

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

Kaluwadewage Kulasena

No.64, "Abeyisiri Niwasa",

Kolamunna, Piliyandala.

**Plaintiff- Appellant (Deceased)**

**Case No. C.A. 1291/99 (F)**

**D.C.Panadura Case No.199/P**

**Vs.**

1. Kaluhakuruge Rupawathie  
Fernando alias  
  
Kaluwadewage Rupawathie alias  
Kulasinghage Rupa Nalani,  
  
No.64,"Abeyisiri Niwasa",  
Kolamunna,Piliyandala
2. Kaluhakuruge alias Kaluwadewage  
Karunaratne.

No.64,"Abeyisiri Niwasa",  
Kolamunna,Piliyandala

**Power of Attorney Holders of the  
Plaintiff- Appellant (Deceased)**

1. Kaluwadewage Anoma Rathnaseeli  
  
No.9/4, Millagahawatta Batakettara,  
  
Madapatha.
2. Kaluwadewage Swarnaseeli  
  
No. 64, Kolamunna , Piliyandala.

3. Jayasekara Vithanage Chandrani

No.64/1, Kolamunna, Piliyandala

**Substituted Plaintiffs-Appellants**

**-Vs-**

1. Morawakkoralage Piyadasa Fonseka  
Abeykoon

2. Bamunusinghe Arachchige  
Misilinnona (Deceased)

2A. Morawakkoralage Chadradasa  
Fonseka Abeykoon

3. Morawakkoralage Premadasa  
Fonseka Abeykoon

4. Morawakkoralage Chandradasa  
Fonseka Abeykoon

5. Morawakkoralage Chandrani  
Fonseka Abeykoon (Deceased)

5A. Morawakkoralage Chandradasa  
Fonseka Abeykoon

All of:

Diggala Road, Kolamunna, Piliyandala.

**Defendants- Respondents**

**And**

1. Kaluwadewage Ranjani
2. Kaluwadewage Tension Kulathilake
3. Kaluwadewage Thilaksiri

All of: No.71F, Kolamunna, Piliyandala

4. Kaluhakuruge Nirosha Chamali  
Saman Kumari
5. Kaluhakuruge Thushara Chaminda  
Udaya Kumara
6. Kaluhakuruge Shiroma Dilhani  
Lanka Kumari
7. Kaluhakuruge Anusha Nimali Ganga  
Kumari

All of: No.64/1, Kolamunna,Piliyandala

8. Kaluwadewage Abeyrathne

No.63, "Anurambi", Kolamunna,  
Piliyandala

9. Suduwadewage Dayarathne

No.67, Bandipitiya Road,  
Kolamunna,Piliyandala

#### **Respondents**

**Before:** M.M.A. Gaffoor J.

Janak De Silva J.

**Counsel:** Asoka Fernando for Substituted-Plaintiffs-Appellants

H. Pieris for Defendants-Respondents

#### **Written Submissions tendered on:**

Substituted-Plaintiffs-Appellants on 30<sup>th</sup> November 2017

Defendants-Respondents on 23<sup>rd</sup> November 2017

**Argued on:** 23<sup>rd</sup> October 2017

**Decided on:** 26<sup>th</sup> January 2018

**Janak De Silva J.**

The Plaintiff-Appellant (deceased) (hereinafter referred to as "Plaintiff") filed the above action in the District Court of Panadura seeking to partition the land more fully described in the schedule to the plaint.

The Plaintiff claimed that the original owner of the said land was one Morawakkoralalage Madappuhamy Fonseka (hereinafter referred to as "Madappuhamy") who died leaving four children Adwin, James, Maggie and Cornelia who inherited an undivided  $\frac{1}{4}$  share each of the said land. The case of the Plaintiff was that he had acquired the rights of James, Maggie and Cornelia and thereby acquired an undivided  $\frac{3}{4}$  share of the said land while the 1<sup>st</sup> to 5<sup>th</sup> Defendants in the District Court had acquired the rights of Adwin and were entitled to the respective shares set out in the plaint. The Plaintiff, in addition to his paper title, pleaded prescriptive title to an undivided  $\frac{3}{4}$  share of the corpus.

The 2<sup>nd</sup> to 6<sup>th</sup> defendants (hereinafter referred to as "2<sup>nd</sup> to 6<sup>th</sup> Defendants") denied the title of the Plaintiff. They claimed that the land described in the schedule to the plaint is a smaller portion of a larger land 6 paddy bushel sowing extent which amounts to 3 acres. They stated that the larger land was owned by two brothers and that Adwin, James, Maggie and Cornelia were descendants of one brother. It was further claimed that the descendants of the original owners of the larger land had in lieu of their undivided rights possessed divided portions over a long period of time and thereby acquired prescriptive title to the said portions one of which is the land sought to be partitioned.

The learned Additional District Judge of Panadura held that the Plaintiff had failed to establish the pedigree pleaded and dismissed the action with costs. Hence this appeal by the Plaintiff.

The conclusion of the learned Additional District Judge on the pedigree is closely connected to the description of the land and therefore it is important to examine it as described in the schedule to the plaint.

The schedule to the plaint identifies the corpus to be partitioned as follows:

ඉහතකී උපලේඛනයයි

බස්නාහිර පලාතේ කොළඹ දිස්ත්‍රික්කයේ සල්පිටි කොරලේ පල්ලේ පත්තුවේ කොලමුන්න යන ගම පිහිටා තිබෙන, ඊරියගහඹිවිට කියන උතුරට වෙනත් අයිති මෙම ඉඩම කොටසක්ද නැගෙනහිරට ආචාර්යාවන්ත සහ හකුරුගෙවත්තද දකුනට හකුරුගෙවත්ත සහ ඹවිටද බස්නාහිරට ගමයා කුඹුර සහ බටුවන්දරයා කුඹුරද මායිම් වන වී බුසල් හයක පමන වපසරිය ඇති ඉඩමේන් ඇම්. ඩී. ඒ. ගුනතිලක අවසරලත් මිනින්දෝරු තැනගේ අංක 623 සහ 1935.04.29 වෙනි දිනත් දරන ජලානේ ප්‍රකාර බෙදු රැඬි එකකුත් පර්චස් තිස්දෙකක විශාලකම ඇති බිම් කොටස අත්හැර ඉතිරි කොටස වූ

ඊරියගහඹිවිටය කියන ඉඩමේ වෙන්වූ කැබැල්ලක් වන එන්. ඒ. ඊ. සිල්වා අවසරලත් මිනින්දෝරු මහතා 1985 දෙසැම්බර්මස 31 වන දින සාදන ලද අංක 240 දරන ජලානේ පෙන්වන ඉඩම වූ උතුරට කලුවාදේවගේ ආම්ස් අයිතිවාසිකම් කියන ඇම්. ඩී. ඒ. ගුනතිලක අවසරලත් මිනින්දෝරු මහතාගේ 1935.04.29 දිනැති හා අංක 623 දරන ජලානේ පෙන්වන ඊරියගහඹිවිටද නැගෙනහිරට දෙවට පාරද දකුනට පාර සහ ලීලවතී ජයතුඹග එස්.ඩී. ඇසලින් සහ කේ. කුලසේන සහ වෙනත් අය හිමිකම් කියන බන්ඩ් පිටියවත්ත සහ බස්නාහිර ගමෙයා කුඹුර සහ බටුවන්තරයා කුඹුරද වන මෙකී මායිම් තුල රැඬි දෙකයි පර්චස් දහ තුනයි දශම තුනක් (අ0 රූ2 ප13.3) විශාල ඉඩම වේ.( මෙම ඉඩම කොලඹ ඉඩම් ලියා පදිංචි කිරීමේ කාර්යලයෙන් එම් 1289/287 දරන පත් ඉරුවේ ලියා පදිංචි වී ඇත)

The said land is shown in the preliminary plan made in this case marked "X" which shows an extent of R.2 P.13.3. This is the same land shown in preliminary plan no. 240(වී12අ) made in D.C. Panadura case no. 19123/P filed by the brother of the Plaintiff Armis Fernando which will be adverted to later. The Plaintiff admits that the larger land called Eriyagahaowita is 6 paddy bushel sowing extent which amounts to 3 acres. The schedule to the plaint states that the corpus sought to be partitioned is the larger land less the land shown in plan no. 623 dated 29.04.1935 (පෑ.2). The extent of land shown in plan no. 623 dated 29.04.1935 (පෑ.2) is A.0 R.1 P.32. Hence if the Plaintiff is correct on the extent of land sought to be partitioned in this action, the total extent of the lands depicted in preliminary plan marked "X" and plan no. 623 (පෑ.2) should be 3 acres. But A.0 R.1 P.32. added to R.2 P.13.3 is only A.1 R.0 P. 5.3 which is only 1/3 of the larger land called Eriyagahaowita leaving nearly 2 acres unaccounted for. It is in this context that the learned District Judge correctly concluded that there are more portions of Eriyagahaowita than what is described in the schedule to the plaint.

The above conclusion is based upon the assumption that the larger land called Eriyagahaowita is 6 paddy bushel sowing extent which amounts to 3 acres. I have previously quoted with approval<sup>1</sup> *Ratnayake and others v. Kumarihamy and others*<sup>2</sup> where the Court of Appeal held that the customary Sinhala system of land measure computed according to the extent of land required to sow with paddy or kurakkan vary due to the interaction of several factors and that in the circumstances it is difficult to correlate sowing extent accurately by reference to surface areas.<sup>3</sup> However, in this case even if allowance is given to this variability, the difference of nearly two acres is too significant to disregard, particularly taking into consideration the circumstances of this case and in D.C. Panadura Case No. 19123/P instituted by Armis Fernando, the brother of the Plaintiff.

It was admitted by the Plaintiff that Armis Fernando filed the said D.C. Panadura Case No. 19123/P against several defendants including the 2<sup>nd</sup> to 6<sup>th</sup> Defendants in this case. The facts of that case impacts on this case both on the identity of the land and in establishing the pedigree.

The schedule to the said plaint (ඒ9) described the land sought to be partitioned in that case as follows:

**ඉහතකී උපලේඛනය**

බස්නාහිර පලාතේ කොලඹ දිස්ත්‍රික්කයේ සල්පිටි කෝරලේ පල්ලේ පත්තුවේ කොලමුන්න යන ගම පිහිටා තිබෙන ඊරියගහඔව්ට කියන උතුරට වෙත අයට අයිති මෙම ඉඩමේ කොටසක් ද නැගෙනහිරට ආචාර්යාවන්ත සහ හකුරුගේවන්නද දකුනට හකුරුගේවන්න සහ ඔව්ටද බස්නාහිරට ගමයා කුඹුර සහ බටුචන්දරයා කුඹුරද මායිම් වන බුසල වපසරිය ඇති ඉඩමෙන් ඇම්. ඩී. ඒ. ගුනතිලක අවසරලත් මිනින්දෝරු නැතගේ අංක 623 සහ 1935.04.29 වෙනි දිනත් දරන ප්ලාන් ප්‍රකාර බෙදු රැඹි එකකුත් පර්චස් නිස්දෙකක විශාලකම ඇති බිම් කොටස අත්හැර ඉතිරි නොබෙදු බිම් කට්ටිය එහි තුල පිහිටි ගහාකොල ගොඩනැගිලි ආදි සියලු දේද වේ.

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<sup>1</sup> *Gunapala et al v. Geetha Kumari et al* [CA 1421/99(F), C.A. Minutes of 09.10.2017]  
<sup>2</sup> (2002) 1 Sri.L.R. 65  
<sup>3</sup> *Ibid.* at page 68

On a comparison of the two schedules to the plaint in this case and D.C. Panadura Case No. 19123/P, it is clear that the land sought to be partitioned in the two cases are the same. In fact, the Plaintiff admitted this under cross-examination. Of course, Armis Fernando transferred all his rights to the Plaintiff before the present partition action was filed. But the facts in the said D.C. Panadura Case No. 19123/P assists in understanding the conclusions of the learned Additional District Judge in this case on the identity of the corpus and the pedigree.

The said Armis Fernando, later sought to amend the plaint in the said D.C. Panadura Case No. 19123/P. The amended plaint filed in that case was marked as 11 in this case. The amended plaint described the land sought to be partitioned as follows:

**ඉහතකී උපලේඛනය**

බස්නාහිර පලාතේ කොලඹ දිස්ත්‍රික්කයේ සල්පිටි කොරලේ පල්ලේ පත්තුවේ කොලමුන්න යන ගම පිහිටා තිබෙන ඊරියගහඹව්ව කියන උතුරට වෙත අයට අයිති මෙම ඉඩමේ කොටසක් ද නැගෙනහිරට ආචාර්යාවන්ත සහ හකුරුගේවන්නද දකුනට හකුරුගේවන්න සහ ඔව්වද බස්නාහිරට ගමයා කුඹුර සහ බටුචන්දරයා කුඹුරද මායිම් වන බුසල වපසරිය ඇති ඉඩමෙන් ඇම්. ඩී. ඒ. ගුනතිලක අවසරලත් මිනින්දෝරු නැතගේ අංක 623 සහ 1935.04.29 වෙනි දිනත් දරන ජලානේ ප්‍රකාර බෙදු රැඬි එකකුත් පර්චස් නිස්දෙකක විශාලකම ඇති බිම් කොටස අත්හැර ඉතිරි වෙන්වූ හතරෙන් එක පංගුව නමැති ඉඩමට 1985 ක් වූ දෙසැම්බර් මස 31 වෙනි දින බලයලත් මිනින්දෝරු එන්.එ.ඊ.ජේ. සිල්වා මහතාගේ අංක 240 දරන පිඹුර ප්‍රකාර මායිම් උතුරට පැමිනිලකරු හිමිකම් කියන ඊරියගහඹව්ව ද නැගෙනහිරට දෙවට පාරද දකුනට පාරද සහ ලීලාවති ජයතුංග එස්.ඩී.සිලින් සහ කේ .කුලසේන සහ වෙනත් අය හිමිකම් කියන බන්ඩිපිටිය වන්නද බස්නාහිරට ගමයෙ කුඹුර සහ වටුචන්දරයා කුඹුරද යන මායිම් තුල පිහිටි රැඬි දෙකයි පර්චස් දහාතුනයි දශම තුන (අ.0රු.2පර. 13.3) ක් විශාල ඉඩම වේ.

In the original plaint (19), Armis Fernando claimed that the land Eriyagahaowita sought to be partitioned was owned by Madappuhamy. The amended plaint (11) changed this position and claimed that Madappuhamy was the owner of only 1/4<sup>th</sup> of the larger land called Eriyagahaowita. This amended plaint was rejected by order of court (10). The reason was that the plaintiff was seeking to bring in a new land to the partition action. Thereafter Armis Fernando sought to withdraw the said partition action reserving his right to file a separate action which was allowed subject to a pre-payment order (11).

Armis Fernando relied upon deeds පැ.6 to පැ.9 and පැ.11 to establish his pedigree in D.C. Panadura Case No. 19123/P (ඒ9). The Plaintiff also relies on the same deeds to establish his pedigree in this case. All of the said deeds describe the land it applies to **firstly as the balance portion and secondly as the undivided portion** of Eriyagahaowita having 6 paddy bushel sowing extent less the land in plan no. 623 (පැ.2). This is not possible for the reasons explained earlier. It appears that Armis Fernando realized that he could not maintain the original plaint (ඒ9) filed in D.C. Panadura Case No. 19123/P without including the rest of the “balance portion” of Eriyagahaowita.

Since the amended plaint was rejected, there seems to have been an attempt to overcome this difficulty. Armis Fernando sold his rights to the Plaintiff in this action by deed no. 749 (පැ.10). The notary who attested the said deed and the lawyer for the Plaintiff in this case was one and the same. As the Counsel for 2<sup>nd</sup> to 6<sup>th</sup> Defendants submitted, පැ.10 is a “cleverly crafted” deed to attempt and get over the difficulty Armis Fernando faced in D.C. Panadura Case No. 19123/P. In පැ.10 it was attempted to identify the land in plan no. 240 as the **separated balance portion** of Eriyagahaowita (ඉතිරි කොටස වූ ඊරියගහඔවිට කියන ඉඩමේ වෙන්වූ කැබැල්ලක් වන). The deeds which form the basis for පැ.10 described the land as undivided whereas පැ.10 sought to describe it as separated balance portion in an attempt to get the said deeds to apply to land in plan no. 240 and thereby to the land in the preliminary plan made in this case marked “X”.

The surveyor who prepared the preliminary pan marked “X” in this case has, in the survey report marked “X1”, stated that the land he surveyed is the land described in the schedule to the plaint. I have previously adverted to the importance of the survey report in the light of Section 18(2) of the Partition Law.<sup>4</sup> However, the circumstances of this case, including the schedule to the deeds marked පැ.6 to පැ.9 and පැ.11, clearly raises serious doubts about the accuracy of the description of the land and pedigree pleaded by the Plaintiff. In these circumstances, the learned Additional District Judge was correct in determining that the pedigree pleaded by the Plaintiff is unclear.

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<sup>4</sup> *Gunapala et al v. Geetha Kumari et al* [CA 1421/99(F), C.A. Minutes of 09.10.2017]



The argument made on behalf of the 2<sup>nd</sup> to 6<sup>th</sup> Defendants is that the larger land Eriyagahaowita had been separately possessed by the owners and the land shown in the preliminary plan marked "X" is the land possessed by Morawakkoralalage Adwin Fonseka Abeykoon and his descendants as a separate land. This appears to have been accepted by the learned Additional District Judge in dismissing the Plaintiff's case. Support for this position is found in the survey report to plan no. 240 (B12) made in D.C. Panadura case No. 19123/P. The report indicates that all the buildings and the plantation was claimed by the defendants and Armis Fernando, the brother of the Plaintiff, only claimed that he had bought part of the land.

Section 25(1) of the Partition Law requires the court to examine the title of each party and hear and receive evidence in support thereof. It has been consistently held that it is the duty of the Court to examine and investigate title in a partition action, because the judgement is a judgement *in rem*. In *Gnanapandithen and another v. Balanayagam and another*<sup>5</sup> G.P.S. De Silva C.J. explained this duty as follows:

"Mr. Samarasekera cited several decisions which have, over the years, emphasized the paramount duty cast on the court by the statute itself to investigate title. It is unnecessary to repeat those decisions here. For present purposes it would be sufficient to refer to the case of *Mather v. Thamotheeram Pillai* <sup>(2)</sup> decided as far back as 1903, where Layard, C.J. stated the principle in the following term: - "Now, the question to be decided in a partition suit is not **merely matters between parties which may be decided in a civil action**; . . . The court has not only to decide the matters in which the parties are in dispute, **but to safeguard the interests of others who are not parties to the suit**, who will be bound by a decree for partition . . ." Layard, C.J. stressed the importance of the duty cast on the court to satisfy itself "that the plaintiff has made out a title to the land sought to be partitioned, **and that the parties before the court are those solely entitled to such land.**" (emphasis added). "<sup>6</sup>

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<sup>5</sup> (1998) 1 Sri.L.R. 391

<sup>6</sup> *Ibid.* page 395

I am of the view that the Plaintiff has failed to fulfill the burden cast upon him.

I see no reason to interfere with the judgment of the learned Additional District Judge of Panadura dated 23<sup>rd</sup> November 1999 and dismiss the appeal with costs.

Judge of the Court of Appeal

**M.M.A. Gaffoor J.**

I agree.

Judge of the Court of Appeal