

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

In the matter of an
application for leave to
appeal

Court of Appeal No: CALA 433/2006

District Court of Avissawella No: 383/P

M.N Premalatha Subasinghe

5th Defendant-Petitioner-
Petitioner

Vs.

Y.W.R.M. Nandawathie
Wijekoon Wijekoon

4th Defendant-Respondent-
Respondent

Pemasiri Subasinghe

3rd Defendant-Respondent-
Respondent

Before: Eric Basnayake J

Counsel: H. Vithanachchi for the 5th Defendant-Petitioner-Petitioner

Dr. Sunil Cooray for the 3rd Defendant-Respondent-Respondent

4th Defendant-Respondent-Respondent absent and unrepresented

Argued on: 21.9.2011

Written submissions tendered on: For the 3rd Defendant-Respondent-

Respondent: 21.2.2008

For the 5th Defendant-Petitioner-
Petitioner: 7.5.2008

Decided on: 23.7.2012

Eric Basnayake J

1. The 5th defendant-petitioner-petitioner (5th defendant) filed this leave to appeal application to have the order dated 12.10.2006 of the learned District Judge of Avissawella set aside. By this order the learned Judge had confirmed the Final Plan No. 1131 of 26.4.2006 prepared by K.Wijeratne, Licensed Surveyor and Court Commissioner. The 5th defendant is seeking to have the alternative plan No.1131 as amended by A. Welagedera, Licensed Surveyor adopted.
2. The plaintiff respondent-respondent (plaintiff) filed this partition action to partition the land called "Mara Kada Kumbura and Mara Kada Ovita". Judgment in this case was delivered on 12.12.2002 allotting shares as follows:-

Plaintiff: 15/80

1st defendant: 50 perches (including 5/80)

2nd defendant: 2/80

3rd defendant: 6/80

4th defendant: 30/80

5th defendant: 22/80

3. After entering the interlocutory decree, final partition plan No. 1131 was tendered. The 5th defendant objected to this plan. The 5th defendant had been allotted lots 7, 9 & 15. Lot No. 7 included the house marked 'E' in the preliminary plan No. 1450 of 16.9.1990 prepared by Sirisena Abeysiriwardena, Licensed Surveyor & Court Commissioner.

4. The 5th defendant states that the house marked 'E' was built on a land filled with about 250 tractor loads of earth and a retention wall built 10 feet in height and 2 feet in width. The 5th defendant states that the filling was done and the retention wall was built long prior to the institution of this action. The 5th defendant had mentioned this fact in a letter addressed to K. Wijeratne, Licensed Surveyor, which is filed of record. The 5th defendant had stated this fact while giving evidence at the inquiry held with regard to the final scheme. This position was taken in the petition and the affidavit filed before this court in the leave to appeal application, in the oral and written submissions of the learned counsel for the 5th defendant.

5. The 5th defendant claimed that by the final plan No. 1131 a portion of this retention wall had been included in to lot No. 6 allotted to the 4th defendant. The 5th defendant claimed the entirety of the filled area together with the retention wall. The 5th defendant filed an alternative scheme (A 10) prepared by A. Welagedera, Licensed Surveyor. The alternative scheme is a modification of plan No 1131. The modified plan had carved out the filled up area together with the portion of the retention wall and the well allotted to the 4th defendant's lot 6, in to the 5th defendant's allotment, **lot 7. A strip of land with an equal extent had been taken out of lot 7 and shown as x1 to be**

given to the 4th defendant in lieu of the land taken from the 4th defendant. According to this plan (Welagedera's plan) the extent of the land taken from lot No. 6 is 2.77 perches. It is the same extent that is proposed to be given back to the 4th defendant.

6. The house marked 'E' is shown in the preliminary plan No. 1450. However the filled up area together with the retention wall is not shown in the preliminary plan. This house is found in lot No. 4 of the preliminary plan with an extent of 3 roods and 6.1 perches. The report to the plan gives a detailed description of the plantation in this lot. The plantation consists of 77 coconut trees, 5 jack trees, 60 arecanut trees & 15 coffee bushes. However there was no reference to a retention wall. The learned Judge had therefore concluded that the retention wall was built after the preparation of the preliminary plan. The learned Judge had found that the alternative scheme drastically reduces the road frontage of the 4th defendant and would therefore cause an injustice to the 4th defendant. For this reason the learned Judge had rejected the alternative scheme and confirmed the final plan No. 1131.

7. The learned counsel for the 5th defendant submitted that the demolition of the retention wall would result in causing damage to the house. The learned counsel submitted that the judgment gave the 5th defendant the area that she had been in possession. According to the preliminary plan the house marked as 'E' was claimed by the 5th defendant. The learned counsel submitted that 'E' is an improvement which cannot be separated from the filled up area and the retention wall. All that has to be considered together. He submitted therefore that the necessary conclusion one can arrive at is that the filled up

area together with the retention wall had been given to the 5th defendant, considering them as improvements.

8. The learned counsel submitted that the finding of court that the building of the retention wall was done after the preparation of the preliminary plan is not supported by evidence. Not showing the retention wall in the detailed report to the preliminary plan appears to be the reason for the learned Judge to conclude that the retention wall was built after the filing of the partition action. Apart from the oral evidence of the 5th defendant, no other convincing evidence had been produced to establish that the retention wall was built prior to the preliminary plan.
9. "In regard to partition proposed by the commissioner, it has been repeatedly held that a partition will not be rejected on light grounds or for mere inequality of value of the allotments, if in making it the Commissioner has honestly exercised his judgment" (Soertsz A.C.J. in Appuhamy vs. Weeratunge 46 N.L.R 461 at 462, Peers vs. Needham (1854) 19 Beav 316). In this case however, in the event part of the retention wall is alienated, it would cause untold loss to the 5th defendant.
10. However if the modification shown in plan marked A-10 is given effect to, it would deprive the 4th defendant the due share from the road frontage. The area covering the road frontage is evidently more valuable than the rest of the land. The 5th defendant had expressed her desire to compensate twice the loss the 4th defendant would suffer due to the deprivation of the portion from the road frontage. The extent of the land taken from the 4th defendant is calculated at 2.77 perches. The modified plan No. 1131 suggests that an equal extent is to be taken from lot No. 7 and shown as X1 in plan A-10. I am of the

view that justice would be done by compensating the 4th defendant with twice the extent that is 2.77 X 2.

11.I direct the learned District Judge to issue a commission to the Court Commissioner to re-demarcate the extents of lots 6 and 7 of plan No. 1131 as follows:-

- The extent shown as x in plan A-10 to be added to lot 7.
- A strip of land from lot No. 7 shown as x1 which is an equal extent that is 2.77 perches, to be annexed to lot No. 6.
- Another strip from lot No. 7 with an extent of 2.77 perches adjacent to lot x1 to be annexed to lot No. 6.
- The 5th defendant to bear the costs of this survey.

12. Considering the above revision the order dated 12.10.2006 is set aside. The appeal is allowed subject to the above adjustment. The 5th defendant to bear the costs of this appeal.

Judge of the Court of Appeal