the schedule to the Plaint, that said land was not possessed by the 1st and 2nd Defendants but possessed by one Kiripuncha and one Gamini Hemachnadra. The 1st and 2nd Defendants pleaded that they claim the land described in the aforesaid Statement of Objections.

At the trial which began on 16.09.1998, six admissions and eight issues were recorded. It was admitted, *inter alia*, that the Plaintiff is the owner of an undivided ½ share of the land described in the schedule to the Plaint and that the 3rd and 4th Defendants possessed Lot A of Plan No. 4023 dated 19.02.1998 prepared by M. Rajasekaram, Licensed Surveyor.

The 1st and 2nd Defendants' position was that the land surveyed by the Court Commissioner was not the land described in the schedule to the Plaint, but a completely different land owned and possessed by the Defendants.

Accordingly the main matter for determination is as to whether Plan Nos. 2909 and 4023 depict the land described in the schedule to the Plaint. Therefore the determination of issue No.3 which reads as follows is crucial to the present action:-

එකී බෙදා වෙන්කරගෙන පැමිණිලිකර, විසින් බුක්ති විඳගෙන එන ලද එකී ඉඩම් කොටස එම. රාජසේකරම් මිනින්දෝරු මහතා විසින් මැන සාදන ලද අංක 2909 සහ 1994.04.22 වන දින දරණ පිඹුරේ සහ අංක 4023 සහ 1997.02.18 වන දින දරණ පිඹුරේ උතුරු මායිමේ සිට පරණ ගම්සනා පාර දක්වා රතු ඉරෙන් ලකුණුකර ඇති ඉඩම් කොටස බුක්ති විඳගෙන ආවේ ද?

The substituted 1A Plaintiff, one Tissa Bulana (Officer of the Primary Court of Palapathwela) and Murugaiya Rajasekaram, Licensed Surveyor testified marking in evidence documents P1 to P7. The 2nd Defendant testified for the 1st and 2nd Defendants' case. The 3rd and 4th Defendants did not file an answer, call any oral evidence or tender documentary evidence.

After the conclusion of the trial, the learned District Judge of Matale delivered his judgment dated 16.07.1999 answering the issues in favour of the Plaintiff and granted the reliefs prayed for in the Plaint. It is against the said judgment of the learned District Judge of Matale that the 1st and 2nd Defendants have preferred this Appeal to this Court. It has to be noted that the Substituted Plaintiffs had been absent and unrepresented before the Court notwithstanding notices on them.

The main contention of the 1st and 2nd Defendants is that Surveyor Rajasekaram by his commission plans has failed to depict the land described in the schedule to the Plaint, but instead depicted the 1st and 2nd Defendants' land. Therefore if judgment and decree are entered on the basis of the said plans of Surveyor Rajasekaram, the 1st and 2nd Defendants will be dispossessed from their own land. This has been the argument that was run before this Court.

This Court bears in mind the settled principle of law that 'in a *rei vindicatio* action the burden is on the Plaintiff to establish the title pleaded and relied on by him. The Defendant need not prove anything'-see *Dharmadasa v. Jayasena* [1997] 3 Sri L.R. 327. It is incumbent on the Plaintiff to establish title to the lands depicted in the said Plans Nos. 2909 and 4023. In fact it was De Kretser J. who stated in *Mrs J.M.A. Morais v. Mrs F. Victoria* 73 NLR 409 at 4417:

“The right to possess (which is one of the rights subsumed in the conception of ownership) implies the right to vindicate – i.e. to recover possession from a person who possesses without title to possess derived from the owner.”

In fact the learned Judge further stated that that the cause of action in a *re vindicatio* action is the trespass which has resulted in Plaintiff being kept out of property of which he is the owner, and which may have caused him consequential loss.

Although the Plaintiff pleaded a long pedigree, at the trial the Plaintiff only marked the deed upon which the Plaintiff purports to have received title - i.e. Deed No. 9387 dated 04.03.1974 attested by A.L. Samarasekera, Notary Public marked ~~ex~~1-see page 238 of

the appeal brief. So the corollary follows- the Plaintiff did not make an attempt to prove the title pleaded. Some salient points that arise are the following.

- i. Although the plaintiff's evidence is that his land extends up to the Gamsabawa Road to the north, the Gamsabawa Road is in fact to the south of the land depicted in Plan No. 2909.
- ii. The land depicted in Plan No. 2909 is substantially smaller than five nellies *kurakkan* sowing and is in fact closer in size to the 1st and 2nd defendant's land.
- iii. The boundaries of Plan No. 2909 and the schedule to the Plaint do not tally.

The above salient arguments will be gone into in turn.

Although the plaintiff's evidence is that his land extends up to the Gamsabawa Road to the north, the Gamsabawa Road is in fact to the south of the land depicted in Plan No. 2909

The schedule to the said Deed marked ~~ex~~1 describes a land in extent five nellies *kurakkan* sowing. The boundaries in the said schedule are as follows:-

- | | |
|-------|---|
| North | - by Gangagedera Hena Mala Ela |
| East | - by the limit of the filed belonging to Diwalegedera Kaluwa |
| South | - by the Agala on the limit of the land belonging to Kahallegedera Kiriya |
| West | - by Gamsabawa Road |

The Court draws its attention to the Plan No. 2909 at page 242 of the appeal brief. From the said Plan No. 2909 it is clear that that the Gamsabawa Road is to the south of the land depicted therein.

The Plaintiff's position in evidence is that Plan No. 2909 depicts his land and that the land extends up to the Gamsabawa Road to the North. This evidence has to be contrasted with the testimony of 1A Substituted Plaintiff's Evidence in chief at page 105 and 106 which reads as follows:-

“මුලින් මට මතකයි ගරු අධිකරණයේ නියෝගයක් පිට වම්. රාජසේකරම් මහින්දේරු මහතා විසින් ඉඩමට ගිනිත් අපේ ඉඩම මැන්නා. රාජසේකරම් මහතා විසින් මැන සාදන ලද අංක 2909 සහ 1994.04.29 වන දින දරණ පිඹුරේ පෙන්වා තියෙනවා කට්ටි අංක ඒ බී සී වගයෙන් එම පිඹුර පැ2 වගයෙන්ද ඊට අදාළ වාර්තාව පැ3 වගයෙන්ද ලකුණු කර ඉදිරිපත් කරනවා.....මම ඉස්සරලා පැ2 දරණ පිඹුරේ මගේ ඉඩම වගයෙන් පෙන්වා තියෙන ඉඩම පැරණි ගම් සතා පාර දක්වා උතුරු පැත්තට තියෙනවා.”

Thus one could see the contradictory positions. The 1A Substituted Plaintiff has taken up the contradictory position that the Gamsabawa Road is to the west according to the schedule to the Complaint and Deed marked **පැ1**; that the Gamsabawa Road is to the south according to Plan No. 2909 marked **පැ2** and that the Gamsabawa Road is to the north in his own evidence at page 106. This does not inspire confidence in the testimony of a witness who seeks to vindicate title. There is inconsistency *per se* in the plaintiff's case.

The land depicted in Plan No. 2909 is substantially smaller than five nellies *kurakkan* sowing and is in fact closer in size to the 1st and 2nd defendant's land

In *Ratnayake and others v. Kumarihamy and others* [2002] 1 Sri L.R. page 65 at page 81 which was affirmed in appeal - [2005] 1 Sri L.R. 303 the Court of Appeal and the Supreme Court set out the schedule by which the old Sinhala land measurements can be computed by the modern day land measurements. By the said schedule five nellies *kurakkan* sowing would approximate to one acre and one rood (A.1 R.1 P.00).

However, the land depicted in Plan No. 2909 marked **පැ2** (page 242) depicts a land which is only one rood and twenty nine point six zero perches (A.0 R.1 P.29.60). This shows that this extent is a little under 1/3 the size of five nellies *kurakkan* sowing. It was strenuously contended by Mr. Upendra Walgampaya Counsel for the 1A to 1D and 2A to 2D Substituted Defendant-Appellants that this substantial difference in extent goes to show that the land depicted in Plan No. 2909 marked **පැ2** (page 242) is not the land of the Plaintiff.

The attention of Court was also drawn to items 10, 11 and 11A of the report to the said Plan No. 2909 which is marked as පැ3 (page 244) which reads as follows:-

10. මෙම ඉඩමේ උතුරු දිසාව (B) මිශ්‍ර වගාවන් මසය වත්තක් වන අතර දකුණු දිසාව (C) හේ වත්තක් වේ මෙම කොටස් දෙකම දැනට විත්තිකරුවන් භුක්ති විඳින බව පැමිණිලිකරුගේ නියෝජිත කියා සිටී.
11. පැමිණිලිකරුගේ නියෝජිත පෙන්වා දුන් ඉඩම මෙම නඩුවට අදාළ කොටසක් නොවන බවත් එමඉ ඩම ඇත්තේ වෙන තැනක බවත් මෙම නඩුවේ විත්තිකරුවන් කියා සිටී.
- 11A. මෙම ඉඩමේ ප්‍රමාණය කොමස්තේරුවේ පර්චස් 80 ක් පමණ (කුරක්කන් හැලි 5ක්) උසාවි කොමසාරිස් කියා තිබූ නමුත් මැනුම අනුව තිබෙන්නේ පර්චස් 69.6 ක් වේ.

Thus upon a perusal of the Surveyor's Report marked පැ3, it is clear that the 1st and 2nd Defendants' position right throughout was that the wrong land had been surveyed and the Surveyor himself has noted the substantial disparity in the extents. Surveyor Rajasekaram confirms this position in his oral evidence-see page 130 of appeal brief.

One has now to contrast the schedule of the 1st and 2nd Defendants' Statement of Objections at page 79. The said schedule describes the 1st and 2nd Defendants' land as being in extent one *pela* paddy sowing. One *pela* paddy sowing according to modern measurements is approximately two roods and twenty perches (A.0 R.2 O.20). Thus the argument of Mr. Upendra Walgampaya that this extent is closer to the land depicted in Plan No. 2909 resonates with the case put forward by the 1st and 2nd Defendants.

The 1A Substituted Plaintiff under cross-examination at page 113 further contradicts the position with regard to the extent by stating that the Plaintiff's land is only 20 perches. The said evidence which is at page 113 reads as follows:-

- ප්‍ර - තමුන් මෙම ඉඩම දන්නවාද?
- උ - ඔව්
- ප්‍ර - ඒ ඉඩමේ තම මොක්කද?

උ - බොරලුවේහේන

ප්‍ර - ඉඩමේ ප්‍රමාණය?

උ - පර්ච්ඤි 20 ක් පමණ ඇති

ප්‍ර - පැරණි විදියටද?

උ - ඔක්කොම කරන්නන් නැලි 5ක් නොබෙදූ 1/2 ක් චිත්තිකරුවන්ට අයිති. අනික් පංශුව අපිට අයිති.

Upon a consideration of all this evidence, I hold that the Plaintiff has failed to identify the subject matter properly.

The boundaries of Plan No. 2909 and the schedule to the Plaintiff do not tally.

Mr. Upendra Walgampaya, the Counsel for the 1A to 1D and 2A to 2D Substituted Defendant-Appellants submitted that the boundaries do not tally in the case and this adds a further uncertainty with regard to the identity of the subject-matter. Let me set out the boundaries as set out in Plan No. 2909

North - by Agala

East - by Kahallegedera Kiriya's Agala

South - by Gamsabawa Road

West - by Gangagedera Hena Mala Ela

The aforesaid boundaries do not tally with the boundaries set out in the schedule to the Plaintiff. Surveyor Rajasekaram's evidence at page 133 is quite pertinent in this regard.

ප්‍ර - පැමිණිල්ලේ උපල්ඛණයේ සඳහන් දිසාවන් අනුව තමන් මැනින් ඉඩමේ කිසිවක් දැක්වෙන්නේ නැ?

උ - දිසාව අනුව ගැළපෙන්නේ නැ. පැමිණිලිකරු කීවේ ඉඩම මෙයමයි ඔහු කී අනුව මැන්නා.

It is therefore crystal clear that the directions of the land described in the schedule to the Plaintiff do not tally with the land surveyed and that the Surveyor carried out the survey according to the Plaintiff's wishes. At page 143 he further states that; "මා 2009

දරණ පිඹුරේ මායිම් ගැලපෙන බවක් සඳහන් නොකළේ දිසාවෙන් වෙනසක් තිබෙන නිසා. දිසාවන් ගැලපෙන්නෙන් නැ.”

Conceived in the conspectus of the evidence that has transpired in the case, it is quite apparent that what has been surveyed and depicted in Plan No. 2909 marked **පැ2** (page 242) is not the land described in the schedule to the Plaint and as is apparent if the judgment and decree are entered on the evidence, then the Plaintiff would wrongfully execute the decree against the 1st and 2nd Defendants on the basis of Plan No. 2909 which has wrongly brought in the 1st and 2nd Defendants' land.

In the circumstances I would set aside the judgment of the learned District Judge of Matale dated 16.07.1999 and allow the appeal. I would proceed to dismiss the Plaintiff's action with costs.

JUDGE OF THE COURT OF APPEAL