

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

In the matter of an appeal

Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Plaintiff

SC Appeal 146/2010
SC (Spl) L.A No.29/2010
C.A.(LA) No.337/2002
DC Puttalam Case No.909/L

Vs

1. Meerayadeen Mohamed Riyaldeen,
No.15/2, Castle Street,
Colombo 4.
2. Solamon John Vincent,
No.28/2, Bishop Road,
Wattala.

Defendants

AND BETWEEN

Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Appearing by her power of Attorney holder

Liyanage Don Marcus Stanly Nanayakkara,
Newtown
Dodangaslanda

Plaintiff-Appellant

Vs

1. Meerayadeen Mohamed Riyaldeen,
No.15/2, Castle Street,
Colombo 4.

2. Solamon John Vincent,
No.28/2, Bishop Road,
Wattala.

Defendant-Respondents

AND NOW BETWEEN

Jayakody Arachchige Chandramali,
Kahatagahamulla,
Dodangaslanda.

Appearing by her power of Attorney holder

Liyanage Don Marcus Stanly Nanayakkara,
Newtown
Dodangaslanda

Plaintiff-Appellant-Petitioner-Appellant

Vs

1. Meerayadeen Mohamed
Riyaldeen, **(Deceased)**
No.15/2, Castle Street,
Colombo 4.

- 1(a). Shima Rushana Shararaff
No.24, 40th Lane
Wellawatta.

**Substituted 1a Defendant-
Respondent-Respondent-Respondent**

2. Solamon John Vincent,
No.28/2, Bishop Road,
Wattala.

**Defendant-Respondent-
Respondent-Respondent**

Before : Sisira J de Abrew J
Prasanna Jayawardena PC J
V.K. Malalgoda PC J

Counsel : Rohan Sahabandu President's Counsel with Hasitha Amarasinghe for
the Plaintiff-Appellant-Petitioner-Appellant
M.Y.M. Faiz for the Substituted 1a Defendant-
Respondent-Respondent-Respondent

Argued on : 10.9.2018

Written Submission

Tendered on : 11.2.2011 by the Plaintiff- Appellant-Petitioner-Appellant
18.4.2011 by the Substituted 1a Defendant-
Respondent-Respondent-Respondent

Decided on : 6.3.2019

Sisira J de Abrew J

The learned District Judge by his order dated 15.8.2002,

1. disallowed the application of the Plaintiff-Appellant-Petitioner-Appellant
(hereinafter referred to as the Plaintiff-Appellant) to produce documents
P10 and P10(a),

2. disallowed the application of the Plaintiff-Appellant to call witness Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo,
3. disallowed the application of the Plaintiff-Appellant to call witness Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam, and
4. disallowed the application of the Plaintiff-Appellant to recall Wanigasekara, the Notary Public who had already given evidence.

Being aggrieved by the said order of the learned District Judge, the Plaintiff-Appellant filed an application for leave to appeal in the Court of Appeal and the Court of Appeal by its judgment dated 12.1.2010 affirming the order of the learned District Judge dismissed the appeal of the Plaintiff-Appellant. Being aggrieved by the said judgment of the Court of Appeal, the Plaintiff-Appellant has appealed to this court. This court by its order dated 1.11.2010 granted leave to appeal on questions of law stated in paragraph 12 (e) and 12 (f) of the Petition of Appeal dated 23.2.2010 which are set out below.

1. Did the Court of Appeal and the District Court err in law in not appreciating that in the interest of justice the plaintiff has a right to recall the Notary Public as the impugned documents were produced from the custody of an official witness and when those documents were originated from the said Notary Public?
2. Did the Court of Appeal and the District Court err in law, as P10 and P10(a) were produced subject to proof and these documents were tendered by an official witness, to call the Post Mistress and other witnesses in the interest of justice?

The Plaintiff-Appellant filed action against the 1st and the 2nd Defendants seeking a declaration of title and to evict the 1st Defendant from the land described in the schedule to the plaint.

The 2nd Defendant by Deed No.974 dated 11.2.1995 attested by Wanigasekara the Notary Public transferred the land in dispute to the Plaintiff-Appellant. However the same Defendant by Deed No.3237 dated 9.8.1995 attested by M.B.I. Muhammed the Notary Public transferred the same land in dispute to the 1st Defendant. The land in dispute is in Puttalam District. The Deed No.3237 was registered in the Land Registry in Puttalam District on 4.9.1995.

Learned President's Counsel (PC) for the Plaintiff-Appellant submitted the following facts.

“Wanigasekara the Notary Public practicing in the District of Colombo had sent the original Deed No.974 with a covering letter (P10) addressed to the Registrar Land, Puttalam to register the said deed. However later Wanigasekara the Notary Public discovered that said Deed No.974 had not been registered in the Land Registry, Puttalam. Thereafter, Wanigasekara the Notary Public obtained a certified copy of the 2nd copy of Deed No.974 from the Land Registry, Colombo and got it registered in the Land Registry, Puttalam on 6.9.1995.”

It has to be noted here that the 1st Defendant's deed (Deed No.3237) was registered in the Land Registry, Puttalam on 4.9.1995 and that the Plaintiff-Appellant's deed (Deed No.974) was registered in the Land Registry, Puttalam on 6.9.1995.

When Sumathipala Hettiarachchi, the Registrar Land Puttalam gave evidence, the Plaintiff-Appellant moved to mark a letter sent by Wanigasekara the Notary Public to the Registrar Land Puttalam as P10 and the envelope as P10(a). Although the 1st

Defendant objected to this application, the learned District Judge did not make an order on the objection. In order to prove P10 and P10(a), the Plaintiff-Appellant made an application to call Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo and Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam. This application was refused by the learned District Judge on the ground that they were not listed in terms of Section 121 of the Civil Procedure Code (CPC) prior to the commencement of the trial. The application to recall Wanigasekara the Notary Public to produce the documents P10 and P10(a) was also refused by the learned District Judge on the following grounds.

1. The evidence of Wanigasekara the Notary Public has already been concluded.
2. The documents P10 and P10(a) should have been produced at the initial stage when Wanigasekara the Notary Public gave evidence.
3. P10 and P10(a) had already been refused.

Learned PC for the Plaintiff-Appellant contended that the application to produce P10 and P10(a) should have been allowed under Section 175(2) of the CPC. Section 175(2) of the CPC reads as follows.

“A document which is required to be included in the list of documents filed in court by a party as provided by section 121 and which is not so included shall not, without the leave of court, be received in evidence at the trial of the action:

Provided that nothing in this subsection shall apply to documents produced for cross-examination of the witness of the opposite party or handed over to a witness merely to refresh his memory.”

The Plaintiff-Appellant filed three lists of witnesses and documents. The 1st list was filed on 20.8.1996. The trial commenced on 21.11.1996. After commencement of the trial, the Plaintiff-Appellant filed two lists of witnesses and documents on 9.12.1996 and 26.7.2002. The Plaintiff-Appellant failed to include documents P10 and P10(a) in any one of the abovementioned lists. When the aforementioned matters are considered it can be concluded that documents P10 and P10(a) have not been listed.

According to the Plaintiff-Appellant, Wanigasekara the Notary Public had sent the letter P10 in the envelope P10(a) to the Registrar Land Puttalam requesting him to register the Deed No.974 but it had not been registered. Therefore it was within the knowledge of the Plaintiff-Appellant that documents P10 and P10 (a) would be required to prove the case. Thus the Plaintiff-Appellant knowing that the said documents would be required to prove his case, has not listed them. These facts demonstrate that the Plaintiff-Appellant was highly negligent in prosecuting his case. Further the Plaintiff-Appellant could have sought permission of court to produce them when Wanigasekara the Notary Public was giving evidence. It has to be noted here that Wanigasekara the Notary Public is the author of the said documents. If a party intends to produce a document under Section 175 of the CPC, he has to first obtain leave of court. In my view, leave under Section 175 of the CPC cannot be granted when a party is highly negligent in prosecuting his case.

For the above reasons, I hold that the learned District Judge was correct when he refused the application to produce P10 and P10(a).

Now I turn to then question whether the refusal by the learned District Judge to recall Wanigasekara the Notary Public is correct. Learned PC for the Plaintiff-Appellant in this connection relied on Section 165 of the CPC which reads as follows.

“The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross- examination, whenever in the course of the trail it thinks it necessary for the ends of justice to do so.”

As I pointed out earlier, the fact that P10 and P10 (a) were necessary to prove the case of the Plaintiff-Appellant was within his knowledge. But he did not list them. I have earlier held that the learned District Judge was correct when he refused the application to produce P10 and P10(a). If these documents cannot be produced, no purpose would be served in recalling Wanigasekara the Notary Public. Further in my view Section 165 of the CPC cannot be utilized to cover up negligence of parties. Wanigasekara’s evidence was concluded on 26.6.2000. The application to recall Wanigasekara the Notary Public was made in August 2002. Parties must be ready with their cases and the courts are not expected to grant postponements of cases due to the negligence of parties. If these types of postponements are granted, the principle that ‘there must be finality in litigations’ enunciated by Sansoni CJ in H.A.M. Cassim Vs Government Agent Batticaloa 69 NLR 403 would be violated. It is an accepted principle in law that appointments of courts are definite. This view is supported by the judgment of Justice Amarasinghe in the case of Jinadasa Vs Sam Silva [1994] 1SLR 232 wherein His Lordship held as follows.

“A judge must ensure a prompt disposition of cases, emphasizing that dates given by the court, including dates set out in lists published by a court's registry, for hearing or other purposes, must be regarded by the parties and

their counsel as definite court appointments. No postponements must be granted, or absence excused, except upon emergencies occurring after the fixing of the date, which could not have been anticipated or avoided with reasonable diligence, and which cannot be otherwise provided for.”

For the above reasons, I hold that the learned District Judge was correct when he refused to recall Wanigasekara the Notary Public and the Court of Appeal was correct when it affirmed the said order of the learned District Judge.

The next question that must be considered is whether the refusal by the learned District Judge to call Devayani Kalinga, the Post Mistress of Museum Post Office, Colombo, and Velupillai Sri Skandarajah, the Chief Post Master of Puttalam Post Office, Puttalam was correct. They were required to prove that the envelope P10(a) had been sent to the Registrar Land Puttalam. I have earlier held that the refusal by the learned District Judge to permit the production of P10 and P10(a) was correct. Learned PC for the Plaintiff-Appellant relied on Section 175(1) of the CPC which reads as follows.

“No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party as provided by section 121:

Provided, however, that the court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid,

Provided also that any party to an action may be called as a witness without his name having been included in any such list.”

It has to be noted here that the Plaintiff-Appellant made an application to call these two witnesses in order to prove P10 and P10(a). I have earlier held that the refusal

by the learned District Judge to produce P10 and P10(a) was correct and that documents P10 and P10(a) were not listed due to the negligence of the Plaintiff-Appellant. Therefore this court cannot hold that there were special circumstances to call the above two witnesses. The words 'interest of justice' in section 175 (1) of the CPC, in my view, does not cover negligence of parties. When I consider all the above matters, I hold that the learned District Judge was right when he refused to call the two witnesses. For the above reasons I answer the above questions of law in the negative.

For the above reasons, I hold that the Court of Appeal was correct when it dismissed the appeal of the Plaintiff-Appellant. For the aforementioned reasons, I affirm the judgment of the Court of Appeal dated 12.1.2010 and dismiss the appeal of the Plaintiff-Appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

Prasanna Jayawardena PC J

I agree.

Judge of the Supreme Court.

V.K. Malalgoda PC J

I agree.

Judge of the Supreme Court.

