

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

In the matter of an application for *Restitutio in Integrum* under Article 138(1) of the Constitution of Democratic Socialist Republic of Sri Lanka read with Section 753 of Civil Procedure Code.

C. A. Case No.594/2005 (Rev)  
D.C. Gampaha Case No.39869/P

Amarasinghe                      Mudiyanse                      Saranelis  
Amarasinghe  
No.68, Amunukumbura,  
Wathuragama.

PLAINTIFF

-Vs-

1. Samarakoon Arachchige Jinadasa  
of Kirikiththa, Weliweriya.
2. Arupala Gamage Wimalawathie  
No.30, Batapola,  
Wathuragama
3. Arupala Gamage Kamalawathie  
No.69, Amunukumbura,  
Wathuragama.
4. Samarakoon Arachchige Sumanapala
5. Senadheera Kankanamalage Tissa
6. Senadheera Kankanamalage Nihal
7. Gagabada Liyanage Jagath Kumara Chandrasiri  
All of Kirikiththa, Weliweriya.

8. Ramanayaka Appuhamilage Chandra Rohini  
of Baliwila, Radawana.

DEFENDANT

AND BETWEEN

1. Palihawadana Arachchige Sunil Gamini
2. Palihawadana Arachchige Jayantha Nimal
3. Palihawadana Arachchige Sisira Kumara Nimal  
Gamini

All of Kirikiththa, Weliweriya.

PETITIONERS

-Vs-

Amarasinghe                      Mudiyansele                      Saranelis  
Amarasinghe  
No.68, Amunukumbura,  
Walhuragama.

PLAINTIFF-RESPONDENT

-Vs-

1. Samarakoon Arachchige Jinadasa  
of Kirikiththa, Weliweriya.
2. Arupala Gamage Wimalawathie  
No. 30, Batapola,  
Wathuragama
3. Arupala Gamage Kamalawathie  
No.69, Amunukumbura, Wathuragama.

4. Samarakoon Arachchige Sumanapala,
5. Senadheera Kankanamalage Tissa,
6. Senadheera Kankanamalage Nihal,
7. Gagabada Liyanage Jagath Kumara Chandrasiri,  
All of Kirikiththa, Weliweriya.
8. Ramanayaka Appuhamilage Chandra Rohini  
of Baliwila, Radawana.

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1. Palihawadana Arachchige Sunil Gamini
2. Palihawadana Arachchige Jayantha Nimal
3. Palihawadana Arachchige Sisira Kumara Nimal  
Gamini  
All of Kirikiththa, Weliweriya.

PETITIONER-PETITIONERS

-Vs-

Amarasinghe                      Mudiyansele                      Saranelis  
Amarasinghe (Deceased)  
No.68, Amunukumbura,  
Walhuragama

PLAINTIFF-RESPONDENT-RESPONDENT

- 1A. Arupala Gamage Wimalawathie  
No. 30, Batapola,  
Wathuragama.
- 1B. Arupala Gamage Kamalawathie

No. 69, Amunukumbura,  
Wathuragama.

Substituted 1A and 1B PLAINTIFF-  
RESPONDENT-RESPONDENTS

-Vs-

1. Samarakoon Arachchige Jinadasa  
of Kirikiththa, Weliweriya.
2. Arupala Gamage Wimalawathie  
No.30, Batapola,  
Wathuragama.
3. Arupala Gamage Kamalawathie  
No.69, Amunukumbura,  
Wathuragama.
4. Samarakoon Arachchige Sumanapala
5. Senadheera Kankanamalage Tissa
6. Senadheera Kankanamalage Nihal
7. Gagabada Liyanage Jagath Kumara Chandrasiri  
All of Kirikiththa, Weliweriya.
8. Ramanayaka Appuhamilage Chandra Rohini  
of Baliwila, Radawana.

DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Geeshan Rodrigo for the Petitioner  
Priyantha Alagiyawanna with Isuru Weerasuriya  
and Bushra Hashim for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant-  
Respondent-Respondents and Substituted 1A-1B  
Plaintiff-Respondent-Respondents

T. Palliyaguruge with Dulmini Indika for the 4<sup>th</sup>  
Defendant-Respondent-Respondent

Decided On : 26.03.2019

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent-Respondent filed an action for partition in the District Court of *Gampaha* by a plaint dated 26.07.1996 against the Defendant-Respondent-Respondents, to partition a land described in the schedule to the plaint and after the *lis pendens* was registered, summons were reported to have been served on the several Defendant-Respondent-Respondents. On 01.08.1997, the Court Commissioner returned to Court the preliminary survey plan bearing No.100 and report dated 08.07.1997.

The Petitioners before this Court had been present at the preliminary survey and were named in the surveyor's report as non-parties having rights in certain buildings and plantations on Lot 2 of the preliminary plan. The survey in his report quite clearly states that the Petitioners who had not been named in the plaint made claims to a number of structures and permanent fixtures on Lot 2.

It would appear that there has been an abdication of the mandatory duty on the part of the Court Commissioner to serve notices on these claimants who are now before this Court as Petitioners seeking the remedies of revision and *restitutio in integrum*.

Section 16(3) of Partition Law No.21 of 1977 as amended by Section 2 of Act No.32 of 1987 states as follows:-

*"Where the court orders the issue of a commission to a surveyor under subsection (1) of this section, it shall in addition order the issue to such surveyor of such number of copies of a notice substantially in the form set out in the Second Schedule to this Law together with the translations thereof, as the Court may deem sufficient in the circumstances, to be served on any person (not being a party to the action) or his agent who at the time of the survey may prefer any claim to the land to which the action relates."*

Section 16(4) of Partition Law No.21 of 1977 as amended by the same section namely Section 2 of Act No.32 of 1987 brought in an amendment corresponding to the amended subsection (3). The amended subsection reads as follows:-

**Section 16 (4):**

*The surveyor shall serve the copy of the notice referred to in subsection (3) of this section on any person (not being a party to the action) or his agent Court who at the time of the survey prefers any claim, by personally tendering to such person or his agent such copy together with the translation thereof in the language of such person or his agent whose language is not the language of the Court.*

Section 18(1)(a)(iv) of Partition Law No.21 of 1977 enjoins the surveyor to transmit to court a report, in duplicate, substantially in the form set out in the Second Schedule to the Law, verified by affidavit stating *inter alia*, the parties to the action who were present at the survey, and the name and address of any person (not being a party to the action ) who, at the time of the survey, preferred any claim, the nature of such claim and the date of service of the notice referred to in subsection (3) of Section 16.

It has to be noted that even though the surveyor reported back to Court that the Petitioners were present at the survey and preferred claims, the fact that he served notices on these non-parties is non-existent in the report. Though the surveyor names the Petitioners in the report and specifically makes references to what they claimed as their interests, I must state that there has been a total dereliction of the mandatory duty to serve notices on these petitioners.

Upon a perusal of the pleadings and copies of the proceedings that have been furnished to this Court in this application, I find that several Defendants thereafter filed joint statements of claims on several dates. None of these statements of claims ever make a reference to the rights of the petitioners before this Court.

On 20.03.2000 the case had been taken up for trial and concluded before the District Judge of *Gampaha* with the adduction of evidence of only the Plaintiff. It is manifest that the parties reached a settlement. However the 6<sup>th</sup> and 7<sup>th</sup> Defendant-Respondents who had not participated at the trial made an application on 01.06.2000 to have their rights

vindicated and the 1<sup>st</sup> and 4<sup>th</sup> Defendant-Respondents filed objections to the said application and the matter was thereafter fixed for inquiry. At the said inquiry a settlement was reached by the parties, and it would appear that the matter was resolved on 28.05.2001. Thereafter the case had been fixed for judgement which was finally pronounced on 22.03.2002. The case was fixed for interlocutory decree and final commission, and after the registration of the interlocutory decree it was returned to Court on 27.06.2002.

The final plan bearing No.402 and dated 15.07.2002 effected by E.W. Karunasekara Licensed Surveyor was returned to Court on 16.07.2002.

It is pertinent to note that although the Petitioners had not been made parties to the case, they were declared entitled to the buildings and the plantation in Lot No.2 of the preliminary plan. Since these interests of the Petitioners were referred to in the report of the Surveyor who had carried out the preliminary survey, one could assume that these buildings and plantations found their way into the interlocutory decree.

The Petitioners filed an application dated 25.11.2002 supported by an affidavit and pleaded that the interlocutory decree should be set aside as their rights had been substantially prejudiced and that the Plaintiff had proceeded on a false pedigree.

It would appear that the Petitioners gave a narrative of all the details of title and produced their title deeds in the application before the District Court. In the application the devolution of title of the Petitioners had been set out *in extenso*.

The 1<sup>st</sup> and 4<sup>th</sup> Defendant-Respondent-Respondents resisted this application by filing their objections dated 23.01.2003. The inquiry into the application was disposed of by written submissions and the learned District Judge of *Gampaha* delivers his order dated 18.10.2004 stating that the intervention could not be permitted as it was too late in the day and dismissed the application. The learned District Judge correctly opined that the only relief that the Petitioners could seek lay in a higher forum.

It is only thereafter that this application dated 04.04.2005 by way of revision and *restitutio in integrum* has been made by the Petitioners to this Court.

In my view though there had been a delay of about 5 months from the order of the District Court refusing intervention, I am disinclined to hold this delay against the Petitioners.

As was quite eloquently articulated by Soza, J. in *Somawathie v. Madawela* (1983) 2 Sri L.R 15; (1986) BLR 233, despite the finality conferred by Section 48(1) of the Partition Law No.21 of 1977, the powers of the Court of Appeal by way of revision and *restitutio in integrum* are not affected by the provisions of the subsection. The Court can intervene and set aside the decrees entered when grave prejudice and perversity have been perpetrated upon a party whose interest has been substantially wiped out.

It is as plain as a pikestaff that there are some salient defects that taint the conduct of the proceedings in the partition action. It all arises from the failure on the part of the surveyor to serve notices on the Petitioners who preferred their claims at the preliminary survey.

The names of the Petitioners were brought home to the notice of Court by way of the report submitted by the surveyor and the Plaintiff must have been directed to amend the plaint in view of the fact that new claimants surfaced at the preliminary survey. The Plaintiff must have amended the plaint to bring in the new claimants paving the way for summons to be issued. As the crow flies, it goes without saying that proceedings without summons being served goes to the root of a trial and the whole proceedings become null and void-see Victor Tennekoon C.J in *Beatrice Perera v. Commissioner of National Housing* 77 NLR 361; *Kusumawathie v. Wijesinghe* (2001) 3 Sri L.R 245.

Judges have drawn distinctions between a decision which is merely declaratory of the existing legal position and a decision which, is constitutive or, in other words, changes the existing legal position. In this context one must recall the distinction drawn between a decree entered in favour of the Plaintiff in an action *rei vindicatio*, and a decree entered in an action for partition of the land-see Alan Rose C.J in *Seedin v. Thediyas* (1951) 53 N.L.R 63. The learned Chief Justice at pp 63-64 cited with approval the following words of De Sampayo, J. *Bernard v. Fernando* (1913) 16 N.L.R 438, 439:-

“Partition decrees.....are not, like other decrees affecting land, merely declaratory of the existing legal rights of the parties inter se. They create a new title....”



So there is a bounden duty on trial Court Judges conducting partition cases to ensure the presence of correct parties before them and investigate title so that the partition decrees hold good against the whole world.

In my view as a result of the omissions and the failure to observe the mandatory provisions of Partition Law, the rights of the Petitioners have been substantially prejudiced and the award of compensation to the Petitioners cannot become a redeeming feature having regard to the fact that the Petitioners were never heard on their entitlements. In other words one cannot imagine a decree for compensation without the Petitioners having been heard. One cannot award compensation on hearsay. If the report of the Commissioner is good enough for perusal and awarding of compensation, it should be equally good for amendment of pleadings and issuance of summons. One cannot be selectively blind to the contents of reports submitted by surveyors. Such omissions on the part of the District Court will only compound the failure to serve notices by surveyors. There cannot be double jeopardy caused to parties who surface as new claimants.

In the case of *Richard and another v. Seibel Nona and Others* (2001) 2 Sri L.R 1 the Court held:-

*"Court has completely acted in violation of the provisions of the Partition Law and has accepted by way of a settlement, the evidence of the 1<sup>st</sup> Defendant, without investigating into the title of all the parties as required by the Partition Law. A Partition decree cannot be entered by settlement. It is the duty of the judge to fully investigate into the title to the land and shares."*

In *W. Uberis v. M. W. Jayawardena* (1959) 62 N.L.R 217 it was held:-

*"In a partition action, when a commission is issued to a surveyor to carry out a preliminary survey, it is the duty of the surveyor to adhere strictly to its terms and to locate and survey the land he is commissioned to survey. It is not open to him, even with the consent of the parties, to survey a portion only of the land and submit the plan and report of such survey. If he is unable to locate the land he is commissioned to survey, he should so report to the Court and ask for further instructions."*

In *Kannangara v. Silva* 35 N.L.R 1 it was declared:-

*“Where a partition decree was entered without a trial and without notice to the parties on the record, and an application was made by a person who was no party to the action to set aside the decree and allow him to intervene, the District Court had no power to vacate the decree. The Supreme Court would in the exercise of its powers of revision set aside a decree entered under such circumstances and direct proceedings to be taken de novo.”*

Thus it is crystal clear that both the surveyor and the Court have acted in violation of the provisions and the law relating to partition actions and in consequence grave prejudice has been caused to the Petitioners as a result of the non-investigation of title pertaining to the Petitioners. In such situations the superior courts have acted with circumspection and permitted parties to participate at the trial after having set aside the partition decrees notwithstanding the finality conferred on them.

In the circumstances I set aside the judgement and decree entered in this case and order a trial *de novo*. The learned District Judge of *Gampaha* is directed to permit the amendment of plaint in order to add the Petitioners so that their statements of claims could be filed and this matter fully investigated with the participation of the Petitioners.

Accordingly I allow this application

JUDGE OF THE COURT OF APPEAL