

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

In the matter of an application for leave
to substitute made under and terms of
Section 404 of the Civil Procedure Code
read with Section 79 of the Partition Law
No. 21 of 1977.

Lanka Lands Company Ltd.
No. 347, Union Place,
Colombo 12.
3rd Defendant - Appellant

CA Case No. 541/2000(F)

D.C. Kandy Case No. 14564/P

Vs

Kalukapuge Thomas Perera
No. 612, Desinghe Mawatha
Thalangama South.

Plaintiff – Respondent

1. Kalukapuge Engalthina
2. Kalukapuge Simiyan

Both of No. 612, Desinghe Mawatha
Thalangama South.

1st and 2nd Defendant – Respondents

AND NOW BETWEEN

Communication and Business Equipment
(Pvt) Ltd.(Now known as Apogi
International (Pvt) Ltd.
No. 99/6, Rosmead Place,
Colombo 07.

Petitioner

Vs

Lanka Lands Company Ltd.
No. 347, Union Place,
Colombo 12.

3rd Defendant – Appellant – Respondent

Kalukapuge Thomas Perera
No. 612, Desinghe Mawatha
Thalangama South.

Plaintiff – Respondent – Respondent

3. Kalukapuge Engalthina
4. Kalukapuge Simiyan
Both of No. 612, Desinghe Mawatha
Thalangama South.

**1st and 2nd Defendant – Respondent
– Respondent**

BEFORE

: Deepali Wijesundera J.

: M.M.A. Gaffoor J.

COUNSEL

**: Nihal Jayamanne PC with Noorani
Amarasinghe for the Petitioner.**

**Dr. Jayatissa De Costa PC with
Lahiru N. Silva for the Substituted
Plaintiff Respondent Respondent.**

ARGUED ON

: 06th October, 2015

DEDICED ON

: 25th May, 2016

Deepali Wijesundera

The original plaintiff had instituted a partition action in the District Court of Colombo to partition the land described in the second schedule to the plaint under the provisions of the Partition Act. There were two defendants at the commencement and later a third defendant had intervened. After parties filed their statement of claim the case was taken up for trial and judgment was given to partition the land sought to be partitioned. Being aggrieved by the said judgment the third defendant Lanka Lands (Pvt) Ltd had preferred this appeal. While the appeal was pending the name of the appellant company was struck off from the company register due to the fact that it had not been registered under the new *Companies Act No. 7 of 2007*. The counsel for the plaintiff respondent has raised a preliminary issue that since the appellant company has ceased to exist the appeal can not be maintained. Both parties tendered their submissions on this issue. While the submissions were pending Communication and Business Equipment (Pvt) Ltd has filed an application in terms of *Sec. 404 of the Civil Procedure Code* to have itself substituted in place of the Appellant Company stating that the appellant company had transferred all their rights to the petitioner by deed no. 907 dated 09/08/1994. The judgment of the District Court was delivered on 04/07/2000 by this time the third defendant was no longer in existence.

The learned counsel for the petitioner submitted that in a partition action the court has to determine the rights of parties as at the filing of the action and

that court cannot simply shut out a party without hearing that party. To do so the court had to substitute the said party. The petitioner stated that the third defendant appellant had transferred a divided portion of land owned by them which is a separate land and not the subject matter of the partition action to the petitioner. He further stated that on the face of the deed marked "X" lot B claimed by the defendant as a separate divided land in the partition action has been sold to the petitioner pending the action. The petitioner stated that this appeal was abated and that the petitioner made an application to relist the instant appeal.

The petitioner submitted that at the time the partition case was filed the amendment to the Companies Act was not in operation. The petitioner has cited a number of judgments to say that the substitution can be made under *section 404 of the Civil Procedure Code* in a partition action before the final decree.

The plaintiff respondents submitted that section 66 of the Partition Act prohibits the alienation of rights and interests of parties pending a partition action. Citing the judgment in **Virasinghe vs Virasinghe and others 2002 (1) SLR 1** the respondents stated that an alienation of property can not be permitted after the registration of a *lis pendens* with regard to a pending partition action.

The respondents stated that the petitioner can not challenge the due registration of the *lis pendens* in this action as there was no issue to that effect at the trial and cited the judgment in **Hanafi vs Nallamma 1998 (1) SRL 73** where it has been stated that a case has to proceed on the issues framed at the trial. The respondents cited a number of cases on the argument of transferring rights after the *lis pendens* was registered.

The respondents stated that the petitioner who has not acted with *uberima fide* and who has slept over its alleged rights is not entitled to invoke the discretion vested in this court under *Sec. 404 of the Civil Procedure Code*.

The respondents also stated that the petitioner is guilty of laches, that the appellant company was struck off from the company register in 2010 according to R1 and the preliminary objection of maintainability of the appeal was taken up in 2011 and the present application for substituted was made in 2012 one year after the date of objections and two years after the appellant company was struck off.

The transfer of interest by deed no. 907 had taken place in 1994 where as substitution was sought in 2012 eight years after the transfer. Clearly the petitioner has been sleeping over in his rights. The substitution was sought after the appeal was filed and the case was abated and long after the appellant

company ceased to exist, therefore the judgments cited by the petitioner on substitution is not applicable to the instant case.

Sec. 66 of the Partition Act states:

66 (1). *“After a partition action is duly registered as a lis pendens under the Registration of Documents Ordinance no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of certificate of sale”.*

66 (2). *Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void.*

The petitioner has purchased the rights of the appellant after the *lis pendens* was registered.

The petitioner stated that the land transferred by deed 907 is not part of the subject matter to the partition action while making submissions if so why

does the petitioner want to intervene in the instant application. If it is so if his application is refused his rights will not be affected.

For the afore stated reasons the application of the petitioner is refused with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I Agree

JUDGE OF THE COURT OF APPEAL