

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

In the matter of estate of late Dr.
Edmond Madonza Wijerama of
No.87, Horton Place, Colombo 7

Adlin Agnes Anula Wijerama
87/2, Horton Place,
Colombo 7
(Deceased)
Petitioner

Vs.

1. Jayanthi Mendis
87/2, Horton Place, Colombo 7.
(Deceased)
1st Respondent

2. Olitha Somasiri Gunaratna,
No. 21, 3rd Lane
Midland Avenue,
Kohuwala.
2nd Respondent

Case No. 217/2000 (F)

D.C. Colombo case No. 28578/T

And Now Between

1. Jayanthi Mendis,
(Deceased)
Respondent Appellant
1a. Ranil Mendis No. 40/2,
1st Lane, Kirulapona,
Colombo 5
Substituted Respondent
Appellant.

VS

Olitha Somasiri Gunaratna,
No. 21, 3rd Lane
Midland Avenue,
Kohuwala.

Petitioner – Respondent.

Before : A.H.M.D. Nawaz, J.
E.A.G.R. Amarasekara, J

Counsel : Chanaka Kulatunga AAL with Sagarika Dharmabandhu for the
1st Respondent Appellant.

Decided on : 26.10.2018.

E.A.G.R. Amarakekara, J.

The Respondent- Appellant has filed the Petition of appeal to get the Judgment dated 20.03.2000 delivered by the learned Additional District Judge of Colombo in the case No. D.C. Colombo 28578/T set aside on the various grounds set out in the aforesaid petition of appeal. The Original Petitioner in the aforesaid District Court case was one Adlin Agnus Anula Wijerama who was the wife of late Dr. Edmond Medonza Wijerama, one of the joint makers with her of the last will No. 2119 which was the subject matter of the aforesaid District Court case.

The Appellant was the 1st Respondent and the Petitioner – Respondent was the 2nd Respondent in the original petition filed by the said Adlin Agnus Anula Wijerama (hereinafter sometimes referred to as Anula Wijerama). It should be noted that the Appellant who was the 1st Respondent to the original petition in the aforesaid District court case, though filed objections to the grant of probate to the aforesaid Original Petitioner, Anula Wijerama, on the grounds set out there in the objections dated 01.12.1981, did not challenge the execution of the aforesaid joint last will. Only in her amended objections dated 02.05.1983 she had taken up the position that the last will was not duly executed. However, in her original objections as well as amended objections she had admitted the paragraph 1, 2 and 3 of the original petition of the Original Petitioner which refers to the execution of the said joint last will and testament bearing No. 2119 dated 28.11.1957. Thus, even by her amended objections she had not challenged the execution of the said last will and testament but only the due execution of it. The stance relating to the due execution is a new stance taken up in the amended objections as in the original objections, only the suitability of the original Petitioner to be the executrix was challenged by the Appellant. However, before the said last will was proved, the Original Petitioner passed away on 29.07.1983. When the death of the Original Petitioner was reported to the District Court of Colombo on 20.09.1983, the learned District Judge had made an order to lay by the case. Till the case was taken back to the calling roll after certain applications filed by the Respondent - Petitioner in the latter part of 1993, the District Court Colombo case was laid by as per the aforesaid order but no one had moved for abatement of the action. Without moving for an abatement of the aforesaid Testamentary action D.C. Colombo 28578/T, the Appellant had filed a separate action No. 150/T in Marawila District Court claiming letters of

administration for the intestate property of late Dr. Edmond Madonza Wijerama without disclosing the following facts to that court.

1. That there was a pending, laid by case for the same estate in the Colombo District Court,
2. That the Petitioner- Respondent and she were parties to that Colombo District Court case,
3. That there was a joint Last will executed by the said Dr. Wijerama and his wife, the Original Petitioner of Colombo District Court case, and that she admitted the execution of said will but she challenged only the due execution of it in the said Colombo District Court Case.

Furthermore, she lied to the said Marawila District Court by stating in her Petition that said Dr. Wijerama died without leaving a will or Testament, when she had admitted the execution of the said last will in her objections to the Colombo District Court case.

This Court also observes that Appellant while giving evidence during cross examination in the lower court inquiry at many times have admitted the existence of a last will executed by Dr. Wijerama (vide pages 173, 179, 180, 185 of the brief). Though on certain occasions, she had denied the existence and or validity of the last will of Dr. Wijerama or evaded giving answers to some vital questions posed in cross examinations, especially at page 17³~~8~~, she had revealed how they found the last will and at pages 179 and 180 she had admitted the said last will as a legally valid last will. In such a backdrop the findings of the learned Additional District

Judge of Colombo that the Appellant obtained letters of administration from the Marawila District court to administer the estate of Dr. Wijerama by concealing facts to that court can be endorsed as correct by this court. As the said letters of administration from Marawila District Court were obtained by fraudulently concealing relevant facts to that Court, the Appellant should not be allowed to benefit from the order of Marawila D.C. case since fraud vitiates the outcome of Marawila District Court Case. The learned District Judge is correct in answering issue No. 10 in the affirmative stating that the order and proceedings of Marawila case are null and void. On the other hand, it is highly inappropriate, while being a party to the Colombo District Court case, to file another action in Marawila District Court for the same estate of Dr. Wijerama while the Colombo District Court case, though laid by, was still pending. If her position was genuine, she could have proceeded with her cross claim in her objections in the Colombo District Court case. On the other hand, if she revealed the Colombo District Court case in her petition filed in the Marawila District Court case, the learned District Judge of Marawila could have made order to make the Petitioner - Respondent a party to that case and inquire into the issue of maintaining a second action for the same estate while it is sub judice in another Court.

Another argument put forward by the Appellant is that there was no substitution made in the room of the deceased Original Petitioner and, therefore, all the proceedings of the District Court Colombo are ab initio void. In this regard the counsel for the Appellant has referred to the decisions in *Karunawathie Vs Godayalage Piyasena SC Appeal 09A/2010*, *Mariam Beebee Vs Seyed Mohamed 68*

NLR 36. However, this Court observes that the Petitioner- Respondent had made applications to the District Court of Colombo to substitute him in the room of the deceased Original Petitioner (vide petitions dated 14.10.1993, 29/04.1994, and affidavits dated 07.06.1993 and 25.03.1994 at pages 106, 108, 112, and 115 of the brief).

It is true that there is no specific order naming the Petitioner- Respondent as the Substituted Petitioner in the room of the Original Petitioner but the learned District Judge after the filing of above applications took the laid by case to the roll and allowed the Petitioner Respondent to proceed with the case and to take steps to publish notices in the newspapers as the petitioner. As per the proceedings dated 12.02.1996 the Petitioner- Respondent was allowed to frame the issues of the inquiry as the Petitioner. The above shows without doubt that the learned District Judge accepted the Respondent- Petitioner as the Petitioner of the case. Thus, though there is no specific order appointing the Petitioner- Respondent as the Substituted Petitioner, the learned district judge by conduct had accepted him as the Substituted Petitioner. This court does not observe any objection taken by the Appellant in the original court with regard to the Petitioner-Respondent being treated as the Petitioner of the case or prosecuting the case as the Petitioner. Not only the district court, even the Appellant has named the Petitioner-Respondent as the Petitioner or Petitioner- Respondent in his notice of appeal as well as in the petition of appeal. Therefore, the status of the Petitioner Respondent was not challenged in the original court and I do not see any reason to accept such argument in favour of the Appellant during the appeal. As the Respondent

Petitioner was granted the probate in the case No. 32966/T which was filed with regard to the estate of the deceased Original Petitioner, he is a suitable person to represent the deceased Original Petitioner, Anula Wijerama in the testamentary case filed by her with regard to the estate of late Dr. Wijerama. If the Petitioner-Respondent got the probate in 32966/T by a fraudulent representation it will be recalled after an inquiry on the application made by the Appellant. If such a thing happens, the Appellant will be able to file necessary papers to recall the probate issued to the Petitioner - Respondent with regard to Dr. Wijerama's estate in case No. 28578/T, but till that I do not see any bar for him to hold and act according to the probate issued to him as his actions are subject to the supervision of the District Court. On the other hand, if the last will of the original Petitioner Anula Wijerama is not proved in the action filed by the Petitioner- Respondent, he may not able to claim under the last will of late Dr. Wijerama. In such a situation the Appellant has the opportunity to raise objections at the time of distribution of assets of Dr. Wijerama's estate. Furthermore, this court observes that Appellant is not a suitable person to be substituted for or represent Original Petitioner in case No. 28578/T due to conflict of interests. She was opposing the probate being granted to the Original Petitioner and was challenging the joint last will stating that it was not duly executed. The grant of probate was only to administer the estate pending action and to take necessary steps in that regard. Such appointment cannot prejudice the rights of the Appellant as one who holds the probate can be brought under the supervision of the Court.

The Counsel for the Appellant in his written submission argues that, even if it is presumed that the Will No. 2316 made by the Original Petitioner relevant to case No. 32699/T is genuine, it revokes the previous Will, the subject matter in case No. 28578/T. However, as far as the estate of late Dr. Wijerama is concerned, this argument has no relevance as the Will in case No. 28578/T is a joint will.

The Counsel argues stating that the learned District Judge had applied different standards to similar situations which form the backgrounds to the Marawila District Court case 150/T and Colombo District Court case No.32699/T. As per the evidence led before the learned District Judge, there was sufficient material to show that the letters of administration were obtained from Marawila District Courts by representations of facts which are false, while knowing the falsehood of the facts represented through the Petition. The evidence was that the application to recall the probate in 32699/T is yet pending. Whether the last will tendered in that case is a genuine one has to be decided in that case. The delay in filing that action with regard to the purported last will has to be evaluated by the Judge hearing that case. Though there are suspicious circumstances, it is not yet established that there is fraud in filing 32699/T. Therefore, the learned District Judge has correctly held that if the Petitioner- Respondent had obtained the probate in 32699/T fraudulently, necessary steps should be taken in that action to recall the probate. The case No. 32699/T is not an action filed while another action is pending for the same estate and representing falsehood with regard to the other action. Though there are suspicious circumstances and allegations, no fraud is established on the face of the documents but with regard to Marawila District Court case there was

clear evidence to establish the fraudulent nature of the action as previously referred in this judgment.

Finally, the Appellant tries to argue that the Petitioner failed in proving the last will, the subject matter of the D.C. Colombo case No.28578/T. Proof of the last will is a matter depending on the facts tendered before the original Court. Thus, this court shall not interfere unless the decision of the learned Additional District Judge is perverse and not supported by the facts placed before him. The Appellant's position in the amended objections was that it was not a duly executed will. In her original objections, she has not taken up this position. As per her objections she had admitted the averments No. 1, 2 and 3 of the Petition which reveals the facts relating to the making of the joint last will. If the execution of the will is admitted, the appellant must explain why she states that it is not properly executed. This Court observes that her evidence lacks integrity and uniformity. On certain occasions as mentioned before she herself admits the relevant last will as a legally valid last will. In such a backdrop, this Court cannot find fault with the learned Additional District Judge's findings in the Judgment dated 20/03/2000. Furthermore, the learned Additional District Judge has given ample and acceptable reasons to support his findings in his judgments. Therefore, I do not intend to interfere with the findings of the learned Additional District Judge.

Therefore, this appeal is dismissed with costs.

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E.A.G.R. Amarasekara.

Judge of the Court of Appeal.

I agree.

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A.H.M.D. Nawaz.

Judge of the Court of Appeal.