

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

Dona Mallika Wettasinghe,

Remuna,

Anguruwatota.

Plaintiff

Case No: C.A. 1245/96(F)

D.C. Horana Case No: 3115/L

Vs.

1. Kudamanage John Singho

2. Karannagodage Asilin

Both of

No.31A, Kandana

Horana.

Defendants

AND

1. Dona Mallika wettasinghe

Remuna,

Anguruwatota

Plaintiff-Appellant

Vs.

1. Kudamanage John Singho (deceased)

2. Karannagodage Asilin

Both of

No. 31A, Kandana,

Horana.

Defendants-Respondents

AND NOW BETWEEN

Dona Mallika Wettasinghe

Remuna,

Anguruwatota.

Plaintiff-Appellant

Vs.

1. Karannagodage Asilin

2. Kudamanage Lasantha Kusum

Kumari

3. Kudamanage Buddhi Hemantha

4. Kudamanage Thushal Indranath

All of

No. 31A, Kandana

Horana.

Substituted Defendants-Respondents

Before: Janak De Silva J.

Counsel:

Thamali De Alwis for Plaintiff-Appellant

Saliya Pieris P.C. with Amila Suyama for Substituted Defendants-Respondents

Written Submissions tendered on:

Plaintiff-Appellant on 26.04.2012, 09.06.2017

Substituted Defendants-Respondents on 16.10.2012, 28.06.2017

Argued on: 18.01.2019

Decided on: 28.06.2019

Janak De Silva J.

This is an appeal against the judgment of the learned District Judge of Horana dated 28.01.1997.

The Plaintiff-Appellant (Appellant) instituted the above styled action and sought a declaration of title to the land more fully set out in the schedule to the plaint 2A 1R P26.5 in extent and the ejectment of the Defendants therefrom. The Appellant pleaded paper title on the strength of deeds marked P3 and P4.

The Defendants-Respondents (Respondents) denied the claim of the Appellant and stated that they are entitled to prescriptive title to a portion of the land claimed by the Appellant which is more fully depicted in plan no. 2345 (V3).

The learned District Judge dismissed the action of the Appellant and held that the Respondents have prescribed to the portion of land depicted in V3 excluding the portion acquired for the road and hence this appeal by the Appellant.

The learned counsel for the Appellant urged the following grounds in appeal:

- (a) The learned District Judge failed to analyze the documentary evidence establishing the title of the Appellant before proceeding to decide on the issue of prescription
- (b) The learned District Judge erred in concluding that the Respondents had prescribed to the land in dispute

Paper Title vs Prescriptive Title

The learned counsel for the Appellant submitted that when paper title and prescriptive title are raised in relation to a land dispute the Court must first determine the paper title. The decision in *A.M. Karunadasa v. Abdul Hameed* (60 N.L.R. 352) was relied on where it was held:

“in a *rei vindicatio* action, it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of parties”.

The learned District Judge has not disregarded the paper title of the Appellant. He has proceeded on the basis that the Appellant has paper title to the land in dispute and that the burden is on the Respondents to prove the prescriptive title claimed by them. This is clear upon a consideration of the answer given to issue no. 1 where he holds that the Appellant is not the owner of the full extent of land in dispute. If he disregarded the paper title of the Appellant there was no need to qualify this answer to only a portion of the land in dispute. Therefore, I reject this contention of the Appellant.

Prescriptive Title

The learned counsel for the Appellant submitted that the learned District Judge erred in concluding that the Respondents had prescribed to the land claimed by them. It was submitted that the Respondents failed to discharge the burden of proof in proving prescriptive title. Reliance was placed on the decision in *Siyaneri v. Jayasinghe Udenis De Silva* (52 N.L.R. 289) where it was held that in an action for declaration of title, where the legal title is in the plaintiff, but the property is in the possession of the defendant, the burden of proof is on the defendant.

In *Juliana Hamine v. Don Thomas* (59 N.L.R. 546 at page 548) L.W. De Silva A.J. held:

“The paper title being in the 2nd and 3rd defendants, the burden of proving a title by prescription was on the plaintiff. That burden he has failed to discharge. Apart from the use of the word possess, the witnesses called by the plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram C. J. in the Full Bench Case of *Alwis v. Perera* [1 (1919) 21 N. L. R. at 326.]:

“ I wish very much that District Judges-I speak not particularly, but generally-when a witness says 'I possessed ' or 'We possessed ' or 'We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record. ””

In determining the question of prescriptive title, it is also important to bear in mind that it is a means of defeating the paper title a party holds and in that context as Udalgama J. held in *D.R. Kiriamma v. J.A. Podibanda and 8 others* (2005 B.L.J. 9 at 11):

“Onus probandi or the burden of proving possession is on the party claiming prescriptive possession. Importantly, prescription is a question of fact. Physical possession is a factum probandum. I am inclined to the view that considerable circumspection is necessary to recognize the prescriptive title as undoubtedly it deprives the ownership of the party having paper title. It is in fact said that title by prescription is an illegality made legal due to the other party not taking action. It is to be reiterated that in Sri Lanka prescriptive title is required to be by title adverse to an independent to that of a claimant or plaintiff.”

The learned District Judge concluded that there is a house on the land claimed by the Respondents and the two deeds P3 and P4 relied on by the Appellant does not indicate that there is a house on the land forming the subject matter of the two deeds and that this corroborates the version of the Respondents. In *Siriyawathie v. Alwis et al* [(2002) 2 Sri.L.R. 384] this court considered building extensions to a house as circumstances giving rise to the presumption of ouster.

In addition to the above ground, the learned District Judge held that the Respondents have prescribed to the land in dispute for one or more of the following reasons:

- (a) Although the Appellant sought to prove that one David Singho was residing at no. 31A as a licensee and the father of the Respondents was residing at no. 135, there was no evidence to indicate whether these two houses were one and the same.
- (b) The Appellant did not mention any of the two residence numbers in the complaints made to the Police and did not even refer to the number in the plaint. In fact, her evidence was that she was not aware of the above numbers until she obtained the electoral registers.
- (c) Plan V3 shows 'hik' trees which establishes that the Respondents had made a fence separating the land to which they were claiming prescriptive title from the larger land claimed by the Appellant on the strength of her paper title.
- (d) The documents tendered on her behalf confirmed that David Singho was residing on the land in dispute since 1960s and later the Respondents also living there since 1982 with David Singho.
- (e) No evidence was provided to establish that David Singho was a licensee.
- (f) The Appellant failed to prove how she possessed the whole land claimed by her whereas the Respondents proved how they possessed the smaller portion claimed by them.

I have given careful consideration to the evidence and the evaluation thereof by the learned District Judge. He has correctly evaluated the evidence and concluded that the Respondents have fulfilled the burden of proof on them in establishing prescriptive title. The facts relied on by the learned District Judge indeed establish that the Respondents had undisturbed and uninterrupted

possession for more than ten years of the land claimed by them by title adverse to that of the Appellant.

For all the foregoing reasons, I see no reason to interfere with the judgment of the learned District Judge of Horana dated 28.01.1997.

The appeal is dismissed with costs.

Judge of the Court of Appeal