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

In the matter of an application for Leave to Appeal in terms of Sec: 5 (c) (1) of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006

Walpola Mudalige Janenona
No.87/1, Walpolawatta
Kelanimulla, Angoda.

SC/HC/CALA306/2013
WP/HCCA/AV/603/08 (F)

PLAINTIFF

Vs.

D. C. Homagama Case No.1095/L

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT

AND BETWEEN

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT-APPELLANT

Vs.

Walpola Mudalige Janenona(deceased)
No.87/1, Walpolawatta
Kelanimulla, Angoda

PLAINTIFF-RESPONDENT

Malwi Pathirannehelage Walter Dickson Perera
No.145, Siridamma Mawatha
Colombo 10.

SUBSTITUTED PLAINTIFF RESPONDENT

AND

Malwi Pathirannehelage Walter Dickson Perera
No.145. Siridamma Mawatha
Colombo 10.

SUBSTITUTED PLAINTIFF RESPONDENT PETITIONER

Vs.

Manamala Gamage Nandawathie
337, Kothlawala,
Kaduwela

DEFENDANT APPELLANT RESPONDENT

BEFORE: B.P.ALUWIHARE, PC, J
SISIRA J. DE ABREW, J &
H. N. J PERERA, J.

COUNSEL: Ranjan Suwandaratne for the substituted Plantiff-Respopndent-Petitioner.
Nilshantha Sirimanne for the Defendant-Appellant-Respondent.

ARGUED ON: 06.06.2016

DECIDED ON: 23.03.2017

ALUWIHARE, P.C. J,

When this matter came up for support, the following preliminary objections were raised on behalf of the Defendant-Appellant-Respondent (hereinafter referred to as the Defendant)

(i) The Petitioner does not have the necessary *locus standi* to have and maintain this Application, especially given the particular subject matter of the Petitioner's Application and the substantive reliefs sought in the Plaint; and

(ii) The Petitioner has failed to come before Your Lordship's' Court with clean hands, and he wilfully suppressed and/or misrepresented vital and material facts, which clearly render the Petitioner's Application and final reliefs futile.

Original Plaintiff, Walpola Mudalige Jane Nona had brought this action before the District Court against the Defendant, Nandawathie seeking a declaration of title to the land described in the schedule to the plaint and to have the Defendant ejected from the said property.

The Plaintiff had succeeded in her action and aggrieved by the judgment of the District Court, the Defendant had appealed to the High Court of Civil Appeals. The High Court of Civil Appeals, by its judgment dated 27th June, 2013 set aside the judgment of the learned District Judge dated 29th May, 2002 and directed the Defendant to pay a sum of Rs.150, 000/- with legal interest (to the Plaintiff), and upon the payment the Plaintiff was directed to re-transfer the property in question, to the Defendant.

Aggrieved by the said judgment of the High Court of Civil Appeals, the Plaintiff (Substituted-Plaintiff-Respondent-Petitioner) had come by way of leave to appeal to this court.

Counsel for the Defendant submitted, that the original Plaintiff Jane Nona died on or about 6th December, 2007 while this matter was pending before the High Court of Civil Appeals. Thereafter, the Petitioner to the present application, her son, had been substituted in room of the original Plaintiff, on 13th November, 2008.

Counsel further stated, that on 18th March, 2005, the property which is the subject matter of this case had been gifted to one Malawi Pathirannehelge Eranda Perera (hereinafter referred to as Eranda Perera) by the original Plaintiff Jane Nona.

Further, the Defendant had also produced a copy of the deed bearing No.3153 attested by Notary Public Handunneththi. Perusal of the same reveals that Deed No.3153 is a deed of gift by which original Plaintiff, Jane Nona had gifted a property retaining a life interest of the same, to one Malawi Pathirennehelage Eranda Perera.

The learned counsel for the Plaintiff, submitted that the said donee, Eranda Perera was a grandchild of Jane Nona, the original Plaintiff: The transfer of the property had taken place 2 years and 08 months prior to the death of Jane Nona: that Jane Nona, continued to be represented as the owner of the property before the High Court of Civil Appeals: and did not disclose the fact that the title of the property had been passed on to the donee Eranda Perera.

After the demise of Jane Nona, the present substituted-Plaintiff-Respondent-Petitioner (hereinafter referred to as the substituted plaintiff) was substituted in room of Jane Nona, by application for substitution, dated 30th October, 2008.

In the affidavit filed by the substituted-Plaintiff, he had moved for substitution on the basis that he is one of the heirs of Jane Nona, and the necessity had arisen for the heirs of Jane Nona to be substituted.

It was submitted on behalf of the Defendant that nowhere in the affidavit filed by him, had he disclosed the fact that the subject matter of the case stands transferred to the donee Eranda Perera.

A comparison of the schedule to the Plaint with the schedule to the deed of gift, makes it abundantly clear that both schedules refer to one and the same property. Thus, there is no doubt what has been conveyed to Eranda Perera by the original Plaintiff Jane None is the subject matter of this case.

If that be the case, the issue before this court is whether the present Substituted-Plaintiff-Respondent-Petitioner has the locus standi to prosecute this application as he does not appear to have any rights over the subject matter of this case now.

Furthermore, it was the contention of the learned counsel for the Defendant that the Substituted-Plaintiff, ought not to have sought him to be substituted in room of Jane Nona when the property in question had been conveyed to Eranda Perera by way of a deed of gift sometime before Jane Nona passed away.

It was contended on behalf of the Defendant that, as matters stand now, Substituted-Plaintiff has no Locus standi whatsoever to prosecute or maintain this application.

As referred to earlier, this is a *rei-vindicatio* action filed by the original Plaintiff Jane Nona, who sought a declaration of title, for the property and an order for eviction of the Defendant from the said property (prayers "ඌ" and " ඍ" to the plaint).

It was the contention of the learned Counsel for the Defendant that, a Plaintiff who institutes a *rei Vindicatio* action is required to maintain title to the said land throughout the cae and relied on the decision of this court in *Ekanayake and others Vs. Ratranhamy* – SC Appeal 5/2010, SC minutes of 6th February,2012 where the court held that *"in a vindicatory action, it is necessary for the title to be present with the Plaintiff not only at the beginning of the action, but until the conclusion of the case".*

The contention of the Defendant was that, in the present case, not only the original Plaintiff lost title to the property (save for life interest) by her own action, but the substituted plaintiff also never enjoyed title to the property.

In the case of *De Silva Vs. Goonatilake 32 NLR 217,* Chief Justice Macdonell held that: *"One who seeks to dispossess another in possession must show paramount title….. In order to sue by way of rei vindication the plaintiff must have the right of ownership vested in him….."There is abundant authority that a party claiming a declaration of title must have title himself….. 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".*

It was argued on behalf of the Defendant that in the instant case, the substituted Plaintiff had failed to demonstrate that he has title to the property in the face of the alleged conveyance: deed of gift No.3153 to Eranda Perera. If that be the case the question arises as to how can this court declare the title vest in the substituted-Plaintiff, whereas the title vest in another, holding adversely to him?

In the case of Silva v. Jayawardena 43 N.L.R 551, Justice Keuneman, referred to the principle set out by Voet (Voet 6:1:4) on the very issue:
"But again, if he who brought this action was the Dominus at the time of institution of the suit, but 'lite pendente' has lost the Dominium, reason dictates that the defendant should be absolved….. both because the suit has fallen into

that case, from which an action could not have a beginning, and in which it could not continue….. and because the interest of the Plaintiff in the subject of the suit has ceased to exist,…… and in short because that (right of dominion) has action". (Voet's Title on Vindications and interdicta by Casie Chitty, Bk VI TITLE I pg.14)

In the case referred to above, the Plaintiff admitted that after the institution of the action, before the adjudication of the rights of the parties by the District Judge, she transferred some of the blocks of land which were the subject matter of the case.

In the case before us, Jane Nona was alive when the learned District Judge adjudicated that Jane Nona was the title holder of the land in question. Thereafter, she was cited as the Plaintiff-Respondent before the High Court of Civil Appeals. The need for substitution arose with the demise Jane Nona in 2008 when the matter was still pending before the High Court of Civil Appeals. It is to be noted that there was no change in the status of the parties up to the point, the issues raised before the District Court were adjudicated upon by the learned District Judge. In my view, sitting in appeal, all what the High Court of Civil Appeals called upon to consider was, whether the said adjudication was legally sound. If the cause of action survives after the death of a party, as in the instant case, the substitution is effected purely for the purpose of prosecuting the appeal and not for the adjudication of fresh matters or to decide the rights of the parties.

In this context terms of Section 760A of the Civil Procedure Code stipulates that "*where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided*

in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid".

In the case of *Careem V Subramanium and others 2003 2 SLR 197* Justice Udalagama expressed the view that the inquiry to determine a " proper person" under the provisions of section 760A (of the Civil Procedure Code) is one to ensure the continuation of the appeal after the change of status in the action and not to decide the rights of the parties. Interestingly enough, the opposite was argued in the case of *Lawana Gunesekera v. Hemawathie Sahabandu C. A 476/95 (F)* which was decided by the Court of Appeal on 11.09.2002. Although the decision is not binding on this court it has in my view, to an extent, of persuasive value.

In the case referred to, the plaintiff succeeded in a declaratory action and the defendant appealed. While the appeal was pending, the plaintiff died. An application was made in terms of section 760A to effect substitution on the basis that the deceased plaintiff had by a deed, donated the premises to the petitioner who moved that he be substituted in room of the Plaintiff.

The Defendant resisted on the basis that there was no proper donation of the premises to the petitioner and he is not a "proper person" to be substituted even for the limited purpose of prosecuting the action.It was also argued that the plaintiff in that case died intestate leaving the plaintif's siblings as intestate heirs and the petitioner was not a heir. It was further argued, that without considering the authenticity of the deed of gift to determine whether or not the said deed

gives the petitioner "lawful title" to the premises, the petitioner cannot be considered as a "proper person" in terms of section 760A of the Code.

His lordship held that *"It is my considered view that what the provision 760A requires is, that the court determine a "proper person" to be substituted.In determining a proper person I would venture to hold that what the section envisages is a proper person necessary to prosecute the appeal.Such apponintments are made by court for a limited purpose of prosecuting an appeal and ones made such appointee could not in any manner claim rights to the property of the deceased merely on the basis of being appointed to be so substituted in place of the deceased.*

His Lordship went on to state that *"the subsequent appointment of a person to prosecute the appeal in place of the deceased could not in any way prejudice the rights of other parties as at the date of the institution of the action.*

In the case of Paramasivam and another v. Piyadasa and others CA 135/99 (F), Justice H.N.J Perera was called upon to decide this very issue. His Lordship held that Section 760A of the Code gives the discretion to the court to decide, who in the opinion of the court is a the proper person to be substituted and the inquiry to determine a "proper person" under Section 360A is one to ensure continuation of the appeal after the change of status in the action and not to decide the rights of the parties.

I have already referred to the fact that, throughout the period this matter was under adjudication before the learned District Judge, Jane Nona remained a party and no alienation of the property took place.

The High Court of Civil Appeals also considered the property rights of Jane Nona and the Defendant based on the evidence led before the District Court, and this court would be called upon to do the same if this court finds sufficient merit in this matter to grant leave to appeal. There is nothing before it for this court to hold the view, that the substituted - Plaintiff -Respondent has any infirmity that makes him "unfit" to be substituted in place of the original plaintiff Jane Nona, to prosecute the appeal,
Considering the above, I am of the view that the Substituted-Plaintiff-Respondent does have *locus standi* to prosecute and maintain this application.

The second preliminary objection raised by the Respondent was that the he wilfully suppressed and/or misrepresented vital and material facts, which clearly render the Petitioner's Application and final reliefs futile.
It was argued on behalf of the Respondent that the failure of the original Plaintiff to disclose the vital and material facts that the original plaintiff had, during the pendency of the appeal before the High Court of Civil Appeals, transferred her title in the subject matter of the case to a third party and suppressed and or failed to disclose this fact to the High Court of Civil Appeals and this amounts to misleading of the said court. At the hearing it was further argued that this failure was intentional on the part of the original plaintiff, to prevent the Respondent from availing herself of the substantive relief granted by the High Court of Civil Appeals.

As referred to earlier the substitution will not prejudice the rights of the other parties of the case, as at the date of the institution of the action. On the other hand, there is no material before this court to conclude that the non-disclosure of the conveyance of the property in question to Eranda Perera by a deed of gift was done with the intention of misleading the court. Although the original plaintiff, who had retained life interest of the property, had suppressed the fact that she

had gifted the property, while the appeal was pending before the High Court of Civil Appeals, such suppression in my view is not fatal to the maintainability of the present action.

For the reasons set out above, I overrule both preliminary objections raised on behalf of the Defendant-Respondent and dismiss the preliminary objections.
I make no order as to costs.

JUDGE OF THE SUPREME COURT

JUSTICE SISIRA J DE ABREW

I agree

JUDGE OF THE SUPREME COURT

JUSTICE H.N. J. PERERA

I agree

JUDGE OF THE SUPREME COURT