

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

Hadira Gamage Agnes Nona

Pugalla, Kitalawa.

PLAINTIFF

C.A. Case No. 713/1999 (F)

-Vs-

D.C. Kuliyapitiya Case No. 7727/P

1. Adikari Mudiyanseage Padmasiri

No. 130, Kuliyapitiya Road,

Hettipola.

2. A.A. Jocelyn Nona,

3. Dissanayake Mudiyanseage Jinadasa,

4. Dissanayake Mudiyanseage Nandasiri,

5. S.P. Jane Nona,

5a. A.A. Maiappuhamy

(Substituted 5th Defendant)

6. A.A. Maiappuhamy,

7. A.A.T. Wickramasinghe

All of Pugalla, Kitalawa.

DEFENDANTS

AND BETWEEN

A.A. Maiappuhamy (Deceased)

Pugalla, Kitalawa.

5(a) and 6th DEFENDANT-APPELLANT

Athurigi Arachchige Teslin Wickramasinghe.

Pugalla, Kitalawa.

Substituted 5(a) and 6th DEFENDANT-
APPELLANT

-Vs-

Hadira Gamage Agnes Nona (Deceased)

Pugalla, Kitalawa.

PLAINTIFF-RESPONDENT

Jayakody Mudiyansele Ranasighe,

Pugalla, Kitalawa.

Substituted PLAINTIFF-RESPONDENT

1. Adikari Mudiyansele Padmasiri

No. 130, Kuliapitiya Road,

Hettipola.

2. A.A. Jocelyn Nona,

3. Dissanayake Mudiyansele Jinadasa,

4. Dissanayake Mudiyansele Nandasiri,

7. A.A.T. Wickramasinghe

All of Pugalla, Kitalawa.

DEFENDANT-RESPONDENTS

NOW BETWEEN

Athurigi Arachchige Teslin Wickramasinghe,

Pugalla, Kitalawa.

Substituted 5(a) and 6th DEFENDANT-
APPELLANT-PETITIONER

-Vs-

Hadira Gamage Agnes Nona (Deceased),
Pugalla, Kitalawa.

PLAINTIFF-RESPONDENT-RESPONDENT

Jayakody Mudiyanseelage Ranasighe,
Pugalla, Kitalawa.

Substituted PLAINTIFF-RESPONDENT-
RESPONDENT

1. Adikari Mudiyanseelage Padmasiri,
No. 130, Kuliyaipitiya Road,
Hettipola.
2. A.A. Jocelyn Nona,
3. Dissanayake Mudiyanseelage Jinadasa,
4. Dissanayake Mudiyanseelage Nandasiri,
7. A.A.T. Wickramasinghe
All of Pugalla, Kitalawa.

DEFENDANT-RESPONDENT-
RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Upul Kumarapperuma with Udumbara
Dissanayake for the 5(a) and 6th Defendant-
Appellant.

Wasantha Kahathuduwa for the 3rd and 4th
Defendant-Respondents.

R. Chula Bandara with Mangala Jivendra for the
Plaintiff-Respondent and 2nd Defendant-
Respondent.

Decided on : 26.11.2016

A.H.M.D. Nawaz, J.

The Plaintiff-Respondent (hereinafter sometimes referred to as “the Plaintiff”) instituted this action seeking a partition of a land described in the schedule to the plaint as Gorakagahamulalanda and Kongagamulahena. Initially the Plaintiff named four Defendants to the action and since one Jane Nona, her husband Maiappuhamy and their son Teslin Wickremasinghe also came forward at the preliminary survey to claim two contiguous lots of the land sought to be partitioned, they were respectively added as 5th, 6th and 7th Defendants. In the preliminary Plan bearing No.938 and report returned to court by the licensed surveyor A.B.M. Weber, the two lots of the land claimed by the 5th, 6th and 7th Defendants are depicted as Lots 1 and 4. It has to be noted that though lots 1 and 4 claimed by the 5th, 6th and 7th Defendants were included by the Plaintiff and shown to the surveyor as parts of the land sought to be partitioned, the Plaintiff had not allotted any share entitlements to the 5th, 6th and 7th Defendants-vide the plaint dated 30.04.1985.

Statement of Claim of the 5th, 6th and 7th Defendants

The 5th, 6th and 7th Defendants, filing their *joint* statement of claim dated 22.08.1988, averred that the land described in the schedule to the plaint had already been partitioned in the District Court of Kurunegala Case No. 12817 and since the final partition on 24.01.1930, the parties had been in possession of their respective lots. By pleading their own mode of devolution of rights, the 5th, 6th and 7th Defendants sought the dismissal of the action on the ground of *res judicata* and that they had acquired prescriptive rights to Lots 1 and 4 as depicted in preliminary Plan bearing No. 938.

This position of the 5th, 6th and 7th Defendants is quite consistent with the stance they had taken before the surveyor namely in item 8 of the report returned to Court by the surveyor, it is specifically mentioned that the 5th Defendant (Maiappu), 6th Defendant and 7th Defendants claimed Lots 1 and 4 as depicted in the preliminary plan-see page 201 of the brief wherein one finds item No. 8 of the report. Mr. Upul Kumarapperuma contended that Lots 1 and 4 as shown in the preliminary Plan No. 938 cannot form part of the corpus and the claim of the 5th, 6th and 7th Defendants was that Lots 1 and 4 should be excluded from the corpus. The testimony of the Plaintiff herself went to establish this assertion of the Defendants. The Plaintiff Agnes Nona was cross-examined on an alternative plan (Plan No. 159 commissioned by the Defendants) and most importantly the Plaintiff admitted that the land on the eastern side was wrongly included in the preliminary survey (see page 95 of the appeal brief). It has to be highlighted that Lots 1 and 4 in the preliminary plan correspond to Lots 3, 4 and 5 of the alternative Plan No 159 and it is noteworthy that the Plaintiff admitted Lots 3, 4 and 5 in the alternative plan to be those of the 5th, 6th and 7th Defendants.

If Lots 3, 4 and 5 in the alternative plan belong to the 5th, 6th and 7th Defendants, the Plaintiff could not have incorporated them in the schedule to the plaint, thus increasing the extent of the corpus to be more than what it should be. A perusal of the preliminary Plan No. 938 and alternative Plan bearing No. 159 would show that the lots claimed by the 5th, 6th and 7th Defendants lie on the eastern side and on her own admission of the Plaintiff, it is clear that she did incorporate them in the corpus sought to be partitioned. Upon a perusal of the proceedings in the District Court, it is quite clear that the Plaintiff does not co-own Lots 3, 4 and 5 as shown in the alternative plan.

Mr. Upul Kumarapperuma sought to impugn the judgment dated 31.08.1999 on a more fundamentally important aspect of partition law namely the corpus has not been properly identified by the Plaintiff and the exact land was not surveyed. It was contended by Mr. Upul Kumarapperuma that the action must be dismissed on this ground. If the Plaintiff has wrongly brought Lots 1 and 4 as shown in the preliminary

plan into the corpus and she admits that fact at the trial, one cannot seek partition of land that does not belong to oneself.

I have already pointed out that the Plaintiff depicted the corpus to be partitioned by giving specific boundaries but the schedule to the plaint refers only to northern, eastern and southern boundaries and there is no reference to the western boundary demarcating the land. Interestingly enough, the preliminary Plan bearing No. 938 shows that the corpus is demarcated by four boundaries. In fact the schedule to the plaint speaks of a road reservation lying on the eastern boundary but in the preliminary plan no such reservation could be observed. It was suggested to the Plaintiff in cross-examination that there is some more extent of land that lies on the western boundary, which has not been brought to the corpus and this failure on the part of the Plaintiff to bring in portions of land that lie on the western side demonstrates that she has sought to enhance the extent of the corpus sought to be partitioned by bringing in Lots 1 and 4 as in the preliminary plan. The Plaintiff's admission confirmed this position.

In *G.A.D.P.de S. Jayasuriya v. A.M. Ubaid* 61 NLR 352, Sansoni J. held that in a partition action there is a duty cast on the judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it is always open to him to call for further evidence (in a regular manner) to make a proper investigation.

In the circumstances, Issue No. 1 raised on behalf of the Plaintiff could not have been answered in the affirmative by the learned District Judge. Issue No 1 went as follows:

“Has the land described in the schedule to the plaint as Gorakagahamulalanda and Kongagamulahena, which has been surveyed Surveyor Weber on 02.06.1986, been depicted as Lots 1, 2 and 3 in the Plan bearing No. 938?”

In fact the learned District Judge has answered the aforesaid issue in the affirmative, when the Plaintiff herself admitted that Lot 1 was not hers. When Lot 1 belongs to the 5th, 6th and 7th Defendants and they have not been allotted any shares, it doesn't stand to reason that Lot 1 could have formed part of the corpus, leave alone Lot 4. There is also no evidence that Lot 1 is co-owned by the Plaintiff.

It is imperative that the District Judge must indulge in a thorough investigation of title and when this has not happened, more particularly in the case of the Plaintiff when she has established the identity of the land, an essential ingredient necessary to partition the land has not been established.

Accordingly I hold that the Plaintiff's action would stand dismissed having regard to the fact that the identity of the land sought to be partitioned has not been established. In the circumstances I set aside the judgment dated 31.08.1999 and allow the appeal of the 5th, 6th and 7th Defendants.

JUDGE OF THE COURT OF APPEAL