

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

In the matter of an application in terms of Section 754(1) read with Section 758(1) of the Civil Procedure Code as amended.

Kanatta Kankanamlage Suranganee Jayawardena
No. 216, Veluwana Road,
Dematagoda, Colombo 09.

Plaintiff

Case No. C. A. 261/2000(F)
D. C. Colombo Case No. 6018/ZL

Vs.

Kumarapperuma Arachchilage Edward
No. 149/18, Kolonnawa Road, Dematagoda.

Defendant

AND NOW BETWEEN

Kanatta Kankanamlage Suranganee Jayawardena
No. 216, Veluwana Road,
Dematagoda, Colombo 09.

Plaintiff-Appellant

Vs.

Kumarapperuma Arachchilage Edward
No. 149/18, Kolonnawa Road, Dematagoda.

Defendant-Respondent

Counsel:

S.W. Premaratne for Plaintiff-Appellant

Dr. Sunil Coorey with Nilanga Perera for the Defendant-Respondent

Written Submissions tendered on:

Plaintiff-Appellant on 02.10.2012 and 03.04.2019

Defendant-Respondent on 17.10.2012 and 06.08.2018

Argued on: 01.03.2019

Decided on: 09.08.2019

Janak De Silva J.

This is an appeal against the judgment of the learned Additional District Judge of Colombo dated 03.05.2000.

The Plaintiff-Appellant (Plaintiff) filed the above styled action seeking a declaration of title to the land more fully described in schedule to the plaint, ejectment of the Defendant-Respondent (Defendant) and all others holding under him from the said land, judgment in a sum of Rs. 400/= from 1988 October to 1989 January at Rs. 100/= per month and damages of Rs. 100/= per month until she received peaceful possession of the land. The Defendant made a cross-claim to the land described in the schedule to the plaint.

The learned Additional District Judge dismissed both the claim of the Plaintiff and the cross-claim of the Defendant. The Plaintiff has appealed.

Parties agree that the original owner of the land in dispute was Stanley Jayawardena the husband of the Plaintiff.

The title pleaded by the Plaintiff is based on deed no. 1879 dated 04.02.1970 (P.1) attested by T.D. Samson Silva Notary Public. The title pleaded by the Defendant is based on deed no. 2155 dated 13.03.1973 (V.2) attested by F.S.V. De Silva, Notary Public. Both these deeds were said to have been executed by Stanley Jayawardena.

The learned Additional District Judge correctly held that the Defendant cannot maintain a declaration of title to the land more fully described in the schedule to the plaint containing in extent 21 perches as the deed no. 2155 (V.2) relied on by the Defendant to establish his title is for a land 10.5 perches in extent.

The question is whether the Plaintiff established her title to the land more fully described in the schedule to the plaint. In this context the learned Additional District Judge held that upon an examination of plans P.2, P.3 and P.4 and the evidence of S. Lokanathan, Licensed Surveyor it is clear that the land claimed by the Defendant falls within the land claimed by the Plaintiff. In fact, this was admitted by T.D. Samson Silva Notary Public who was called by the Plaintiff [Appeal Brief page 289].

Having given careful consideration to the oral and documentary evidence on the above issue, I see no reason to disagree with this finding of fact by the learned Additional District Judge.

The next question is whether the Defendant has established his title to the land claimed by him. He relied on deed no. 2155 dated 13.03.1973 (V.2) attested by F.S.V. De Silva, Notary Public.

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.”

In this case, F.S.V. De Silva, Notary Public gave evidence on the execution of deed no. 2155 dated 13.03.1973 (V.2). One of the attesting witnesses thereto S.J. Herman Gunawardena also testified. They both testified that Stanley Jayawardena signed the deed in front of them. In these circumstances, the learned Additional District Judge was correct in concluding that the execution of deed no. 2155 dated 13.03.1973 (V.2) has been proved.

On the contrary, the deed relied on by the Plaintiff no. 1879 dated 04.02.1970 (P.1) attested by T.D. Samson Silva Notary Public relates to a smaller portion of a larger extent of land the identity of which the Plaintiff has failed to establish. It is also a conditional transfer and as the learned Additional District Judge points out the Plaintiff has failed to establish whether the said conditions have been fulfilled. The failure to do so results in the Plaintiff failing to establish the requisites under Roman-Dutch law to prove her ownership.

Willie's Principles of South African Law [Hutchinson, Van Heerden and Der Merwe (eds), 8th Ed. Third Impression, page 270] explains that ownership is a composite right consisting of a conglomeration of abilities and states that the composite right of an absolute owner of a thing consists of right (i) to possess it (ii) to use and enjoy it (iii) to destroy it and (iv) to alienate it.

Maarsdorp [*The Institutes of Cape Law*, Book II at p.31 (1903)] states that the rights of ownership “..... are comprised under three heads, namely, (i) the right of possession, ownership having indeed been defined by some as consisting in the rights to recover lost possession; (2) the right of usufruct, that is the right of use and enjoyment; and (3) the right to disposition.”

Given the divergent views as to the different rights that make up the concept of ownership, it is important to ascertain what are the rights that a person should enjoy over a corporeal thing to be declared as its owner.

Maarsdorp (supra) provides an answer to this question by reference to the rights of possession, enjoyment and disposition and states as follows:

“these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time. Thus, though there need not be actual use and enjoyment present in every case, the right of alienation, coupled with the legal means of effecting such alienation, is at all times necessary in order to constitute valid ownership: and perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim the possession and enjoyment thereof.”

Professor Max Radin, an authority on Roman Law, in *Fundamental Concepts of the Roman Law* [California Law Review Vol, 13 Issue 3 page 212] states that “...especially the power of transfer, are legally and popularly associated with the idea of dominium as fundamental parts of it.”

The Privy Council in *Attorney General v. Herath* (62 N.L.R. 145) adopted part of Maarsdorp’s formulation and held that the rights of an owner under the general law of Ceylon are comprised under three heads, namely, (1) the right of possession and the right to recover possession; (2) the right of use and enjoyment; and (3) the right to alienate and that **these three factors are all essential to the idea of ownership but need not all be present in an equal degree at one and the same time.** (emphasis added)

One of the conditions in deed no. 1879 dated 04.02.1970 (P.1) is that the property must be transferred back to Stanley Jayawardena upon repayment of the money borrowed by him. Clearly the right of the Plaintiff to transfer the corpus to a third party was limited.

There is also evidence that the Defendant instituted action bearing no. 5584/ZL to evict one Alikutti from premises no. 110 which is reflected in plan no. 3577 (V.1) whereas the said assessment number is not shown on plan no. 873 (P.2) relied on by the Plaintiff.

This being a *rei vindicatio* action it was a paramount duty on the part of the Plaintiff to establish correct boundaries in order to identify the land in dispute [*Peeris v. Savunhamy* (54 N.L.R. 207)]. There is a greater and heavy burden on a plaintiff in a *rei vindicatio* action to prove not only that he has dominium to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title [*Abeykoon Hamine v. Appuhamy* (52 N.L.R. 49)]. To succeed in an action *rei vindicatio*, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is clearly identifiable. The identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment [*Latheef v. Mansoor and another* (2010) 2 Sri.L.R. 333]. In a vindicatory action it is necessary to

establish the identity of the corpus in a clear and unambiguous manner and the action must fail upon the failure to do so [*Fernando v. Somasiri* (2012 B.L.R. 121)].

Therefore, the learned Additional District Judge correctly dismissed the action of the Plaintiff.

However, it appears that in answering the issues the learned Additional District Judge has erred in answering issue no. 7 in the affirmative. Issue no. 7 and the answer reads:

7. 4, 5, 6 විසඳනාවන්ට විත්තිකරුගේ වාසියට පිළිතුරු දෙන්නේ නම් විත්තිකරුට විත්තිකරුගේ උත්තරයේ සඳහන් පරිදි ඔහුට සහන ලබා ගැනීමට අයිතියක් ඇද්ද? ඔව්

As set out earlier the cross-claim of the Defendant was for a declaration of title to the land more fully described in the plaint which was 21 perches in extent whereas the deed no. 2155 (V.2) relied on by the Defendant to establish his title is for a land 10.5 perches in extent. It follows that issue no. 7 should have been answered in the negative. Hence acting in terms of the powers vested in Court by Article 138 of the Constitution, I vary the judgment of the learned Additional District Judge of Colombo dated 03.05.2000 by answering issue no. 7 as follows:

7. 4, 5, 6 විසඳනාවන්ට විත්තිකරුගේ වාසියට පිළිතුරු දෙන්නේ නම් විත්තිකරුට විත්තිකරුගේ උත්තරයේ සඳහන් පරිදි ඔහුට සහන ලබා ගැනීමට අයිතියක් ඇද්ද? නැත

For all the forgoing reasons and subject to the above variation, I see no reason to interfere with the judgment of the learned Additional District Judge of Colombo dated 03.05.2000.

Appeal is dismissed with costs.

Judge of the Court of Appeal