

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

Dona Dayawathie Liyanarachchi,
Iddagoda,
Matugama.

CA 236/99(F)

D.C. Matugama Case No. 1416/P

6th Defendant Substituted Plaintiff

Vs.

1. Kannangara Koralalage Dona Emi Nona
Hamine of Uragoda Welipenne
2. Indra Malanie Jayasekara of Hamine of
Uragoda Welipenne
3. Henry Sarath Kumarage of Iddagoda,
Matugama.
4. Don Moses Munasinghe
(Deceased)
- 4A. Kamal Munasinghe of Gurudola,
Iddagoda, Matugama
5. Dona Karjina Samarasekera of
Maasliyadda, Gurudola, Iddagoda,
Matugama.

Defendants

6. C. Ananda Kumarage
7. Thamara Sri Kumarage
8. Gamini Wijayananda Kumarage
9. Nayana Neelamani Kumarage
10. Chandra Kamani Vithana
All of Sri Chandrajaya Maatha,

Iddagoda, Matugama.

**1st – 5th Plaintiffs added as 6th – 10th
Defendants**

AND NOW BETWEEN

Chandra Kamanie Withana,
Sri Chandrajaya Maatha,
Iddagoda, Matugama.

**10th Defendant – Appellant
(Original 5th Plaintiff)**

Vs.

Dona Dayawathie Liyanarachchi,
Iddagoda,
Matugama.

**Plaintiff – Respondent
Original 6th Defendant**

1. Kannangara Koralalage Dona Emi Nona
Hamine of Uragoda Welipenne
2. Indra Malanie Jayasekara of Hamine of
Uragoda Welipenne
3. Henry Sarath Kumarage of Iddagoda,
Matugama.
4. Don Moses Munasinghe
(Deceased)
- 4A. Kamal Munasinghe of Gurudola,
Iddagoda, Matugama

5. Dona Karjina Samarasekera of
Maasliyadda, Gurudola, Iddagoda,
Matugama.
6. C. Ananda Kumarage
7. Thamara Sri Kumarage
8. Gamini Wijayananda Kumarage
9. Nayana Neelamani Kumarage
All of Sri Chandrajaya Maatha,
Iddagoda, Matugama.

Defendant – Respondents

BEFORE: M.M.A. GAFFOOR J.

S. DEVIKA DE LIVERA TENNEKOON J.

COUNSEL:

**C. Laduwahetti for the 10th Defendant –
Appellant
Rohana Deshapriya for the Plaintiff –
Respondent**

ARGUED ON:

18.05.2017

WRITTEN SUBMISSIONS –

10th Defendant – Appellant – 03.02.2017

Plaintiff – Respondent – 06.02.2017

DECIDED ON:

26.07.2017

S. DEVIKA DE LIVERA TENNEKOON J.

The instant appeal relates to a partition action instituted by the 1st – 5th Original Plaintiffs against the original Defendants to partition a land called “Kahatagahawatta” as provided for in the Schedule to the Plaint.

On 10.03.1993 trial commenced and issues and admissions were framed by the parties. In the meantime the 5th Defendant was substituted in room of the 5th Plaintiff and the 5th Plaintiff was made the 10th Defendant (the Appellant) in this case. The Parties informed Court that this case could be settled.

The Appellant in this case was not present on numerous Court dates and Court therefore moved on the basis that she has abandoned her rights. Thereafter the Appellant filed Petition and Affidavit to purge her default and produced medical certificates marked as P1 and P2 respectively. Consequent to the parties filing written submissions on this issue the learned District Court Judge delivered order on 24.11.1998 rejecting the application of the Appellant on the basis *inter alia* that the medical certificates were not duly proved since what was produced was only a photocopy and not produced as a true copy of the original and further that the Appellant has not been vigilant to substitute another in the room of the Appellant. Thereafter the learned District Judge delivered Judgment in the main issue on 30.12.1998.

Being aggrieved by the said Judgment the Appellant has preferred the instant Appeal to *inter alia* set aside judgment delivered on 30.12.1998 and the interlocutory decree, order *de novo trial* and to permit the Appellant to participate in the trial and produce her title deeds.

The Respondent in this case raises a preliminary objection that the Appellant in this case is a defaulting party under Section 25(2) of the Partition Act and as such that she cannot appeal the main judgment dated 30.12.1998 as at the time of delivery of the judgment she was a defaulting party.

Section 25(2) of the Partition Act reads;

If a defendant shall fail to file a statement of claim on the due date the trial may proceed ex parte as against such party in default, who shall not be entitled, without the leave of court, to raise any contest or dispute the claim of any other party to the action at the trial.

The Respondent contends that a defaulting party has no right to appeal the final judgment in the case and further that in any event that the Appellant has not prayed to set aside the order of the learned District Judge refusing the application to purge the default of the Appellant.

At the outset it is clear that the Appellant has not taken any steps to either Appeal and / or revise the order of the learned District Judge dated 24.11.1998 rejecting the application of the Appellant to purge her default. Upon perusal of the Petition of Appeal dated 24.02.1999 it is clear that the Appellant has also failed to give reasons as to why the said order was not challenged and further there is no prayer to set aside the said order.

The Appellant further contends that the Settlement reached between the parties in this case is to the detriment of the Appellants interests and that such settlement was reached in collusion between the parties and fraudulently. However this Court finds that the Appellant has not placed sufficient material before Court to make a

determination on this ground and in any event the Appellant has not invoked the powers of Court in this regard.

Under these circumstances this Court is of the view that the Appellant has not taken the correct steps to remedy her default and has circumvented procedure by challenging the final judgment and not the aforesaid order. As such the preliminary objection raised by the Respondent is upheld and this Appeal is dismissed.

Appeal dismissed.

Judge of the Court of Appeal

M.M.A. GAFFOOR J

I Agree.

Judge of the Court of Appeal