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

In the matter of an Application for Leave to Appeal under Article 128 of the Constitution read with Section 5 (c) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006.

AMERASINGHE ARACHCHIGE DON DHARMARATNE
No. 274, Makola North,
Makola.

PLAINTIFF-RESPONDENT-APPELLANT

SC APPEAL No. 158/2013
S.C. H.C. C.A.L.A. No.100/2013
WP/HCCA/GPH/29/2007(F)
D.C. Gampaha Case No.40570/L

VS.

1. DODANGODAGE PREMADASA
2A. DODANGODAGE PREMADASA
2B. DODANGODAGE PREMALATHA
2C. DODANGODAGE DAYAWATHI
2D. DODANGODAGE AMARASEELI MALLIKA
2E. DODANGODAGE HARINDRANATHA
All of No. 274/4, Makola North,
Makola.

DEFENDANTS-APPELLANTS-RESPONDENTS

Priyasath Dep,PC J
K.T.Chitrasiri J
Prasanna Jayawardena, PC. J

COUNSEL: W. Dayaratne,PC with Ms.R.Jayawardena for the Plaintiff-Respondent-Appellant
Gamini Marapana, PC with Navin Marapana the Defendants-Appellants -Respondents.

ARGUED ON: 04th July 2016

DECIDED ON: 12th October 2016

Prasanna Jayawardena, PC, J

The Plaintiff-Respondent-Appellant ["the Plaintiff"] instituted this Action in the District Court of Gampaha against the 1st and 2nd Defendants ["Defendants"], praying for a Declaration of Title to an allotment of land in the Gampaha District and the ejectment of the Defendants from this property.

The Plaint avers that, one Jayaratne was the original owner of this allotment and that: Jayaratne transferred the land to Somalatha by Deed of Transfer No. 6348 dated 16th June 1987; Somalatha then transferred the land to Aida Jayaratne (the widow of Jayaratne) and her six children by Deed of Transfer No. 99 dated 19th August 1993; and that, these seven persons transferred the land to the Plaintiff by Deed of Transfer No. 4061 dated 28th December 1995.

The Plaint goes on to aver that, the Defendants were occupying the land at the time the Plaintiff obtained title and that, from then on, the Defendants continued in occupation with the leave and license of the Plaintiff. The Plaintiff does not claim that he had possession of the land at any stage. The Plaint averred that, the Defendants remained in wrongful occupation despite the Plaintiff having terminated the leave and license.

In their Answer, the 1st and 2nd Defendants admitted that, the original owner – namely, Jayaratne – had title to the land but denied the aforesaid three Deeds of Transfer. The Defendants also denied that Deed No. 6348 and Deed No. 99 were the acts and deeds of the Transferors named therein and put the Plaintiff to proof of these Deeds. The Defendants admitted that they were in possession but denied being licensees of the Plaintiff. The Defendants prayed that, the Plaintiff's Action be dismissed. No counter claim was made.

When the Trial commenced, it was admitted that, Jayaratne was the original owner of the land. Issue No. 1 framed by the Plaintiff was as to whether he held title to the land in the manner averred in the Plaint – *ie:* upon the chain of title set out in the aforesaid three Deeds of Transfer No.s 6348, 99 and 4061. The other issues framed by the Plaintiff are not relevant for the purposes of this Appeal. The Defendants did not frame any issues.

The Plaintiff gave evidence at the Trial and also led the evidence of several other witnesses. The Defendants did not give evidence and did not lead the evidence of any witnesses. During the pendency of the Trial, the 2nd Defendant died and her husband and children, namely the 2A to 2E Defendants-Respondents-Respondents, were substituted in her place.

When the Plaintiff gave evidence, he produced the aforesaid three Deeds. Deed No. 6348 was marked **"P3"**, Deed No. 99 was marked **"P4"** and Deed No. 4061 was marked **"P5"**. All three Deeds of Transfer were produced 'Subject to Proof'. As I mentioned earlier, the Defendants had denied these Deeds in their Answer and had also denied that, the Deeds marked **"P3"** and **"P4"** were the acts and deeds of the Transferors named therein and had specifically put the Plaintiff to proof of these Deeds.

In these circumstances, if the Plaintiff was to succeed in this Action, he had to discharge the burden of duly proving the three Deeds marked **"P3"**, **"P4"** and **"P5"** since he relied on these three Deeds to establish his title to the land. – *vide:* Sections 101 and 102 of the Evidence Ordinance.

The learned District Judge entered Judgment for the Plaintiff, holding that, the Defendants' failure to raise issues disputing the notarially attested Deeds of Transfer produced by the Plaintiff and the Defendants' failure to lead evidence to challenge these Deeds, resulted in the District Court having to accept these Deeds as being proved.

The Defendants appealed to the High Court of Civil Appeal (holden in Gampaha). In appeal, the learned High Court Judges set aside the Judgment of the District Court and dismissed the Plaintiff's Action holding that, this was a *rei vindicatio* Action in which the burden was

cast on the Plaintiff to prove his title, but that, the Plaintiff had failed to discharge this burden by duly proving the Deeds marked **"P3"**, **"P4"** and **"P5"** in the manner required by Law. The learned High Court Judges held that, the Plaintiff had failed to prove any one of the Deeds marked **"P3"**, **"P4"** and **"P5"**.

The Plaintiff sought Leave to Appeal from this Court and obtained Leave to Appeal on the following two questions of Law:

(i) *Did the Civil Appellate High Court misdirect itself in holding that execution of **"P5"** had not been duly proved ?*

(ii) *Did the Civil Appellate High Court misdirect itself in holding that the termination of the license had not been established by evidence ?*

It is clear that, the second question of Law set out above will need to be considered only if this Court answers the first question of Law in the affirmative and holds that, the Plaintiff had established title.

We have heard learned President's Counsel for the Plaintiff and learned President's Counsel for the Defendants. I will now proceed to consider whether the Plaintiff can succeed in this Appeal.

It is not in dispute that, this is a *rei vindicatio* Action. The Plaintiff has expressly stated so in his Written Submissions in the District Court which state (reproduced *verbatim*) *"This is a rei vindicatio action filed by the Plaintiff against the Defendants who disputed his title, denied that they were not in possession under his leave and license which were terminated by Defendants and, therefore, the Plaintiff's burden of proof is that he is the lawful owner of the land and the Defendants are in unlawful possession.".*

As recognised by the Plaintiff in his Written Submissions quoted above, it is well established law that, in a *rei vindicatio* Action, the burden of proof is cast firmly upon the Plaintiff to prove his title to the land, if he is to succeed in the Action.

Thus, in DE SILVA vs. GOONETILLEKE [32 NLR 217 at p.219], a Full Bench stated that, in a *rei vindicatio* Action, *"The authorities unite in holding that plaintiff must show title to the corpus in dispute and that if he cannot, the action will not lie."*. More recently, in HARIETTE v. PATHMASIRI [1996 1 SLR 358 at p. 361], S.N.Silva J (as he then was) stated, *" ….. the action being one for declaration of title and possession, the burden was on the Plaintiff to establish his title to the land which was in dispute. ……. The Plaintiff's action as presently constituted should therefore be dismissed if she fails to establish title and the right to possess the corpus pursuant to such ownership."*. In the subsequent Case of DHARMADASA vs. JAYASENA [1997 3 SLR 327], G.P.S.de Silva CJ stated (at p. 330) *"But the point is that this is a rei vindicatio action and the burden is clearly on the plaintiff to establish the title pleaded and relied on by him."*. In LATHIEF vs. MANSOOR [2010 2 SLR 333 at p.352], Marsoof J pointed out that, *"An important feature of the actio rei vindicatio is that it has to necessarily fail if the plaintiff cannot clearly establish his title."*.

It is also established law that, in a *rei vindicatio* Action, the Defendants need not establish any Defence or prove their right or title to the land unless and until the Plaintiff discharges the burden of proving his title. This principle is, perhaps, best illustrated by the Judgment of the Supreme Court in the often quoted Case of JUWANIS APPUHAMY vs. WANIGARATNE [65 NLR 1657] which held that, "*It has been laid down now by this Court that in an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title."*

As set out above, the Plaintiff's Case is that he obtained title by the Deed of Transfer marked **"P5"**. Therefore, the Plaintiff had to duly prove **"P5"** in order to prove his title.

However, proving **"P5"** alone would not suffice since whatever title the Plaintiff may have obtained by **"P5"** is dependent on the Transferors named in **"P5"** - namely Aida Jayaratne (the widow of Jayaratne) and her six children - having held valid title at the time they are said to have executed **"P5"** in favour of the Plaintiff.

Therefore, in order to duly prove his title, the Plaintiff *also* had to prove that Aida Jayaratne (the widow of Jayaratne) and her six children obtained title by the Deed of Transfer marked **"P4"** executed by Somalatha and also that, prior to **"P4"**, Somalatha obtained title by the Deed of Transfer marked **"P3"** executed by the undisputed original Owner, namely Jayaratne. This is the very basis of the Plaintiff's Case.

In other words, in order to establish his title and succeed in the Action, the Plaintiff had to prove all three links in his alleged chain of title - namely, the Deeds marked **"P3"**, **"P4"** and **"P5"**, all of which have been expressly denied by the Defendants. If the Plaintiff failed to do so, his *rei vindicatio* Action had to fail.

Chronologically, the Deeds marked **"P3"** and **"P4"** precede the Deed marked **"P5"**. Therefore, simple logic requires that, this Court has to be satisfied that, the Plaintiff had duly proved the two Deeds marked **"P3"** and **"P4"** (*ie:* the first two links in the alleged chain of title) before a need arises to consider whether the Deed marked **"P5"** (*ie:* the last links in the alleged chain of title) has been proved.

As well known, the manner of proving Deeds is specified in Section 68 of the Evidence Ordinance which states *"If a document is required by law to be attested, it shall not be used in evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence."*.

Sir James Fitzjames Stephen who was the author of the Indian Evidence Act, 1872 which is the blueprint for our Evidence Ordinance described the rule contained in Section 68 as an ancient rule which is inflexible in its operation – *vide:* Sir James Fitzjames Stephen's

Committee Report to the Council,1872. Coomaraswamy's The Law of Evidence [Book 1 at p. 108] cites the Indian Cases of KARIMULLAH vs. KOERI [AIR 1925 All. 56] and BENARSI DAS vs. COLLECTOR OF SAHARANPUR [AIR 1936 All. 712] and states, *"The section insists on strict compliance where the defendant denies the execution of the document…. The omission to call such a witness, where the execution is denied or not admitted, is fatal to the admissibility of the document"*.

Our Courts have consistently taken the view that, other than in instances where a notarially attested Deed is admitted by the opposing party or is produced in evidence without objection or requirement of proof, the requirements of Section 68 of the Evidence Ordinance are imperative and that Deed will not be considered in evidence unless the testimony of, at least, one attesting witness has been led. Thus, in BANDIYA vs.UNGU [15 NLR 263]. Lascelles CJ described the requirements of Section 68 of the Evidence Ordinance as a *"wholesome rule"* and held that, a notarially attested Deed shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, capable of giving evidence and subject to the process of the Court.

Next, the general rule that is evident from the decisions of this Court is that, the Notary Public who attested the Deed can be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance.

Thus, Cases such as KIRIBANDA VS. UKKUWA [1892 1SCR 216], SOMANATHA vs. SINNETAMBY [1899 1 Tambiah 38] and SENEVIRATNE vs. MENDIS [6 CWR 211] have held that, the Notary Public who attested the Deed may be regarded as being an attesting witness for the purposes of Section 68 of the Evidence Ordinance. In WIJEGOONETILLEKE vs. WIJEGOONETILLEKE [60 NLR 560] Basnayake CJ stated, *"In our opinion a Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."*.

However, it must be noted that, this general rule that, a Notary Public who attests a Deed will be regarded as an attesting witness for the purpose of proving the Deed, is subject to

the restriction that, the Notary Public should have been personally acquainted with the executant or executants of the Deed, if he is to be regarded as an attesting witness for the purposes of Section 68.

This is simply because the purpose of leading the evidence of an attesting witness is to place before the Court, the evidence of a person who knew the alleged executant of the Deed and, therefore, can properly testify that: (i) the alleged executant did, in fact, execute the Deed in his presence; and (ii) the formalities specified by Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 were complied with at the time of the execution of the Deed.

Thus, T.S.Fernando J explained in SOLICITOR GENERAL vs. AVA UMMA [71 NLR 512 at 516-516] *"The object of calling the witness is to prove the execution of the document. Proof of the execution of the documents mentioned in section 2 of No. 7 of 1840 means proof of the identity of the person who signed as maker and proof that the document was signed in the presence of a notary and two or more witnesses present at the same time who attested the execution.".*

Therefore, if the Notary Public was not personally acquainted with the executant or executants of the Deed, he will not qualify to be regarded as an attesting witness for the purposes of satisfying the requirements of Section 68 of the Evidence Ordinance.

Thus, T.S.Fernando J stated in SOLICITOR GENERAL vs. AVA UMMA (at p. 516), *"If the notary knew the person signing as maker he is competent equally with either of the attesting witnesses to prove all that the law requires in section 68 - if he did not know that person then he is not capable of proving the identity as pointed out in Ramen Chetty v. Assen Naina (supra), and in such a case it would be necessary to call one of the other attesting witnesses for proving the identity of the person."* In the same vein, Sinnetamby J previously stated in MARIAN vs JESUTHASAN [59 NLR 348 at p.349] *"To become an attesting witness a notary must personally know the executant and be in a position to bear witness to the fact that the signature on the deed executed before him is the signature of the*

executant.". See also RAMEN CHETTY vs. ASSEN NAINA [1909 1 Current Law Reports 256] and SENEVIRATNE vs. MENDIS (*supra*).

This rule was recognised by Tambiah J, with Ranasinghe J agreeing, in the original decision of the Court of Appeal in JAYASINGHE vs. SAMARAWICKREMA [1982 1 SLR 349 at p. 358-359] who reiterated that, a Notary Public is competent to prove a Deed under Section 68 only if he knew the maker of the Deed. In terms of this Judgment of the Court of Appeal, this Case was sent back to the District Court for Trial *de novo.* When the Judgment of the District Court in the fresh Trial later came up to the Supreme Court in Appeal in SAMARAWICKREMA vs. JAYASINGHE [2009 1 SLR 293], Marsoof J cited with approval and applied Tambiah J's recognition of the rule that, that a Notary Public is competent to prove a Deed under Section 68 only if he knew the maker of the Deed. See also Marsoof J's later Judgment in LATHIEF vs. MANSOOR (*supra* at p. 358) which reiterates this rule.

It should also be mentioned that, Section 68 of the Evidence Ordinance only spells out the *mode* of proof or what I might call the minimum required to make the Deed admissible in evidence, which is that, as stated in Section 68, *"at least"* one attesting witness must give evidence to enable the Deed to be *"used as evidence"*. In other words, the testimony of *"at least"* one attesting witness is the threshold stipulated by Section 68 which must be passed for the Court to take the Deed into consideration.

However, Section 68 does not state that, leading the evidence of only one attesting witness shall fully discharge the burden of proving due execution of the Deed. In other words, Section 68 does not refer to the *quantum* of proof required to prove the Deed in a manner which will satisfy the Court that the Deed was the act and deed of the executant and was executed in compliance with the requirements of Section 2 of the Prevention of Frauds Ordinance.

As Tambiah J explained in JAYASINGHE vs. SAMARAWICKREMA [1982 1 SLR 349 at p.359] citing Sarkar's Law of Evidence, *"S. 68 of the Evidence Ordinance lays down that documents required by law to be attested shall not be used as evidence unless at least one*

attesting witness is called to prove its execution, if he is alive and subject to the process of the Court. 'This is not the same thing as saying that a document required to be attested by more than one witness shall be proved by the evidence of only one witness. S. 68 only lays down the mode of proof and not the quantum of evidence required. More than one attesting witness may be necessary to prove a document according to the circumstances of a case' (Sarkar's Law of Evidence, 10th Edn. p. 591).".

Therefore, if there are doubts regarding the circumstances in which the Deed was executed or the role played by the Notary Public, the party producing that Deed may be well advised to lead the evidence of more than one attesting witness since the evidence of the Notary Public alone or the evidence of only one witness may not suffice to duly prove a Deed which is challenged. As Bonser CJ succinctly observed in ARNOLIS vs. MUTU MENIKA [2 NLR 199], *"A deed can be proved by the evidence of one witness, though as a matter of precaution it may be advisable in many cases to call all the witnesses."*. See also BARONCHY APPU vs. PODOHAMY [2 Browne's Reports 221], JAYASINGHE vs. SAMARAWICKREMA, SAMARAWICKREMA vs. JAYASINGHE and LATHIEF vs. MANSOOR (*supra*).

No rule of thumb can be laid down. The quantum of proof required – *ie:* the witnesses who should be called and other evidence required - will vary according to the circumstances of the Case.

I have recounted, at some length, the principles which are evident from the decisions of our Courts with regard to the manner of duly proving a Deed in terms of the requirements of Section 68 of the Evidence Ordinance, because these principles determine the fate of this Appeal.

To move to the facts of the present Appeal, as I stated earlier, this Court should *first* consider whether the Deeds marked **"P3"** or **"P4"** were proved, since these two Deeds are the first and second links in the chain of title which the Plaintiff was required to prove in order to succeed in the Action.

The evidence establishes that, the Plaintiff was not an attesting witness to either of the Deeds marked **"P3"** or **"P4"**, though he claimed to have been present when **"P3"** was executed. The Plaintiff did not lead the evidence of an attesting witness to either of the Deeds marked **"P3"** or **"P4"**. The Plaintiff also did not lead the evidence of the Notaries Public who attested the Deeds of Transfer marked **"P3"** and **"P4"**.

The Plaintiff did not seek to invoke the exception provided in the last two lines of Section 68 of the Evidence Ordinance and lead evidence to suggest that the attesting witnesses or the Notaries Public had died or were incapable of giving evidence or that it was impossible to procure their attendance.

The Deeds marked **"P3"** and **"P4"** which are dated 16th June 1987 and 19th August 1993 were produced in evidence on 02nd December 2012 – *ie:* less than thirty years after the execution of these Deeds - and, therefore, no question arises for consideration whether the Plaintiff could have invoked the benefit of Section 90 of the Evidence Ordinance which vests the Court with a discretion to draw certain presumptions in the case of Deeds which are over 30 years of age at the time they are produced in Court and are produced from proper custody.

It should also be mentioned that, the Plaintiff led the evidence of an Officer from the Gampaha Land Registry and produced the folios at the Land Registry which established that, the Deeds marked **"P3"**, **"P4"** and **"P5"** had been registered. However, quite obviously, the production of the folios did not prove the due execution of the Deeds.

In the aforesaid circumstances, the result of the Plaintiff not having led the evidence of an attesting witness or Notary Public to either of the Deeds marked **"P3"** or **"P4"** is that, the Plaintiff failed to pass these two Deeds through the threshold stipulated in Section 68 of the Evidence Ordinance.

Thus, the Plaintiff has failed to prove the Deeds marked **"P3"** and **"P4"**, which, as stated earlier, are the first two of the three links in his alleged chain of title.

I will now proceed to consider the first question of law framed by this Court. That is, the question: *"Did the Civil Appellate High Court misdirect itself in holding that execution of* ***"P5"*** *had not been duly proved ?*

The Plaintiff did not call either of the attesting witnesses to the Deed of Transfer marked **"P5"**. The Plaintiff only led the evidence of the Notary Public who attested this Deed.

As stated above, it is settled law that, Notary Public who attested this Deed can be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance only if he knew the executant or executants of the Deed.

The learned High Court Judges held that, the evidence before the Court established that, the Notary Public did not know the executants of the Deed marked **"P5**.

In this regard, I note that, the Notary Public stated in his Evidence-in-Chief that he knew one of the executants of the Deed marked **"P5"**. But, his evidence in Cross Examination suggests that he was unsure whether he knew the executants and that he was only able to say, with certainty, that he knew the attesting witnesses to the Deed. Thus, the testimony of the Notary Public did not clearly establish that he knew the executants of the Deed marked **"P5"**.

Further, in his Attestation on the Deed marked **"P5"**, the Notary Public does not state that, he knows the executants and only states that he knew the attesting witnesses. It seems to me that, the only conclusion that can be properly reached from the wording of the Attestation is that, the Notary Public did not know the executants (transferors) who are said to have executed the Deed marked **"P5"**.

If the Notary Public did know the executants of the Deed, he would have had no reason not to state so, in his Attestation. In fact, if the Notary Public did know the executants of the Deed, the provisions of Section 30 (20) (*b*) of the Notaries Ordinance No. 1 of 1907, as

amended, placed a duty upon him to state so in the Attestation. Therefore, the fact that, the Notary Public did not state in his Attestation that he knew the executants, leads compellingly to the conclusion that, he did not know the executants. Further, it seems to be that, the general principles set out in Sections 91 and 92 of the Evidence Ordinance will apply and result in the statement in the Attestation prevailing over any oral evidence that the Notary Public may have given.

Thus, I agree with the finding by the learned High Court Judges that, the evidence placed before the Court at the Trial did not establish that, the Notary Public who attested the Deed marked **"P5"** and who gave evidence at the Trial, knew the alleged executants of that Deed.

Therefore, upon an application of the aforesaid settled law that, a Notary Public who does not know the executant of a Deed, cannot be regarded as an attesting witness for the purposes of Section 68 of the Evidence Ordinance, the evidence of the Notary Public who gave evidence at the Trial did not satisfy the requirements of Section 68 and did not prove the Deed marked **"P5"**.

The learned High Court Judges correctly applied the aforesaid established principle of law and held that, the Deed marked **"P5"** had not been proved.

I agree with the determination of the learned High Court Judges and, accordingly, answer the aforesaid first question of law in the negative. I would also add that, not only was the Deed marked **"P5"** not proved, as I observed earlier, the Deeds marked **"P3"** and **"P4"** were also not proved.

Accordingly, I hold that, this Appeal should be dismissed since the Plaintiff has failed to prove the Deeds of Transfer marked **"P3"**, **"P4"** and **"P5"** in the manner required by the law.

In view of the above, the second question of law regarding whether the Plaintiff has proved the termination of the leave and license does not need to considered. In this connection, I should also state that, the Plaintiff identifies this as a *rei vindicatio* Action and does not suggest that this is a possessory Action where a question of a contractual nexus may have to be considered. In any event, it is an undisputed fact that, the Plaintiff never had possession of the land.

The Appeal is dismissed with costs in a sum of Rs.20,000/- payable by the Plaintiff-Respondent-Appellant to the Defendants-Appellants- Respondents.

Judge of the Supreme Court

Priyasath Dep, PC J.
I agree

Judge of the Supreme Court

K.T.Chitrasiri J.
I agree

Judge of the Supreme Court