

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

Balasinghe Pedige Wilson
**7th Defendant-Respondent-
Petitioner-Appellant.**

SC Appeal 123/2010
SC(HCCA) CALA 223/10
WP/HCCA/GPH/No. 49/02(F)
DC Gampaha Case No.34135/P

Vs

Nilgal Pedige Kusumawathi
Plaintiff-Appellant-Respondent-Respondent

1. Balasinghe Pedige Babiya (Deceased)
- 1a. Balasinghe Pedige Wilbert
2. Balasinghe Pedige Edwin
3. Balasinghe Pedige Wilbert
4. Balasinghe Pedige Anulawathi
5. Balasinghe Pedige Jayamanna
6. Balasinghe Pedige Nalini Jayamanna
7. Balasinghe Pedige Wilson
8. Sinhala Pedige Pesona
9. Balasinghe Pedige Swarna
10. Chandrasiri Pathiranage Keerthiratne
**Defendant-Respondent-Respondent-
Respondents**

Before : Saleem Marsoof PC, J
Sisira J De Abrew J
Sarath de Abrew J

Counsel : Sandamal Rajapakshe for the
7th Defendant-Respondent- Petitioner-Appellant.
Palitha Ranatunga for the
Plaintiff-Appellant-Respondent-Respondent
Sumudu Liyanaarachchi for the 1a and 3rd
Defendant-Respondent-Respondent-Respondents

Argued on : 7.7.2014

Decided on : 17.10.2014

Sisira J De Abrew J.

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action in the District Court of Gampaha (DC Gampaha 34135/P) to have the land called Othudena Atambagahakumbura which is morefully described in the schedule to the plaint partitioned. After trial the learned District Judge, by his judgment dated 1.7. 2002, dismissed the action. Being aggrieved by the said judgment, the said plaintiff-Respondent filed an appeal in the High Court (Civil Appellate) of Gampaha (hereinafter referred to as the High Court). The said Plaintiff-Respondent before filing the petition of appeal in the High Court, filed a notice of appeal naming all the parties in the District Court. She also sent notices of appeal to all the parties. At the hearing before the High Court, the 7th Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) raised a preliminary objection that the Plaintiff had not given names of all the respondents in the petition of appeal as required by Section 758 of the Civil Procedure Code. The High Court overruled the said preliminary objection and fixed the matter for argument. Being aggrieved by the said order of the High Court, the Appellant has appealed to this court.

This court, by its order dated 4.10.2010 granted leave to appeal on the question of law set out in paragraph 13(1) of the petition of appeal dated 16.7.2010 which is reproduced below:-

“Did the learned judges of the Provincial High Court err in law in arriving at the erroneous conclusion that not naming all the affected parties to an action in the Petition of Appeal is a curable defect under the Provisions of section 759(2) of the Civil Procedure Code?”

Learned counsel for the Appellant stressed on the same preliminary objection raised in the High Court. He submitted that failure on the part of the Plaintiff-Respondent to name the nine respondents who were defendants in the District Court had caused severe prejudice to the said respondents. He further submitted that this was not a curable defect under Section 759 of the Civil Procedure Code. This was the only ground submitted by him. Learned counsel for the 1^a and 3rd Defendant-Respondent-Respondent-Respondents too made the same submission. I now advert to the said contention.

It has to be noted here that when the Plaintiff-Respondent filed the notice of appeal she cited the names of all the parties in the said notice of appeal. Further she had sent notices to all the parties. When I consider the submission of learned counsel for the Appellant it is pertinent to consider Section 759 of the Civil Procedure Code which reads as follows.

“(1) If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons of such rejection. And when

any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.

(2) In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just.”

I would like to consider a certain judicial decision on this point. In *Nanayakkara V Warnakulasuriya* [1993] 2 SLR 289 Supreme Court held thus:

“The power of the Court to grant relief under s. 759 (2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced in which event the appeal has to be dismissed.”

The decision of the Supreme Court in *Jayasekara V Lakmini* and others [2010] 1SLR41 would lend support to answer the contention raised by learned counsel for the Appellant. In the said case the following facts were observed.

“The 4th defendant-appellant failed to name the 1st and the 2nd defendants in the District Court in the partition action as the respondents in the appeal – only the plaintiff was made a party. On the objection raised by the plaintiff-appellant that the appeal is not properly constituted the High Court overruled the objection stating that all necessary parties had been noticed by the 4th defendant-appellant in compliance with Section 755 and fixed the case for the argument. The plaintiff-respondent sought leave to appeal from the said order and leave was granted.” Justice Chandra Ekanayake (with JAN de Silva CJ and Marsoof PC,J agreeing) held (page 52) thus: “The issue at hand falls within the purview of a

mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755. In such a situation if the Court of Appeal was of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deem just.”

In the light of the aforesaid judicial decisions, I hold that when there is a failure on the part of an appellant to name all the respondents in the petition of appeal the test that should be applied is whether the respondents have been materially prejudiced by such failure. If the respondents have not been materially prejudiced, the Court can grant relief under Section 759 of the Civil Procedure Code.

Can it be said that the respondents in the present case have been materially prejudiced by the failure on the part of the Plaintiff-Respondent to state names of all the respondents? It is correct that the Plaintiff-Respondent has set out only the name of the 1st respondent in the petition of appeal filed in the High court. If the respondents were notified of the appeal which would be filed in Court, in my view, it cannot be said that the respondents were materially prejudiced because if the respondents were interested in opposing the appeal, they had the opportunity to do so. The Plaintiff-Respondent has cited the names of all the respondents in the notice of appeal and sent notices to all of them and to their registered Attorneys-at-law under registered post. Thus if they wanted to oppose the appeal they had ample opportunity to do so. For these reasons, I hold that the respondents have not been materially prejudiced by the failure on the part of the Plaintiff-Respondent to name all the respondents in the petition of appeal. In my view the said defect can be cured by amending the caption naming all the respondents and by sending notices to the respondents. For the above reasons, I hold that the above defect is a curable

defect under Section 759 of the Civil Procedure Code. I answer the above question of law raised by the Appellant in the negative.

The learned High Court Judges, in their judgment dated 10.6.2010, have already specified the names of all the respondents. The Plaintiff is directed to file an amended caption by naming all the respondents.

For the above reasons, I dismiss the appeal with costs and direct the High Court to send notices to all the respondents whose names appear on the notice of appeal and conclude the appeal without delay. In all the circumstances of the case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Saleem Marsoof PC, J

I agree.

Judge of the Supreme Court.

Sarath de Abrew J

I agree.

Judge of the Supreme Court.