

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

1. M.M.Karunathilaka

Aludeniya, Hemmathagama.

2. M.M.Dharmadasa.

Aludeniya, Hemmathagama

Defendant-Appellants.

C.A.No.956/97 (F)

D.C.Kegalle No.2085/L .

M.M.Dingiribanda

Aludeniya, Hemmathagama,

And 04 others

Plaintiff-Respondents

C.A. No.956/97(F)

D.C. No.Kegalle No.2085/L

Before : Deepali Wijesundara,J. &
M.M.A.Gaffoor,J.

Counsel : Sudharshani Coory for the 1st and 2nd
Defendant-Appellants.
Respondents are absent and unrepresented.

Argued on : 11.02.2015

Decided on : 21.05.2015

M.M.A.Gaffoor, J.

1st and 2nd Defendant-Appellants filed this appeal seeking to set aside the judgment dated 02/10/1997 of the learned District Judge of Kegalle. Being aggrieved by the said order the 1st and 2nd defendant- appellants filed this action on the following grounds :

- i)The Plaintiff-Respondent filed this action in the District Court of Kegalle and stated that they are the lawful owners of the land called

‘Palle Kumbura’ and the Western boundary of the said land belonging to the Defendants and between the said to land is a stream.

ii) After floods and heavy rains in the area, the steam was dislocated and a part of the land belonging to the plaintiff’s had been annexed to the defendant’s land is depicted as lots 1 and 2 of the plan No.158 dated 17/08/1979.

iii) Although the plaintiff asked permission of the Defendants to possess the said land which has been annexed to the lands of the Defendants, the defendants refused.

At the trial the following issues were raised on behalf of the Plaintiffs:

i)Is the Plaintiff entitled to the land called ‘ Polle Lodanatha Kumbura’ as per the Deeds mentioned in paragraph 2 of the plaint.

ii) Is land called “Pinagolle” which is on the western boundary of the land called “Palle Lokantha Kumbra’ belong to the 1st to 6th Defendants.

iii) Due to heavy rains during 1978 did boundary, which is a stream existing between “ Palle Lodantha Kumbura” and land called “ Pinnagolle” charge.

iv) Due to the said change, did an extent of 19 perches from the land of Palle Kokantha Kumbura “ belonging to the plaintiff, attached to the land belonging to the Defendants called Pinnagolle?

v)Is the said land in extent of 19 purches belonging to the plaintiff attached to the Defendants land, depicted as lots 1 and 2 of in Plan No.M158/A made by M.B. Ranatunga

vi) Have the Plaintiffs prescribed to the land in extent of 19 perches belonging to the Defendants land , depicted as lots 1s t and 2 of in Plan No. M158/A made by M.B.Ranatunga, after being in possession of the land for more than 10 years.

vii) Accordingly what relief can the Plaintiffs obtain as per prayer to the plaint.

At the trial the several persons gave evidence on behalf of the plaintiff-respondent and the surveyor who drew plan No. M 158 and M 158 A and the 1st

plaintiff himself had given evidence. The plaintiffs have close their case making in evidence "Pe 1" to "Pe 10". The 1st defendant –appellant gave evidence and marked in evidence V1 to V2. He says that the earlier position taken up by the plaintiffs in this action changed course as the this action came two wards the end of trial. Although the plaintiffs instituted this action stating to Court that the defendant had encroached to a portion of the land on the Plaintiffs land, later it was revealed that western boundary of the Plaintiff's land was washed away due to the Defendants removing a "Erabudu Tree" which was kept to stop the erosion due to heavy rains. He further submitted that Ranatunga Surveyor based his superimposition on a Plan made by Charles Gerdinand, however Plan P3 is said to be from a Final Partition Decree but this Final Partition Decree has not been produced. Therefore it is submitted that the said plan No.P3 has not been proved.

He further submitted that although the plaintiffs attempt to show that the plaintiff's land has been washed away due to the defendant removing the "Erabudu Tree", there is no evidence to show that such action was done by the Defendant, as he vehemently denies having removed the "Erabudu Tree". He submitted that the land of the Plaintiffs' was washed away due to heavy rains and not due to any act of the Defendants. The fact has not been considered by the learned District Judge at all. He says that there is not an iota of evidence, that the

Defendants had ever encroached on to the land of the plaintiffs. In fact the learned District Judge has not considered the fact that the plaintiff has cut a portion of the Defendants land to stop the erosion. It is stated that the witnesses of the plaintiff are all biased witnesses and therefore their evidence cannot be accepted as true. And that the erosion that took place is due to an act of nature and the defendants are not in any way responsible for the said incident. It is also stated that as it has not been proved that the defendants were in any way responsible for the erosion, it is unfair for the plaintiffs to pray for costs from the Defendants and the Judgment of the District Judge of Mawanella be set aside and the appeal should be allowed and prayer to the answer of the Defendant should be allowed.

For the aforesaid reasons, we set aside the order of the order learned District Judge dated 02/10/1997 and the appeal is allowed without costs.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundara,J.

I agree.

JUDGE OF THE COURT OF APPEAL

WC/-