

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

Guniyan Godage Chandrasiri,
“Sandakelum”, 48th Road,
Kiriwelkele,
Pitabeddara.

2nd Party-Respondent-
Petitioner-Appellant

C.A. Case No: **CA/PHC/47/2015**
PHC Matara Case No:
Rev 108/2013
MC Morawaka Case No: **46164**

OIC, Police Station,
Morawaka.

Plaintiff-Respondent-Respondent

-Vs-

Dinuka Nilnuwan Edirisuriya,
Athuela C Division,
Athuela,
Morawaka.

1st Party Respondent-
Respondent-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

Mahinda Samayawardhena J.

Counsel : Chanuka Kulatunga for the 2nd Party-Respondent-Petitioner-Appellant.

Kapila Manamperi, PC with Thilak Karunanayake for
the 1st Party-Respondent-Respondent-Respondent.

Written Submissions: By the 1st Party-Respondent-Respondent-Respondent on
18/10/2018

By the 2nd Party-Respondent-Petitioner- Appellant on
21/05/2019

Argued on : 28/05/2019

Judgment on : 27/06/2019

A.L. Shiran Gooneratne J.

This is an appeal by the 2nd Party-Respondent-Petitioner-Appellant (Appellant) against the order of the learned High Court Judge of the Southern Province holden at Matara, dated 30/03/2015, dismissing the revision application and affirming the order of the learned Magistrate of Morawaka.

The officer-in-charge of the Morawaka police instituted action in the Magistrates Court by filing an information report under Section 66(1)(a) of the Primary Courts Procedure Act (Act), over a disputed right of way between the Appellant and the 1st Party-Respondent-Respondent (Respondent). The learned Magistrate having inquired into the complaint, by order dated 15/07/2013, held that the Respondent has not satisfied Court that he was entitled to enjoy the right of way to access his land, as claimed.

The Appellant submits that, he has restricted this application only to the issue of the right of way, which is depicted as 'H' in the sketch, prepared by the police attached to the information report. The Appellant has used the roadway which is 3 feet wide and 200 feet in length over the land depicted in documents marked 1Va12, 1Va13 and 1Va14, which the Respondent claims to be the only access to his land. However contrary to the above position, in plan No. 260, depiction 'C', in document marked 1Va13, and in the observations made by the police officer inquiring into the dispute has made reference to a 2-meter wide alternate roadway to the land belonging to the Respondent. It is also observed by the affidavit submitted by the Appellant and the observations of the police officer that the roadway claimed by the Appellant is a re-constructed fleet of steps which facilitate the flow of rain water.

The learned Magistrate having taken into consideration the use of the roadway has concluded that the Appellant has failed to establish that the right of way claimed had been used for a long period of time.

In consideration of Section 69(1) of the Act, the Supreme Court in ***Ramalingam vs. Thangaraja (1982) 2 SLR 699***, held that;

“if the dispute is in regard to a right to any land other than right to possession of such land, the question for decision, according to Section 69(1), is who is entitle to the right which is subject of dispute. The word “entitle” here connotes the ownership of the right. The Court has to determine which of the parties acquired that right, or is entitled for the time being to exercise that right.”

In ***Siriyawathi Jayasinghe vs. K.A. Karunaratne, CA. No. 863/90***, the Court held that,

“in this case the 1st Respondent claiming a servitude or a right of way over the Petitioner’s land has to prove that he is entitle to such a right and mere user will not determine the dispute.”

Accordingly, the learned Magistrate correctly evaluated the evidence brought before Court, when deciding that the Respondent has failed to establish a right to a roadway and by doing so has not prejudiced any right or interest in the land which a party may establish in a civil suit.

In the said background, it is the view of this Court that the Appellant has failed to prove to the satisfaction of Court the right to the said roadway.

The learned Counsel for the Respondent has also taken up an objection that the Appeal filed in the instant application has been signed by an Attorney-at-Law without revoking the proxy in force and therefore, has no legal status to file this application. The basis of this objection is that there cannot be two registered Attorneys to function at the same time for a party in an action.

In *Silva vs. Cumarathunga 40 NLR 139*, the Court held that,

“a Petition of appeal must be signed by the proctor, whose proxy is on the record at the date on which the Petition is filed.”

“if a proxy has been filed, ‘his Attorney-at-Law’ refers to the Attorney-at-Law on record. Until the proxy is revoked, neither the Appellant nor any other Attorney can sign the Petition of Appeal. According to Rule 2(1) (a) of the Court of Appeal (Procedure for Appeals from High Courts established by Article 154P of the Constitution) Rules of 1988, appeal shall be lodged in the High Court with the Petition of Appeal addressed to the Court of Appeal. Hence the appeal originates in the High Court and the High Court transmits the case record to the Court of Appeal. Appeal proceedings in the Court of Appeal are a continuation of the proceedings commenced in the High Court. Therefore the Attorney on record shall sign the Petition of Appeal and it cannot be done by any other Attorney.”

[Fernando v. Sybil Fernando (1997) 3 SLR 1 (SC) and Jeevani Investments (Pvt) Ltd. v. Wijesena Perera (2008) 1 SLR 207 (SC)]

In *National Insurance Corporation Ltd. v. Violet (2002) 3 SLR 337*,
Somawansa J. held that;

*“when there is an attorney-at-law on record it is such attorney-at-law
who could lodge an appeal.”*

For the above reason alone, this Appeal should be dismissed.

Appeal is dismissed with costs fixed at Rs. 10,000/-

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL