

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

**CA PHC NO: 25/2014**

Koralage Upali Senarath,  
No: 123,  
Imbulgoda,  
Rathgama.

**PETITIONER**

High Court Galle

Case No: HC/rev/29/2012

***Vs.***

01. Mutha Merenngya Keerthi Rohan,  
No: 282,  
Madawila, Rathgama.

**1<sup>ST</sup> RESPONDENT**

M.C. Galle Case No: 79284

02. Paskuwal Handi Upul Dewamiththa  
Dharmapriya Mendis,  
No: 38, Hapugala, Wakwalla.

**2<sup>ND</sup> ADDED RESPONDENT AND  
ATTORNEY OF THE 1<sup>ST</sup> RESPONDENT**

***AND BETWEEN***

01. Mutha Merenngya Keerthi Rohan,  
No: 282,  
Madawila, Rathgama.

**1<sup>ST</sup> RESPONDENT - PETITIONER**

02. Paskuwal Handi Upul Dewamiththa  
Dharmapriya Mendis,  
No: 38, Hapugala, Wakwalla.

**2<sup>ND</sup> ADDED RESPONDENT AND  
ATTORNEY OF THE 1<sup>ST</sup> RESPONDENT -  
PETITIONER**

***Vs.***

Koralage Upali Senarath,  
No: 123,  
Imbulgoda,  
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**PETITIONER – RESPONDENT**

***AND NOW BETWEEN***

01. Mutha Merengya Keerthi Rohan,  
No: 282,  
Madawila, Rathgama.

**1<sup>ST</sup> RESPONDENT – PETITIONER –  
APPELLANT**

02. Paskuwal Handi Upul Dewamiththa  
Dharmapriya Mendis,  
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**2<sup>ND</sup> ADDED RESPONDENT AND  
ATTORNEY OF THE 1<sup>ST</sup> RESPONDENT –  
PETITIONER – APPELLANT**

*Vs.*

Koralage Upali Senarath,  
No: 123,  
Imbulgoda,  
Rathgama.

**PETITIONER – RESPONDENT –  
RESPONDENT**

**Before : P.R. Walgama, J**

**: L.T.B. Dehideniya, J**

**Counsel : J.C. Weliamuna appears for the Appellant.**

**: Saman Liyanage appears for the Petitioner –  
Respondent – Respondent.**

**Argued on : 19.02.2016**

**Decided on: 24.06.2016**

CASE-NO-CA (PHC) 25/ 2014- JUDGMENT- 24.06.2016

**P.R.Walgama, J**

The instant appeal is to review the impugned orders of the Learned High Court Judge, dated 07.05.2014 and order of the Learned Magistrate dated 29.06.2012 by setting aside and vacating the same.

The facts germane to the instant appeal stems from a dispute which was likely to cause breach of the peace between the Petitioner and the Respondent. Initially a complaint was made by the Petitioner, alleging that the 1<sup>st</sup> Respondent had obstructed the road way which he was using as a access to his house.

The said road way was over the Respondent's Seven acre land in which he has cultivated cinnamon.

Although the Petitioner has made a complaint to the police they did not file an information in terms of Section 66 of Primary Court Act No 44 of 1979.

Hence the Petitioner has tendered the petition in terms of Section 66(1)(b) of the above Act, of the alleged dispute;

The Petitioner has asserted the following in the said petition;

That he had been using a 10 foot road way from the boundary of the land belonging to the Respondent.

That the said road has been used over 40 years and had prescribed to the said road way.

Further alleges that the dispute arose due to the fact the Respondent obstructing the road way by cutting the branches of a tree putting across the said road way.

It is the categorical position of the Petitioner that he has no alternative road way, and as such out of necessity he had been using the disputed road way.

In opposing the above application of the Petitione the Respondent asserts the fact that the Petitioner had never used a ten feet wide road way, but had used a road which is wide only six feet. Further it is stated that the Petitioner had been using a road way on to the Western boundary of the Respondent's land.

Further it is stated by the Respondent that the Petitioner has an alternative access and as such he cannot claim this road way, as a necessity.

It is apparent from the facts revealed, that the alleged dispute arose in respect of a road way, and determination of the said issue has to be in accordance with Section 69 (1) of the Primary Court Procedure Act, which states thus;

“ 69 (1) where the dispute relates to any right to any land or any part of a land, other than the right to possession of

such land or part thereof, the Judge of the Primary Court shall determine as to who is entitled to the right which is the subject of the dispute and make an order under subsection (2).”

It was also the contention of the Respondent that there is a Partition case in which the alleged road way is a part of the land sought to be partitioned. But it said that the petitioner has never intervened to vindicate his rights in the said partition case. Further in perusing the documents marked 2P2, 2P3, 2P4 the Learned Magistrate was of the view that the said documents do not depict an existence of the alleged road way.

The Learned Magistrate has also held that any order made under Section 66 of the Primary Court Act, will not be a bar for any determination to be taken in a Civil Court. Any action under Section 66 of the Primary Court Procedure Act is to make order to preserve the peace between the parties to the dispute till a competent court decides the rights of the parties. Therefore any order made by a Magistrate in terms of the Primary Court Act will be only a temporary order which is not capable of deciding the rights of the parties thereto.

Further it was the opinion of the Learned Magistrate that mere fact that the said plans do not depict a road way does not exclude the fact that disputed road way was not in existence, and therefore the Learned Magistrate was persuaded to reject the said argument of the Respondent.

It was the contention of the Respondent that the a temporary road way was allowed for the Petitioner to be used only for the purpose of taking his mothers corps and for the alms giving, for the monks to come to the house of the Petitioner. But nevertheless it was observed by the Learned Magistrate that the disputed road was not given and was cleared for the purpose of the Petitioner's mother's funeral but as per photograph marked P6 it indicates that there had been a clear road way in existence.

In addition to the facts stated above the Learned Magistrate has also adverted to the investigation report of the police, which is a clear indication of the fact that the Petitioner had been using the alleged road way. But it contended by the Respondent that the Petitioner was using a paddy bund and not the disputed road way.

The Learned Magistrate has also considered the Respondent's position as to the existence of the road way. The Respondent asserts the fact that the said road was used for the purpose of transporting cinnamon from the land to the tractor. But it is commented by the Learned Magistrate that if that was the case there was no necessity to have the said road open up to the petitioner's house.

The learned Magistrate was also satisfied with the documents tendered by the petitioner viz, P17 and P19 and also the photograph tendered by the Petitioner as the above said document had proved the fact that the Petitioner had been using the disputed road way.

It was observed by the Learned Magistrate that although the Petitioner has made a statement to the Police that he was using a 10 feet wide road way, in fact he had used a road only 4 feet wide, and made order until a competent court makes an order, in respect of this disputed road the Petitioner could use the said road way without any obstruction.

Being aggrieved by the said order, the Respondent- Petitioner made an application in revision to have the said impugned vacate or set aside.

The Learned High Judge by his order dated 07.05.2014, has dismissed the Respondent-Petitioner's Revision application on the basis that no extraordinary grounds averred for the High Court to exercise its revisionary jurisdiction, and no documentary proof of the said partition case has been tendered. Hence the Learned High Court Judge was of the view that the Respondent- Petitioner has alternative remedy to resolve the alleged dispute.

Being aggrieved by the said order of the Learned High Court Judge the Respondent- Petitioner appealed to this court to have the said order set aside or vacate.

It is intensely relevant to note that the mere fact, a civil action is pending in the District Court, will not fettered a Magistrate to make any order in respect of an application filed under Section 66 of the Primary Court Procedure Act.

The above principle was recognised in the case of KANAGASABE .VS. MAILWAGANAM- 78 NLR- 280.

For the above compelling reasons this Court is of the view that the Respondent-Appellant has not satisfied this Court as to why the orders of the Learned High Court Judge and the Magistrate should be set aside.

Accordingly appeal is dismissed, costs fixed at Rs. 10,000/.

**JUDGE OF THE COURT OF APPEAL**

L.T.B. Dehideniya, J  
I agree,

**JUDGE OF THE COURT OF APPEAL**