

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

An Appeal under and in terms of Article 154(P)
of the Constitution of the Democratic Socialist
Republic of Sri Lanka read with High Court of
the Provinces (Special Provisions) Act No. 19
of 1990

Court of Appeal Case No:

CA (PHC) 06/2008

HC Panadura Revision

Application No: **24/2006**

MC Kesbewa (Primary

Court) No: **7143**

Kandanaarachchige Ruwan Chamika,
No. 130/5B,
Wijayanandarama Road,
Honnantara,
Piliyandala.

2nd Party Petitioner-Appellant

-Vs-

Officer in Charge,
Police Station,
Piliyandala.

Complainant-Respondent-Respondent

1. Liyanasooriya Arachchige Robert Doster Perera,
No. 130/5, Wijayanandarama Road,
Honnantara North,
Piliyandala.
2. Eliyadurage Raneetha Danojane Perera,
No. 130/5, Wijayanandarama Road,
Honnantara North,
Piliyandala.

1st Party Respondents-Respondents

1. Mainan Arachchilage Lorance,
No. 107/A,
Honnantara North,
Piliyandala.
2. Vidanelage Don Wimaladasa,
No. 137/C/1,
Honnantara North,
Piliyandala.

Intervient-Respondent-Respondent

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel :

Asthika Devendra with Milinda Sarathchandra for the
2nd Party Petitioner-Appellant.

Ravindra Anawaratne for the 1st Party Respondent-
Respondent.

Written Submissions: By the 2nd Party Petitioner-Appellant on 16/02/2015

By the 1st Party Respondent-Respondent on 09/03/2015

Argued on : 21/11/2019

Judgment on : 17/12/2019

A.L. Shiran Gooneratne J.

The Officer in Charge of the Piliyandala Police filed information in terms of Section 66(1)(a) of the Primary Court Procedure Act No. 44 of 1979, (hereinafter referred to as the Act) in the Magistrates Court of Kesbewa, against the 2nd party Petitioner-Appellant (hereinafter referred to as the Appellant) and the 1st party Respondent-Respondent, (hereinafter referred to as the Respondent) based on several complaints made by the Respondent between the period of 05/12/2004 to 09/01/2006, (the information filed was based on a complaint made on 09/01/2006) that the Appellant had removed the fence and encroached into the boundaries of the land belonging to the Respondent in order to expand a 4 feet wide foot path to a 10 feet wide road. The expansion of the alleged roadway has taken place on the Western boundary of the land belonging to the Respondent. Having taken into consideration the affidavits and the documentary evidence filed by both parties, the learned Magistrate by order dated 25/05/2006, held in favour of the Respondent to have the existing fence boundary maintained until the issue is finally resolved by a competent court. A revision application against the said

order was dismissed by order dated 09/01/2008, made by the learned High Court Judge of the Western Province holden in Panadura. Being aggrieved by the said order of the learned High Court Judge, the Appellant is before this Court.

The Appellant has urged the following grounds of Appeal for determination.

- The judgment dated 09/01/2008 made by the learned High Court Judge is contrary to law and facts of the case.
- The order made by the learned Magistrate in terms of Section 69(1) of the Act is bad in law.
- The learned Magistrate failed to consider the evidence placed before him under Section 68 of the Act.

The facts of the case are briefly as follows.

The Petitioner purchased the land bearing Assessment No. 130/5/B, on 30/11/2004, by virtue of Deed of Transfer bearing No. 3963 marked "2 ට 1". By the said deed the Petitioner had no entitlement to a 10 feet wide road as claimed. The Petitioner relies on the affidavit evidence filed by his predecessor in title of the said land who states that there was a 10 feet wide road for more than 40 years, where paddy seed and harvest was transported by cart. The Petitioner also relies on 2 hand written uncertified photo copied documents with no reference to a Criminal Information Book number, purported to be observations made by the police regarding the said land which are filed of record at pages 37 and 38 of the brief.

The main contention of the Petitioner is that the learned Magistrate instead of deciding the possessory rights of the Respondent under Section 68(3) of the Act has erroneously decided the case under Section 69(1) of the Act as a dispute over a right of way.

The police filed information before the learned Magistrate on a complaint made by the Respondent to the effect that the encroachment by the Appellant resulted in the disturbance to the possessory rights of the Respondent over the said land. Action was instituted as a result of the widening of the foot path towards the Western boundary of the land belonging to the Respondent. It is also noted that in the affidavit filed of record, the Respondent has prayed for relief in terms of Section 69(1) of the Act.

In *Ponnamperuma Arachige Sunil Kumara Vs. Nanayakkarawasam Patudoowa Vidanalage Gnanawathie, CA (PHC) 207/2006 Decided on 13/02/2017, H.C.J. Madawala J.* held that,

“although it is popularly stated that evidence in relation to title and right of possession of the land in dispute cannot be considered in a Section 66 action, still in a situation when the evidence as to possession is clearly balanced title is important as the presumption of possession will benefit the party who brings in evidence of title to the Section 66 action.”

In the above context, it is observed that the schedule to Deed No. 1194 dated 18/06/1990, marked “1 @ 1”, clearly shows that the road in dispute was a

foot path (Page 106-108 of the brief). Plan No. 3344 marked “1 ට 2”, (at page 181 of the brief) confirms this position. The said Deed bearing No. 3963 marked “2ට1”, does not show a 10 feet wide road as claimed by the Appellant. It is also observed that in the schedule to Deed No. 1194 attested on 18/06/1990, shows that what is in dispute is a footpath.

In paragraph 3 of the affidavit filed by the Appellant (at page 77 of the brief), it is stated that before purchasing the land the Appellant was aware that plan bearing No. 1842, marked “2ට2(අ)”, (at page 199 of the brief) dated 19/05/2005, was made 2 months prior to the execution of the deed. In the said plan, the disputed road is 10 feet wide. The Deed bearing No. 3963 relied upon by the Petitioner to claim title to the land was attested on 30/11/2004. Therefore, it is surprising to note that the 10 feet road alleged to have being in existence and used by the Petitioner did not transfer to the Appellant in title. What is more surprising is that the said plan bearing No. 1842 relied upon by the Appellant to assert his claim to a 10 feet wide road has been made after the first of several complaints (first complaint made on 05/12/2004) the Respondent made to the police.

Tudor Vs. Anulawathie and Others (1999 3 SLR 235) Gunawardana, J. held that,

“The ultimate object of Section 68, and Section 69 being to restore the person entitled to the right to the possession of land to the possession thereof or to restore the person entitled to the right (other than the right to possession of land) to the enjoyment thereof- the said provision of the law must be rationally construed to

authorise by necessary implication if in fact they had not in terms done so, the removal of all obstructions if the need arise, in the process of restoring the right to the person held to be entitled to such right.”

The schedule to Deed No. 3963, marked as “2 ආ 1” (at page 195 of the brief) has no mention of Plan No. 1842, marked “2 ආ 2”, (at page 199 of the brief). The schedule to Deed No. 1194, dated 18/06/1990, states that the Western boundary is Lot 2 and describes as “අඩි පාර සහ පාර ද”. By Deed No. 3963 dated 30/11/2004, a right of way has not been transferred to the Appellant who is the successor in title to the said land.

Taking into consideration the core issue, the learned Magistrate was correct in deciding the disputed claim in terms of Section 69(1) of the Act and therefore I do not see any reason to interfere with the order of the learned Magistrate.

For all the above reasons, I affirm the order of the learned High Court Judge and dismiss this application.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL