

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

Saramge Upul Wijayasiri de Alwis  
No. 44/2, Old Kottawa Road,  
Pannipitiya.

**Plaintiff**

Vs.

**SC APPEAL No. 57/2014**

SC(HC)CALA/481/2012

WP/HCCA/MT/65/09(F)

D.C. Mt. Lavinia case No.

1486/01/L

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road,  
Pannipitiya.

**Defendants**

**AND BETWEEN**

Saramge Upul Wijayasiri de Alwis  
No. 44/2, Old Kottawa Road,  
Pannipitiya.

**Plaintiff-Appellant**

Vs

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road,  
Pannipitiya.

**Defendant-Respondents**

**AND**

Saramge Upul Wijayasiri de Alwis  
No. 44/2, Old Kottawa Road,  
Pannipitiya.

**Plaintiff-Appellant-Petitioner-Appellant**

Vs.

1. Rashdeen Casim
2. P.R. Boran
3. T.T.N. Casim
4. T.F. Boran

All of No. 50, Old Kottawa Road,  
Pannipitiya.

**Defendant-Respondent-**

**Respondent-Respondents**

Before: Sisira J De Abrew J  
 Upaly Abeyratne J &  
 Anil Gooneratne J

Counsel: Ranjan Suwandarane for the Plaintiff-Appellant-Petitioner-Appellant  
 Ikram Mohamed President's Counsel with Taniya Marjan for the  
 Defendant-Respondent- Respondent-Respondents

Written Submissions

tendered on : 17.6.2014 by the Plaintiff-Appellant-Petitioner-Appellant  
 25.7.2014 by the Defendant-Respondent-  
 Respondent-Respondents

Argued on : 19.1.2017

Decided on : 22.6.2017

Sisira J De Abrew J

The Plaintiff-Appellant-Petitioner-Appellant (hereinafter referred to as the Plaintiff-Appellant) instituted action in the District Court of Mount Lavinia seeking a declaration that the Plaintiff-Appellant is entitled to a right of way over Lot No.4 in Plan No.3159 marked as P2 to gain access to the property described in the schedule to the plaint; that the said Lot No.4 is a road access provided only to gain access to Lot No.A1 and A2 of Plan No.5643 marked as P3; and that for a permanent injunction restraining the Defendant-Respondent-Respondent-Respondents (hereinafter referred to as the Defendant- Respondents) from entering and/or using the said road way shown as Lot 4 in Plan No.3159. The learned District Judge by his judgment dated 19.4.2009, dismissed the action of the Plaintiff-Appellant. Being aggrieved by the said judgment, the Plaintiff-Appellant appealed to the Civil Appellate High Court (hereinafter referred to as the High

Court) and the High Court, by its judgment dated 26.9.2012, affirming the judgment of the learned District Judge, dismissed the appeal. Being aggrieved by the said judgment the Plaintiff-Appellant has appealed to this court. This court by its order dated 3.4.2014, granted leave to appeal on the following question of law.

“Whether the Plaintiff-Appellant who is entitled to a right of way without the soil right is entitled in law to obstruct the Defendant-Respondents who have no right of way to use the said road from using the same?”

It is undisputed that the Plaintiff-Appellant is entitled to use the right of way over Lot No.4 in Plan No.3159 (P2) but he has not got any soil right of the said right of way. The important question that must be decided is whether the Plaintiff-Appellant who is only entitled to use the right of way and has not got any soil right of the said right of way can obstruct or has a legal right to obstruct the Defendant-Respondent from using the said right of way. In finding an answer to this question it is important to consider a passage from a book titled ‘Wille on Principles of South African Law page 224’ which states thus:

*“If a person unlawfully claims a servitude over land or claims greater rights under a servitude than it actually comprises, the owner of the land may bring an action against him, known as actio negatoria, for a declaration that his land is free from the servitude claimed, or free from the excessive burdens as the case may be (Voet 8.5.5). This action can be instituted by none but the owner of the land in question.”*

The Court of Appeal in the case of Sapaarmadu Vs Melder [2004] 3 SLR 148 observed the following facts.

*“The plaintiff-respondent instituted action for a declaration that the defendant-appellant is not entitled to use the road reservation. The plaintiff was not the owner of the land over which the road way exists.*

The trial court gave judgment in favour of the plaintiff-respondent.”

Court of Appeal held as follows:

*“The plaintiff not being the owner of the land over which the road way exists cannot maintain the action. It is to be noted that the action has been filed on the basis that the defendant-appellant has no right to use the road: we are of the view that such an action can be filed only by a person who himself enjoys only a servitude.”*

The Court of Appeal based the above decision on the basis of the above legal principle enunciated in the book titled ‘Wille on Principles of South African Law page 224.’

Mr.Suwadaratne submitted that considering the urban development of this country the above judicial decisions should be changed. In my view if urban development is to be recognized the above legal principle enunciated in the book titled ‘Wille on Principles of South African Law page 224’ should be recognized as it prevents users of roadways who are not soil right owners from obstructing the other users of the roadways. When I consider the above matters, I am unable to agree with the contention of Mr.Suwadaratne. In view of the conclusion reached above, I answer the question law stated above in the following language.

The Plaintiff-Appellant who is entitled to a right of way without the soil right is **not** entitled in law to obstruct the Defendant-Respondents who have no right of way to use the said road, from using the same.

For the above reasons, I affirm the judgment of the High Court and dismiss this appeal with costs.

*Appeal dismissed.*

Judge of the Supreme Court.

Upaly Abeyratne J

I agree.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.