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

Makevitage Nirmala Samarasinghe,

Dedigama, Nelumdeniya.

Plaintiff-Appellant

C.A. 1271/2000(F)

D.C. Gampaha Case No:32480/L

Vs.

Makevitage Dharmasiri Samarasinghe,

Aluth Walauwa,Owkanda Mawatha,

Tenna,Matale.

Defendant-Respondent

Before: Janak De Silva J.

Counsel:

Manohara De Silva P.C. with Hirosha Munasinghe for Plaintiff-Appellant

W.D. Weeraratne for Defendant-Respondent

Written Submissions tendered on:

Plaintiff-Appellant on 28.02.2014

Defendant-Respondent on 16.06.2014

Argued on: 23.01.2019

Decided on: 31.05.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Gampaha dated 07.12.2000.

The Plaintiff-Appellant (Appellant) instituted the above styled action seeking a declaration that deed no. 23076 (P1/V2) dated 13.12.1983 attested by P.A.C.B. Perera Notary Public is not a deed signed by the Appellant and that the title of the Appellant to the land more fully described in the schedule to the plaint has not been ended by deed no. 14352 (V1) dated 25.08.1984 attested by Sarath C. Jayawardena Notary Public.

The father of the parties one Makewitage Stevan Perera Samarasinghe became the owner of the land more fully described in the schedule to the plaint. The Appellant contends that upon his death his rights devolved on his wife and seven children including the parties, which is admitted by the Defendant-Respondent (Respondent).

Some of the said children namely Parakrama Pathiraja Samarasinghe, Luxman Pathiraja Samarasinghe, Gamini Pathiraja Samarasinghe and Dharmasiri Samarasinghe had executed a partition deed no. 14352 (V1) dividing the land among the parties to the deed wherein it is stated that the Appellant had transferred his interest in the corpus by deed no. 23076 (P1/V2) the execution of which is denied by the Appellant.

The learned District Judge held that the evidence establishes that the Appellant had signed deed no. 23076 (P1/V2) and dismissed the action without costs. Hence this appeal.

The main question in this appeal is whether the evidence establishes the due execution of deed no. 23076 (P1/V2).

The learned counsel for the Appellant submitted that the Respondent moved for a commission on the Government Analysts department to examine the signatures on the impugned deed but went ahead with the trial without calling such evidence and thereby the Court misdirected itself in proceeding with trial whilst the report of the Examiner of Questioned Documents was pending. This submission is misconceived in law.

Section 68 of the Evidence Ordinance reads:

> "If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

A deed for the sale or transfer of land, being a document, which is required by law to be attested, has to be proved in the manner set out in section 68 of the Evidence Ordinance by proof that the maker (the vendor) of that document signed it in the presence of witnesses and the notary. If this is not done the document and its contents cannot be used in evidence. [*Samarakoon v. Gunasekera and Another* (2011) 1 Sri.L.R. 149].

The two attesting witnesses to deed no. 23076 (P1/V2) Wickremapala and Jayatilleke were called as witnessess by the Respondent and testified to their signatures thereon. Wickremapala said that the notary signed after the Appellant and two witnesses [Appeal Brief pages 66, 70-1]. Jayatilleke said that he was there when the Appellant signed [Appeal Brief page 91]. The learned District Judge has accepted their evidence and held that although the Appellant suggested that the witnesses lied there is no basis to that suggestion.

The learned counsel for the Appellant has referred to some portions of the evidence of the two witnesses Wickremapala and Jayatilleke and contended that there are contradictions. I am not convinced with this submission and in any event, they are not material contradictions. As Weerasuriya S.P.J. held in *The Queen v. Julis* (65 N.L.R. 505 at 524) "the *maximum falsus in uno, falsus* in omnibus" is not an absolute rule which has to be applied in every case where a witness is shown to have given false evidence on a material point." When one considers the evidence of the Appellant more serious questions arise as to the creditworthiness of his testimony for instance, he did not make a complaint to the Police although he became aware of the existence of deed no. 23076 (P1/V2) which according to him he never executed.

In *The Solicitor General v. Ava Umma* (71 N.L.R. 512 at 515-6) T.S. Fernando J. held:

> "The object of calling the two witnesses is to prove the execution of the deed. Proof of the execution of the documents mentioned in Section 2 of No. 7 of 1840, means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution."

Hence the Respondent has proved that the Appellant had signed deed no. 23076 (P1/V2) by calling both the attesting witnesses and there was no need for him to obtain a commission to examine the hand writing.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Gampaha dated 07.12.2000.

The appeal is dismissed with costs.

Judge of the Court of Appeal