

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

Kalamulla Waduge Harriat of
Wdudoda, Kalamulla, Kalutara

C. A. Case No. CA 729/97 (F)

Plaintiff

District Court of Kalutara
Case No. 6325/P

Vs.

1. Panadura Acharige
Karunadasa Perera of No.
165, Kajugahawatta,
Gotatuwa, Angoda
2. Panadure Acharige
Chandradasa Perera
3. Panadure Acharige
Wimalawathei Perera
4. Pandura Acharige
Leelawathie Perera
5. Kalamulla Waduge
Nanthawathie
6. Kalamulla Waduge Alice
Nona
7. Kalamulla Waduge
Leelawathei
8. Kalamulla Waduge Mariya
Nona, Ampara
9. Manawaduwa Acharage
Asilin Nona, Ragama
10. Kalamulla Waduge
Thilekeratne, Ampara
11. Kalamulla Waduge
Pesumawathie
12. Kalamulla Waduge Swarna
Latha

13. N. A. Jane Nona of
Mwathagama
14. Rammuni Nimalawathei,
Kalutara
15. Kalamulla Waduge
Hemalatha Piyaseeli
16. Kalamulla Waduge
Kamalawathie
17. Kalamulla Waduge
Amarasena
18. Kalamulla Waduge
Mallika Pathminie
19. Kalamulla Waduge Daya
Nandanie
20. Kalamulla Waduge Asoka
21. Kalamulla Waduge
Chandrasoma
22. Kalamulla Waduge
Kanthi
23. Kalamulla Waduge
Jayanthi Padmasiri
24. Kalamulla Waduge
Anoma Nandanie
25. Kalamulla Waduge
26. Kalamulla Waduge
Seelawathie
27. Kalamulla Waduge
Amitha Ranjanie
28. Kandaaddara Badalge
Ayrine of Dodangoda

Defendants

BETWEEN

Kalamulla Waduge Harriat
of Wadudoda, Kalamulla,
Klutara

Plaintiff-Appellant

Vs.

1. Panadura Acharige
Karunadasa Perera of
No. 165,
Kajugahawatta,
Gotatuwa, Angoda
2. Panadure Acharige
Chandradasa Perera
3. Panadure Acharige
Wimalawathei Perera
4. Pandura Acharige
Leelawathie Perera
5. Kalamulla Waduge
Nanthawathie
6. Kalamulla Waduge
Alice Nona
7. Kalamulla Waduge
Leelawathei
8. Kalamulla Waduge
Mariya Nona, Ampara
9. Manawaduwa
Acharage Asilin Nona,
Ragama
10. Kalamulla Waduge
Thilekeratne, Ampara
11. Kalamulla Waduge
Pesumawathie
12. Kalamulla Waduge
Swarna Latha

13. N. A. Jane Nona of
Mwathagama
14. Rammuni Nimalawathei,
Kalutara
15. Kalamulla Waduge
Hemalatha Piyaseeli
16. Kalamulla Waduge
Kamalawathie
17. Kalamulla Waduge
Amarasena
18. Kalamulla Waduge Mallika
Pathminie
19. Kalamulla Waduge Daya
Nandanie
20. Kalamulla Waduge Asoka
21. Kalamulla Waduge
Chandrasoma
22. Kalamulla Waduge Kanthi
23. Kalamulla Waduge Jayanthi
Padmasiri
24. Kalamulla Waduge Anoma
Nandanie
25. Kalamulla Waduge
26. Kalamulla Waduge
Seelawathie
27. Kalamulla Waduge Amitha
Ranjanie
28. Kandaaddara Badalge
Ayrine of Dodangoda

Defendants-Respondents

BEFORE : M. M. A. GAFFOOR, J.

COUNSEL : Udaya Bandara for the Plaintiff-Appellant
Chandra Wijesooriya for the 5th and 14th
Defendant-Respondents

WRITTEN SUBMISSIONS

TENDERED ON : 02.04.2013 & 16.05.2018 – Further W.S. (5th
and 14th Defendant- Respondents)

24.04.2018 (Substituted 4th Defendant-
Appellant)

DECIDED ON : 14.09.2018

M. M. A. GAFFOOR, J.

Plaintiff-Appellant (hereinafter referred to as the 'Appellant') instituted this partition action bearing No. 6325/P in the District Court of Kalutara to partition the land morefully described in the Schedule to the Plaint depicted in Plan 'X'. There was no dispute to the corpus depicted in the said Plan; the dispute was on the pedigree between the Appellant and the 14th Defendant.

According to the Appellant's Plaint the Kalamulla Waduge Saralathamy was entitled to 1/75 shares of the land, Maarikku Acharige Soida Hamy 1/75 shares, Panadure Acharige Benedict Perera to 1/90 shares, Illenaide Badalege Appu Naide 13/20 shares and Kiri Hamy to 1/60 shares were the original owners of the said land sought to be partitioned.

Contrary to the above position, the 5th and 14th Defendant-Respondents who filed a joint Statement of Claim along with 13th, 15th to 28th Defendant-Respondents took up the position that the original co-owners of the land were Kalamulla Waduge Ancho Nona alias Jeewathhamy – 1/2 shares, Kalamulla Waduge Saralathhamy alias Hamu Naide – 1/4 shares and Kalamulla Waduge Kiri Hamy – 1/4 shares.

The Appellant gave evidence and produced the documents marked 'X', 'X1' and P1 to P3 and she was cross-examined; there was no other witness gave evidence on behalf of the Appellant.

The parties went to trial on issues 1 to 9. Having taken up the trial the learned District Judge dismissed the claim on 15.08.1997.

Being aggrieved by said judgment and Decree the Appellant brings this appeal to set aside the judgment dated 15.08.1997.

In this appeal, the following submissions of the Appellant are noteworthy:

1. The learned Trial Judge has failed to evaluate the fact that the pedigree put forward by the Appellant was mostly supported by deeds than the pedigree given by the contesting Defendant-Respondents.
2. Even, the Appellant has given number of deeds to prove her pedigree and ownership than the other contesting Defendants; the learned Trail Judge has failed to apply the basic rule of Balance of Probability.
3. Learned District Judge has been unable to pay sufficient attention on a matter that the oral evidence takes a secondary place when compared with the documentary evidence.

4. The shares on which ownership has been proved can be allocated to relevant parties by the Trail Judge; and the remaining shares can be left unallotted, the trail judge was not mindful on this.

While, the 5th and 14th Defendant-Respondents (sometimes referred to as the "Respondents") submitted that the learned District Judge in the aforesaid judgment was highly concerned about the failure on the part of the Appellant to prove his title in this partition action; it was the finding of the learned Judge that the Appellant had failed to adduce evidence to substantiate her position as to the original co-owners of the property in terms of what she had averred in the Plaint.

After evaluation of these all submissions and the said judgment, I am of the opinion that, the learned District Judge being unsatisfied as the proof of title by the Appellant and has dismissed this partition action; and the learned Judge has come to a conclusion in the said judgment that the 14th Defendant too has failed to prove her title according to the pedigree she relied upon.

In every partition action, the Trail Judge has to follow the provisions of section 25 of the Partition Law. Section 25(1) as follows:

'...the court shall examine the title of each party and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, of, or in the land to which the action relates, and shall consider and decide which of the orders mentioned in section 26 should be made.'

Therefore, there is a duty cast upon the Judge to examine the title of each party and determine their rights, title and interest in the subject matter.

To deal this matter further, I would like to recall some judicial decisions. As has been stated by this Court and the Supreme Court in several precedents before, the duty of the Court in a partition action is primarily to investigate the title of the parties to the case to its satisfaction.

In *Peris vs Perera* (1896) 1 N.L.R 362 Bonser, C. J. held as follows:

“It is obvious that the court ought not to make a decree, except it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties.

The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for, unless he makes out his title, his action cannot be maintained; and he must prove his title strictly, as has been frequently pointed out by this Court.” (Page at 367)

This same dicta are found in many decisions such as *Fernando vs. Mohammedu Saibo* (1899) 3 N.L.R 32, *Mather vs. Thamotheram Pillai* (1903) 6 N.L.R 246 and *Neelakutty vs Alvar* (1918) 20 N.L.R 372.

In *Thayalanayagam vs. Kathiresapillai* (1910) 5 Balasingam L.R. 10, Hutchinson, C. J. said:

“In a partition action such as this is, I think that the judge has power, and that in some cases it may be his duty, even after the parties have closed their case, to call for further evidence. (But if he does, he must do it in a regular manner)...”

In the case of *Karunaratne vs. Sirimalie* (1951) 53 N.L.R 444, the Supreme Court held that,

“Where, in a partition action, all possible claimants to the property are manifestly before the court, no higher standard of proof should be called for in determining the question of title than in any other civil suit”

And further it is pertinent to recall the finding of Fernando, J. in *Golagoda vs. Mohideen* (1937) 40 N.L.R 92, he said that a trial judge ‘perfectly satisfy’ himself whether the claimants who are parties to the proceedings or property in question actual parties or not.

In *Chettiar vs. Kumarihamy* (1944) 45 N.L.R 332, Wijewardena, J. held that

“In a partition action the duty is cast upon the Judge to satisfy himself that the property to be partitioned does not belong to persons, who are not parties to the action. With regard to the decision on this question the court would consider the evidence without regard to the issue.”

Further, in the case of *Appuhamy vs. Perera* 56 C.L.W 32 and *Cooray vs. Wijesuriya* 62 N.L.R 158. In *Appuhamy vs. Perera*, Basnayake, C. J. held that, a trial judge need to observe the provisions of Evidence Ordinance even in a partition case and His Lordship further held that ‘it is important that even in partition action evidence that is not relevant according to the provisions of the Evidence Ordinance should not be admitted.’

Basnayake, C. J. in *Cooray vs. Wijesuriya* emphasised that,

Section 25 of the Partition Act imposes on the Court the obligation to examine carefully the title of each party to the action. Apart from proof by the production of birth, death and marriage certificates, the relevant provisions of the Evidence Ordinance in regard to proof of a pedigree are to found in sections 32 (5), 32 (6) and 50 (2).

In this case, the Appellant relay on the position that the documentary evidence is the best evidence; oral evidence takes a secondary place when compared with the documentary evidence.

However, in my opinion, the oral evidence may use to strength the documentary evidence in a partition action. Plaintiff can produce a witness and his testimony to ensure the validity of the documentary evidence. In this case Appellant has admitted her own mistakes regarding P2, these facts also carefully considered by the trail judge.

In the all circumstances, I am of the considerable view that the Trail Judge was difficult to fathom the lawful title of both parties. Therefore he had dismissed the action. I am too feeling the same difficulty.

Accordingly, I see no reason to interfere with the judgment of the learned District Judge, and dismissed the appeal without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL