

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

Iluppengamu Appuhamylage
Martin Appuhamy
(Deceased)
Plaintiff

Iluppengamu Appuhamylage
Milrad Chandrawathie
(Formerly the 1st Defendant)
Substituted Plaintiff

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
All of
Balabowa, Dewalapola.
Substituted Plaintiff

SC APPEAL NO: SC/APPEAL/172/2015

SC LA NO: SC/HCCA/LA/247/2015

HCCA GAMPAAH NO: WP/HCCA/GPH/70/2010/F

DC GAMPAAH NO: 34660/P

Vs.

1. Iluppengamu Appuhamylage
Milrad Chandrawathie
(Deceased)

2. Iluppengamu Appuhamylage
Ariyawansa Gemunudasa
3. Iluppengamu Appuhamylage
Jacolis Appuhamy (Deceased)
- 3(a). Iluppengamu Appuhamylage
Suraweera
4. Sangapala Arachchige Harriet
5. Iluppengamu Appuhamylage
Dannet Ranasinghe
6. Iluppengamu Appuhamylage
Sumithra Padmasilie
7. Iluppengamu Appuhamylage
Swineetha
8. Iluppengamu Appuhamylage
Violet
9. Iluppengamu Appuhamylage
Kumaratunga
All of
Balabowa, Dewalapola.
10. Bowanayaka Arachchige
Sumanawathie
11. Iluppengamu Appuhamylage
Jayath
Both of No. 63/14,
Parakum Mawatha,
Bandarawatta,
Gampaha.
12. Milton Appuhamilage Milton
Chandrawathie
Balabowa,
Dewalapola.

13. Iluppengamage Chandrawathie
No. 142, Balabowa,
Dewalapola.
Defendants

AND BETWEEN

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
Balabowa, Dewalapola.
Substituted-Plaintiff-Appellant

Vs.

1. Iluppengamu Appuhamylage
Milrad Chandrawathie (Deceased)
2. Iluppengamu Appuhamylage
Ariyawansa Gemunudasa
3. Iluppengamu Appuhamylage
Jacolis Appuhamy
(Deceased)
- 3(a). Iluppengamu Appuhamylage
Suraweera
4. Sangapala Arachchige Harriet
5. Iluppengamu Appuhamylage
Dannet Ranasinghe
6. Iluppengamu Appuhamylage
Sumithra Padmasilie
7. Iluppengamu Appuhamylage
Swineetha

8. Iluppengamu Appuhamylage
Violet
9. Iluppengamu Appuhamylage
Kumaratunga
All of
Balabowa, Dewalapola.
10. Bowanayaka Arachchige
Sumanawathie
11. Iluppengamu Appuhamylage
Jayalath
Both of No. 63/14,
Parakum Mawatha,
Bandarawatta,
Gampaha.
12. Milton Appuhamilage Milton
Chandrawathie
Balabowa, Dewalapola.
13. Iluppengamage Chandrawathie
No. 142, Balabowa, Dewalapola.
Defendant-Respondent

AND NOW BETWEEN

Iluppengamu Appuhamylage
Suraweera,
Balabowa, Dewalapola
3A Substituted Defendant-
Respondent-Petitioner

Vs.

Iluppengamu Appuhamylage
Dannet Ranasinghe
(Formerly the 5th Defendant)
Balabowa, Dewalapola
Substituted Plaintiff-Appellant-
Respondent

1. Iluppengamu Appuhamylage
Milrad Chandrawathie
2. Iluppengamu Appuhamylage
Ariyawansa Gemunudasa
4. Sangapala Arachchige Herriet
5. Iluppengamu Appuhamylage
Dannet Ranasinghe
(also the Substituted-Plaintiff-
Appellant-Respondent)
6. Iluppengamu Appuhamylage
Sumithra Padmasilie
7. Iluppengamu Appuhamylage
Swineetha
8. Iluppengamu Appuhamylage
Violet
9. Iluppengamu Appuhamylage
Kumaratunga
All of
Balabowa, Dewalapola.
10. Bowanayaka Arachchige
Sumanawathie
11. Iluppengamu Appuhamylage
Jayalath
Both of No. 63/14,

Parakum Mawatha,
Bandarawatta, Gampaha.

12. Milton Appuhamilage Milton
Chandrawathie
Balabowa, Dewalapola.

13. Iluppengamu Appuhamylage
Chandrawathie
No. 142, Balabowa,
Dewalapola.

Defendant-Respondent-
Respondents

Before: Sisira J. De Abrew, J.

A. L. Shiran Gooneratne, J.

Mahinda Samayawardhena, J.

Counsel: B.O.P. Jayawardena with Oshada Rodrigo for the
3A Substituted-Defendant-Respondent-Petitioner.

J.C. Boange with S. Gurugalgoda for the
Substituted-Plaintiff-Appellant-Respondent and
the 6th, 7th, 8th and 9th Defendant-Respondent-
Respondents.

Argued on: 01.04.2021

Further written submissions:

by the 3A Substituted-Defendant-Respondent-
Appellant on 16.04.2021

by the Plaintiff-Appellant-Respondent on
20.04.2021

Decided on: 21.05.2021

Mahinda Samayawardhena, J.

The Plaintiff filed this action in the District Court of Gampaha seeking to partition among himself and the 1st to 11th Defendants a land named Wawe Ethana in extent of 1 acre and 3 roods, bounded on the North by the land of Thepanis Appu and others, on the East by the land of Thepanis Appu, on the South by the land of Romanis Appu, and on the West by the land belonging to the successors in title of Mudlier Silva.

Upon the death of the original Plaintiff, the 1st Defendant took over as the substituted Plaintiff. The commission to prepare the Preliminary Plan, which is the first step to identifying the land to be partitioned, was sent to the Surveyor who returned the commission duly executed with Plan No. 5733 and the Report. In the Report, the Surveyor states *inter alia* that the substituted Plaintiff and the 2nd to 7th, 9th and 10th Defendants were present at the survey, and the boundaries of the land were shown to him by the substituted Plaintiff and no other party raised objections by stating that the boundaries shown were wrong. The extent of the land depicted in this Plan is 2 acres and 25.5 perches.

The land is described in the schedule to the plaint in accordance with old title Deeds executed many decades ago. This includes title Deed No. 15355 executed in 1925. The extent of the land given in these Deeds is speculative. There were no Plans prepared at that time. Hence, a discrepancy of 1 rood and 25.5 perches between the land described in the old Deeds and the land shown in the more recently prepared Plan cannot be taken to mean a larger land than that sought to be partitioned was surveyed. No party raised such a point at the survey or thereafter.

The trial commenced on 18.05.2001 with the raising of issues and the substituted Plaintiff partly gave evidence. The 1st issue raised by the substituted Plaintiff was whether the land to be partitioned is depicted in Plan No. 5733. The substituted Plaintiff marked Plan No. 5733 as the Preliminary Plan depicting the land to be partitioned as described in the schedule to the plaint.

Conversely, the contesting 3(a) Defendant raised the issue whether the land depicted in Plan No. 5733 is not Wawe Ethana but a different land named Meegahahena alias Midellagahawatta as described in the statement of claim of the said Defendant. According to this Defendant, Meegahahena alias Midellagahawatta is a land of 2 acres, 2 roods and 15 perches in extent.

The substituted Plaintiff continued her evidence-in-chief on 18.06.2002 and 08.11.2002. During the course of her evidence, she stated *inter alia* that the land is known as Wewe Watta, Wawe Ethana, and Millagahawatta.

However, before the commencement of her cross examination, the substituted Plaintiff made an application to amend the plaint. An amended plaint was filed on 06.01.2005. The substituted Plaintiff thereafter moved the Court to issue a commission to prepare a new Preliminary Plan. The issuance of a fresh commission to prepare a new Preliminary Plan was unnecessary because there was no change in the schedule to the amended plaint as to the land to be partitioned. The schedules to the original plaint and the amended plaint are the same.

The new commission was issued to a different Surveyor who sent to Court Plan No. 2256 with the Report. In this second Plan, i.e. Plan No. 2256, a portion of the land on the southern boundary of about 2 roods in extent is excluded and a land of 1 acre, 2 roods and 22.25 perches is depicted. The Surveyor states in the Report that in the commission he received, he was directed to survey the land and prepare the Plan in the manner shown by the substituted Plaintiff, and therefore the survey was done according to the boundaries shown by the substituted Plaintiff. The Surveyor specifically points out that there is no identifiable southern boundary. In this Plan, the southern boundary is shown by a straight line drawn by the Surveyor and the southern boundary is described as part of Wawe Ethana claimed by the substituted Plaintiff. It may be recalled that the original Plaintiff filed this action to partition the land known as Wawe Ethana. The Surveyor has in effect excluded a part of Wawe Ethana on the request of the substituted Plaintiff.

With this new development, the trial commenced *de novo* and issues were raised afresh by the substituted Plaintiff *inter alia* on the basis that the land to be partitioned is depicted in new Plan No. 2256. The substituted Plaintiff gave evidence again and Plan No. 2256 was marked as the Preliminary Plan but subject to proof. Nevertheless, the Surveyor was not called to give evidence.

Thereafter, the 5th Defendant was added as the substituted Plaintiff on the basis that the 1st Defendant, who was initially substituted as the Plaintiff, did not prosecute the case with due diligence.

With the evidence of the new substituted Plaintiff (i.e. the 5th Defendant), the Plaintiff's case was closed, reading in evidence Deeds marked P1-P5. At the time of the closure of the Plaintiff's case, the contesting 3(a) Defendant informed Court that Plan No. 2256 marked subject to proof had not been proved by calling the Surveyor. Thereafter the 3(a) Defendant and the 13th Defendant gave evidence.

P1 of 1967 refers to a land known as Wewe Watta in extent of 1 acre and 3 roods. P2 of 1991 refers to a land known as Wawe Ethana in extent of 1 acre and 3 roods. P3 of 1991 refers to a land known as Wawe Ethana in extent of 1 acre and 3 roods. P4 of 1925 refers to a land known as Millagahawatta alias Wewe Watta in extent of 1 acre and 2 roods. P5 of 1970 refers to a land known as Millagahawatta in extent of 1 acre and 3 roods.

The learned District Judge by his Judgment dated 30.06.2010 dismissed the Plaintiff's action on the basis that the Plaintiff failed to properly identify the corpus.

Apart from the arbitrary removal of a part of the corpus, the learned District Judge says that the boundaries in the schedule to the plaint do not correspond with the boundaries depicted in Plan No. 2256.

The boundaries in the schedule to the plaint are given in accordance with the boundaries in old Deeds. Such boundaries are likely to have changed with the passage of time and, moreover, the existing boundaries have been identified by the Surveyor by the names of the owners of the adjoining lands. If the change in the names of the owners of the adjoining lands can be explained, a District Judge cannot dismiss a partition

action by making a superficial comparison of the boundaries in the schedule to the plaint with the existing boundaries as stated in the Preliminary Plan. No such explanation was given by the substituted plaintiff in this case. The substituted Plaintiff's evidence on the identification of the corpus as well as the pedigree was fragile.

On appeal by the substituted Plaintiff, the High Court of Civil Appeal by Judgment dated 02.07.2015 set aside the Judgment of the District Court and directed the District Judge to partition the land depicted in Plan No. 2256 according to the pedigree of the substituted Plaintiff.

It is against this Judgment of the High Court that the 3(a) Defendant has come before this Court. This Court granted leave to appeal on the questions of identification of the corpus, failure to investigate title to the land, and the prescriptive claim of the 3rd Defendant.

The brief Judgment of the High Court conspicuously lacks an analysis of evidence when it held with the Plaintiff on the identification of the corpus and the title to the land.

Although it was Plan No. 2256 which was marked subject to proof but not proved, the High Court states it was Plan No. 5733 which was marked subject to proof but not proved. Such was the care taken by the High Court in deciding the appeal.

It is abundantly clear from the Surveyor's Report on Plan No. 2256 that the Surveyor was compelled to exclude a part of Wawe Ethana, the land for the partition of which alone the original Plaintiff filed this action, at the instance of the substituted Plaintiff. The Surveyor had to yield to the substituted Plaintiff's

request because of the direction given to him by Court in the commission.

It may be recalled that it is the same substituted Plaintiff who showed the boundaries to the Surveyor who prepared the previous Plan No. 5733. No reasons were given by the substituted Plaintiff at the survey or in evidence for the change of mind.

However, the High Court in its Judgment states that in the first Plan, i.e. Plan No. 5733, a larger land is depicted and the reason for this may be the filling of the paddy field on the southern boundary. But no such evidence was given by the substituted Plaintiff at the trial and I am at a loss to understand how the High Court formulated such a defence to justify the arbitrary removal of a portion of the land from partitioning.

The High Court referring to Plan No. 5733 further states that if a larger land is made the subject matter of the action than what is stated in the schedule to the plaint, a land in excess of the registered *lis pendens* would need to be partitioned, which is unlawful. I am unable to understand this reasoning. This is not a question of enlarging the corpus but a question of identifying the corpus. The proper identification of the land described in the schedule to the plaint on the ground does not necessitate a fresh *lis pendens* being registered. Nor does it amount to partitioning a larger land not covered by the *lis pendens* presently registered.

Without analysing the evidence as to proof of pedigree, the High Court directed the District Court to enter a partition decree as prayed for by the Plaintiff in the amended plaint. This cannot be

done in a partition case. The District Judge did not engage in investigating the title to the land because he formed the opinion that the land to be partitioned had not been properly identified. The High Court did not consider the contest raised by the 3rd Defendant at all.

In the facts and circumstances of this case, the Court need not consider the contest raised by the 3(a) Defendant. The Court can dismiss the Plaintiff's action without considering the said contest.

A partition action cannot be filed to partition a portion of the land. The entire land should be brought into the action and the co-owners of the whole corpus should be made parties. If the land to be partitioned as described in the schedule to the plaint has not been properly identified, the Plaintiff's action shall fail. In such a situation the necessity to investigate title does not arise. Title shall be investigated on a properly identified parcel of land. The Court shall not first investigate title and then look for the land to be partitioned. It shall happen *vice versa*. (*Peris v. Peris* (1903) 6 NLR 321, *Abeyasinghe v. Abeyasinghe* (1946) 47 NLR 509, *Girigoris Appuhamy v. Maria Nona* (1956) 60 NLR 330)

The Plaintiff in this case has failed to bring the whole land into the action. In other words, the Plaintiff has failed to properly identify the land to be partitioned. Hence the Plaintiff's action shall fail.

The questions of law raised before this Court are answered in favour of the 3(a) Defendant-Appellant.

I set aside the Judgment of the High Court and restore the Judgment of the District Court. The appeal of the 3rd Defendant is allowed with costs.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court

A. L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court