

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

Dona Emali Irene Abeysinghe,  
Kahathuduwa, Polgasowita.

**5<sup>th</sup> Defendant-Appellant and 4<sup>th</sup> Substituted  
Defendant-Appellant**

**CA Appeal No.1470/2002 (F)**

D.C. Homagama Case No.200/P.

Vs.

Don Daniel Weerakkody (deceased), Kahathuduwa,  
Polgasowita.

**Plaintiff-Respondent**

1. Aluthge Charlis (deceased)  
Wethara, Polgasowita

1A. Aluthge Leelarathna, Wethara, Polgasowita.

**Substituted 1<sup>st</sup> Defendant-Respondent.**

2. Aluthge Leelarathna, Wethara, Polgasowita.

**2<sup>nd</sup> Defendant-Respondent**

3. Aluthge Piyaseeli, Wethara, Polgasowita.

**3<sup>rd</sup> Defendant-Respondent and five other**

**Respondents**

Before:

**PRASANTHA DE SILVA, J.**

**K.K.A.V. SWARNADHIPATHI, J.**

Counsel: Edward Ahangama  
(For the substituted 4<sup>th</sup> and 5<sup>th</sup> Defendant-Appellants)

J.P. Gamage  
(For the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant-Respondents)

Argument: 13.01.2022

Decided on: 22.03.2022

**K.K.A.V. SWARNADHIPATHI, J.**

### **JUDGMENT**

A partition case was filed at the District Court of Homagama under case bearing No.200/P.

Plaintiff sought to partition the land called Balla Mala Pity Kumbura described in the schedule to the Plaint dated 31.03.1983. On summons, the parties appeared before the Court. P.K. Sumanadasa, Licensed Surveyor, made the preliminary Plan. He submitted to Court his Plan and report bearing No.76/770 dated 10.06.1983 and marked as [X] and [X1] at the trial.

The parties filed their statement of claim. In their statement of claim, the 1st, 2nd and 3rd Defendants admitted the corps and the averments in paragraphs 1-8 of the Plaint. The 5<sup>th</sup> Defendant filed a statement of claim and prayed for a dismissal of the Plaint. According to him, the land described in the Plaint and the land surveyed is Balla Mala Pitiya, alias Kolian Kumbura. Lot No.4 in the preliminary Plan is a part of the land called Uswattha. Only the lots No.1-3 is known as Balla Mala Pitiya alias Kolain Kumbura. Therefore, the 5<sup>th</sup> Defendant of the District Court case has pleaded a separate pedigree for the land in lots No.1-3 of the preliminary Plan.

Even though the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants agreed with the identification of the land, they contested the pedigree. At the trial, points of the contest were raised by all parties. Three points of the contest were raised by Plaintiff and four points by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and on behalf of 4(A) and 5<sup>th</sup> Defendants, eight points of the contest were raised.

At the conclusion of the trial, the learned District Judge answered all points of the contest of the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the affirmative. All points of the contest of the 4(A) and 5<sup>th</sup> Defendants in the negative. No shares were allocated to the 4 (A) and the 5<sup>th</sup> Defendants.

Aggrieved by this judgment, the Petition of appeal dated 21.01.2003 was filed by the 4 (A) and the 5<sup>th</sup> Defendants. The Petition of Appeal is based on;

- (a) Against the facts of law
- (b) Against the evidence led in the case
- (c) Deprivation of the rights of the Defendants who enjoyed the premises time immemorially
- (d) Illegal and unlawful
- (e) Cemetery and/or monuments and public well were granted according to the Plaintiff's pedigree without due regard to the claimants who established that the graves and monuments belong to the generations. That will cause unimaginable and unexpressive feelings and sensations to the Defendants of the deceased whose bodies were laid there.

Therefore, the Defendants had prayed for;

- (a) To set aside the judgment delivered on 26.11.2002.
- (b) To grant the relief sought by the Defendants in their statement of claim
- (c) For costs
- (d) For such other and further relief, the Court shall seem to meet.

Both the Appellants and the Respondents filed their initial written submissions, and the matter was taken up for argument. At the argument, Appellants have not set forward any facts that need to be discussed regarding prayer (e) of their statements of claim. Therefore Averment regarding graves and monuments will not be discussed in this judgment. However, no other person had filed a Petition of Appeal on this issue.

In an appeal, the Appellant must prove the facts on which he relies. In appeal, the Appellants sought to establish that Plaintiff's dishonesty, even though led in evidence, was not considered by the learned Judge. There was evidence to show that Plaintiff had been dishonest at an

examination and was punished. Then he had been in the Government service; the Appellants had not established any flow in his service as a government officer. Therefore, the trial Judge had not discussed the issue.

However, the Appellants have not established how that issue will support their appeal. The preliminary survey was admitted at the trial by the Appellant. Their contention was even though lots No.1-3 was Balla Mala Pitiya. Lot 4 was Kolain Kumbura. However, they failed to call for a second survey.

They have not exercised their right to have a second survey to prove that the land is different. They have failed to establish their claim by superimposing the preliminary Plan on another plan. Such errors cannot be rectified. Mere stating a fact cannot be accepted as evidence without proof. It is the duty of the party who makes the statement to prove it.

In the judgment, the land called Uswatha was discussed on documents and oral evidence. Deed No.10082, marked as [18a], proves that the 4<sup>th</sup> Defendant, Gebrial Abeysinghe, had transferred the land called Uswatha to his son Chandrajith Jayasiri Abeysinghe. According to the schedule of that deed, the Northern boundary was Colombo-Ratnapura main road.

The Appellants had failed to prove that. Lot No.4 is inside the boundaries shown in that deed. Documents marked [4V26 and 4V28], and some deeds produced by the 4<sup>th</sup> and the 5<sup>th</sup> Defendants speak of a Kolain Kumbura. The Northern boundary in most of the deeds was depicted as Balla Mala Pitiya Kumbura owned by Kin of Abeysinghe Achchi. Most of the documents (deeds) produced in evidence by the Appellants bear that the Northern boundary is Balla Mala Pitiya. Therefore, that proves that their deeds are not of Balla Mala Pitiya but an adjoining land.

On this evidence, the learned District Judge had held that the Northern boundary of Kolain Kumbura is Balla Mala Pitiya which was not the subject matter to be partitioned. The learned District Judge's position, therefore, need not be disturbed.

The evidence proved that specific constructions were done by the 4<sup>th</sup> and 5<sup>th</sup> Defendants. As for the claim regarding the improvements, the 4(a) and the 5<sup>th</sup> Defendant-Appellants had not appealed on that ground. Whatever points they raised is limited to proving their rights to the

property. Therefore, I consider that the claims cannot be discussed based on fragments of evidence. If claims are made clear, expenses incurred or improvements should be proved. A person who builds in another's land without permission cannot claim compensation. He does so at his own risk.

However, as the land does not belong to Appellants, what stands in the land goes to whomever it belongs to. In any event, the Appellants in their Petition of Appeal or their statements of claim had not claimed compensation. Therefore, even though the issue of erecting constructions by Appellants in the subject matter is mentioned, those cannot be counted as improvements or points discussed in the appeal.

Therefore, on the strength of the reasons mentioned above, I reject the Appellants' Appeal subject to taxed costs.

**Judge of the Court of Appeal**

**PRESANTHA DE SILVA, J.**

I agree.

**Judge of the Court of Appeal**