

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

Hewa Walgamage Siriyawathie,
Weliyagehena,
Heendeliya,
Galagama South.
4th Defendant-Appellant (deceased)
Nupe Hewage Chandralatha,
Weliyagehena,
Heendeliya,
Galagama South.
4A Defendant-Appellant

**CASE NO: CA/1287/2006/F
CA/NLT/678/2006
DC TANGALLE CASE NO: 2541/P**

Vs.

Nupe Hewage Rosin Nona,
Kongaha Hena,
Urugamuwa.
Plaintiff-Respondent (deceased)
Nambukara Palliyaguruge Upali,
'Sepalika',
Ratmale Road,
Hunnadeniya,
Kottagoda.
Substituted Plaintiff-Respondent

And Several Other Substituted
Plaintiff-Respondents and
Defendant-Respondents
Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Luxman Amarasinghe for the 4th Defendant-
Appellant.

Respondents are absent and unrepresented.

Decided on: 01.08.2019

Mahinda Samayawardhena, J.

The 4th Defendant-Appellant has filed this appeal against the Judgment of the District Court of Tangalle dated 14.06.2005 entered in Partition Case No. 2541/P.

The Plaintiff filed this action in the District Court to partition the land known as *Rukaththana Koratuwa alias Weliyage Watta* in extent of about 7 Kurunis of Kurakkan sowing area.

The Preliminary Plan is Plan No. 2973 marked at the trial X and the Report is X1. There are 4 Lots in the Preliminary Plan. The main Lots are Lots 1 and 4, and Lots 2 and 3 are roads running across the land.

The 10th Defendant in his statement of claim has sought exclusion of Lot 4 on the basis that it is a different land by the name of *Rukaththana Hena alias Weliyage Watta* in extent of 1 Acre.

At the trial, the 10th Defendant has produced Deeds marked 10D1-10D6 to substantiate this position. The 10th Defendant has also produced extracts from the Land Registry marked 10D7 to prove that the 10th Defendant's said Deeds were registered in a different folio under the name of *Rukaththana Hena alias Weliyage Watta* and not in the folio where the plaintiff's Deeds were registered.

All the parties have virtually accepted this position and the learned District Judge in his Judgment has excluded Lot 4 from the corpus on the basis that it is a different land. There is no appeal against that finding.

The 4th Defendant-Appellant in his statement of claim has sought to exclude Lot 1 of the Preliminary Plan stating that she has prescribed to that Lot. It is difficult to understand why the 4th Defendant seeks exclusion of Lot 1 on prescription. She has in paragraph 2 of the statement of claim mentioned that two lands, namely, *Rukattanagaha Watta alias Weliyage Hena*, and *Weliyage Watta* are shown in the Preliminary Plan. Her Deeds tendered at the trial marked 4D1-4D4, which I will refer to later, relate to the former land, namely, *Rukattanagaha Watta alias Weliyage Hena*.

The learned District Judge has rejected this claim of the 4th Defendant for exclusion of Lot 1 and has accepted the pedigree of the Plaintiff to conclude that the 4th Defendant is a co-owner of the land, and as a co-owner she has not proved prescriptive possession to Lot 1.

This the learned District Judge did predominantly on the basis that although the 4th Defendant in evidence has stated that she became entitled to Lot 1 on Deeds 4D1-4D4, she has not in the

statement of claim sought such a relief or produced a pedigree, but rested her entire claim for Lot 1 on prescription.

The learned District Judge also states that the northern and eastern boundaries of the Plaintiff's Deeds tally with those of the Preliminary Plan, but none of the boundaries of the 4th Defendant's Deeds tallies with the Preliminary Plan.

I must state that the 4th Defendant has not raised a clear issue on exclusion of Lot 1 on the basis that Lot 1 is a different land by the name of *Rukattanagaha **Watta** alias Weliyage **Hena*** (and not the land the Plaintiff seeks to partition, which is, *Rukaththana **Koratuwa** alias Weliyage **Watta***). The learned District Judge is correct when he says that by way of issues, the 4th Defendant sought to exclude Lot 1 only on prescription.

I must add that if Lot 1 is a different land, it shall be excluded from the corpus and in that event, the question of prescription does not arise. Once the District Judge decides to exclude a portion on the ground that it is a separate land, he has no right to make further declarations on that portion, such as, the party on whose application the exclusion was made has prescribed to that portion or inherited to the land as that is outside the mandate of the Partition Judge.¹ There may be several other claimants to that portion of land which is not part of the corpus. The situation is however different when a co-owner successfully claims for a separate portion of the land to be partitioned on prescription. In

¹ Hevavitharana v. Themis De Silva (1961) 63 NLR 68. The learned District Judge has attempted to do this in respect of Lot 4-vide last five lines of page 8 and first two lines of page 9 of the District Court Judgment.

such a situation, the basis of exclusion is establishment of prescriptive possession against all other co-owners of the land.

I must stress at this point that this being a partition action, the duty is on the District Judge to identify the real issues among the parties and take them to the forefront by way of issues and address them adequately.

Section 25(1) of the Partition Law, No. 21 of 1977, as amended, imposes that duty on the District Judge in express terms. The District Judge shall understand that it is a statutory duty cast upon the Judge in peremptory terms. That section reads:

On the date fixed for the trial of a partition action or on any other date to which the trial may be postponed or adjourned, the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.

Notwithstanding the system of justice which prevails in our country is adversarial as opposed to inquisitorial, partition action is an exception. In a partition action the District Judge shall actively participate in the trial without playing the passive role of an umpire and safeguard the rights not only of the parties to the action but also of others who are not parties to the action, as all are bound by the Judgment, which confers title *in rem*.

In that backdrop, I cannot agree with the learned District Judge when he has stated in the Judgment that although the 4th Defendant has stated in evidence that she became entitled to Lot 1 on Deeds 4D1-4D4, she has not in the statement of claim made such a claim or set out such a pedigree, but claimed Lot 1 on prescription.

I need hardly emphasize that although practically issues are raised by the lawyers of the respective parties, the duty is on the Judge to raise issues on which the right decision of the case appears to the Judge to depend. (Section 146 of the Civil Procedure Code) What is the purpose of pronouncing a Judgment if real issues of the parties have not been addressed?

As I stated earlier, the learned District Judge has stated that two boundaries of the Plaintiffs' Deeds tally with the northern and eastern boundaries of the Preliminary Plan, but none of the boundaries of the Plaintiff's Deeds tallies with those of the Preliminary Plan.

It is seen from the Report of the Preliminary Plan that it is the Plaintiff who has shown the boundaries to the surveyor. The 4th Defendant has told the surveyor that Lots 1 and 4 are different lands.

In that backdrop, it is unfair by the 4th Defendant to say that two boundaries of the Plaintiffs' Deeds tally with the Preliminary Plan as the boundaries were shown to the surveyor by the Plaintiff. Why only two? What about the other two boundaries? That means, the Plaintiff has unable to show all four boundaries of her Deeds on the ground.

The learned District Judge is incorrect when he says that none of the boundaries of the 4th Defendant's Deeds tallies with those of the Preliminary Plan.

Let me repeat that the 4th Defendant did not dispute the claim of the 10th Defendant that Lot 4 of the Preliminary Plan is ***Rukaththana Hena alias Weliyage Watta***, which was accepted by the learned District Judge. The 4th Defendant claimed Lot 1 on the basis that it is ***Rukattanagaha Watta alias Weliyage Hena***. The 4th Defendant's Deeds describe the land known as *Rukattanagaha Watta alias Weliyage Hena*. The Plaintiff filed the action to partition the land known as ***Rukaththana Koratuwa alias Weliyage Watta***.²

Let me take Deed 4D1 produced by the 4th Defendant. There are three lands described in the schedule to the Deed. The second land is *Weliyage Hena*. The boundaries are: North-a portion of the same land sold by the Government, East-*Mahahena Weta*, South-*Kongahahena*, West-*Weliyage Watta Weta*.

The boundaries of the second land known as *Weliyage Hena* described in the schedule to another Deed marked by the 4th Defendant as 4D3 are also the same.

The boundaries of the second land known as *Weliyage Hena alias Rukattanagaha Hena* described in the schedule to the Deed marked 4D4 are as follows. North-*Talagahakoratuwa*, East-*Mahahena*, South-*Kongaha Hena*, West-*Weliyage Watta*.

² Note the differences among *Watta*, *Hena*, *Koratuwa* etc.

What are the boundaries of Lot 1 of the Preliminary Plan? The boundaries of Lot 1 of the Preliminary Plan are North-*Talagahakoratuwa*, East-*Mahahena*, South-*Kongahawatta*, West-Lot 4 and *Ihalahena*.

Then how can the learned District Judge say that none of the boundaries described in the 4th Defendant's Deeds tallies with those of the Preliminary Plan?

There is another vital point which favours the 4th Defendant. According to the Deeds of the 10th Defendant produced marked 10D1-10D6 to claim Lot 4 and accepted by Court, the eastern boundary is *Weliyage Hena Meda Weta*. The learned District Judge in the Judgment has particularly stated that the 1st Defendant, 4th Defendant and 10th Defendant have admitted that Lot 1 which lies to the east of Lot 4 is also known as ***Weliyage Hena***.³

It is significant to note that it is only the 4th Defendant who claims on Deeds the land known as *Weliyage Hena*. The 10th Defendant claimed a land known as *Weliyage Watta*.

Let me now make it clear that all the Plaintiff's Deeds P1-P4 refer to a land known as *Rukattane Koratuwa*. In those Deeds there is no reference to a land known as *Weliyage Watta* or *Weliyage Hena*. All the Plaintiff's Deeds have been registered in the Land Registry in the folio marked 10D8 where the name of the land is only *Rukattane Koratuwa*. As the learned District Judge has pointed out in the Judgment only the *lis pendens* has been registered in a

³ Vide last five lines of page 7 and first five lines of page 8 of the District Court Judgment.

new folio but connected to 10D8 under the name of the land *Rukattane Koratuwa alias Weliyage Watta*. That new folio has been marked as 10D9. That goes to show that the Plaintiff has introduced the name *Weliyage Watta* to *Rukattane Koratuwa* for the first time in the plaint of this case and it is on that basis a new folio was opened in the Land Registry under the name of *Rukattane Koratuwa alias Weliyage Watta* to register the *lis pendens*. However as the learned District Judge has acknowledged in granting the relief to the 10th Defendant, Lot 1 is not *Weliyage Watta* but *Weliyage Hena*, which is the land claimed by the 4th Defendant.

Then it is abundantly clear that there is a serious question in the instant case as to the identification of the land to be partitioned, which is *Rukattane Koratuwa (alias Weliyage Watta)*.

In a partition case, identification of the corpus is of paramount importance. That is the first and foremost thing the District Judge shall do before embarking upon the arduous task of investigating title to the land. If the identification of the land is not possible, there is no necessity to examine the title Deeds or the pedigree. The title shall be investigated on a properly identified corpus.⁴ The duty is, I stress, cast not on the party but on the Court.⁵ Even at the stage of writing the Judgment if the mind of the District Judge is not clear as to the identification of the corpus, he can call for further evidence on that matter giving prior notice to all the

⁴ *Sopinona v. Pitipanaarachchi* [2010] 1 Sri LR 87, *Abeyasinghe v. Kumarasinghe* [2008] BLR 300, *Dias v. Yasatilaka* [2005] 3 Sri LR 169

⁵ *Wickreematne v. Albenis Perera* [1986] 1 Sri LR 190 at 199

parties. This he can do in a partition case not only in respect of the identification of the corpus but also on any other matter.⁶

It is my considered view that the land sought to be partitioned by the Plaintiff, namely, *Rukaththana Koratuwa alias Weliyage Watta* has not been properly identified. Without properly identifying the corpus, partition is not possible and the action is not maintainable.

I allow the appeal of the 4th Defendant and set aside the Judgment of the District Court. The Plaintiff's action shall stand dismissed. Let the parties bear their own costs.

Judge of the Court of Appeal

⁶ *Jayasuriya v. Ubaid* (1957) 61 NLR 352 at 353, *Cynthia De Silva v. Marjorie D'Alwis* [1997] 3 Sri LR 113 at 115