

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

In the matter of an application for Leave to Appeal under and in terms of Section 5C of High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 against the Judgment of the Civil Appeal High Court of Negombo.

SC/APPEAL No. 13/2021

SC/LA/Application No.

SC/HCCA/LA/26/2020

Civil Appellate High Court of
Negombo Case No.

WP/HCCA/NEG/09/2018/(F)

DC Negombo Case No. **6232/L**

L. Mary Esther Hettiarachchi *nee* Fernando of
“Muditha” Kirimetiyan, Lunuwila.

PLAINTIFF

vs

Nirmala Anthony of No. 250, Chillaw Road,
Kochchikade.

DEFENDANT

And Between

Nirmala Anthony of No. 250, Chillaw Road,
Kochchikade.

DEFENDANT - APPELLANT

vs

L. Mary Esther Hettiarachchi *nee* Fernando
of “Muditha” Kirimetiyan, Lunuwila.

PLAINTIFF – RESPONDENT

And Now Between

L. Mary Esther Hettiarachchi *nee* Fernando
of “Muditha” Kirimetiya, Lunuwila.

**PLAINTIFF-RESPONDENT-
PETITIONER – [APPELLANT]**

VS

Nirmala Anthony of No. 250, Chillaw Road,
Kochchikade.

**DEFENDANT-APPELLANT-
RESPONDENT-[RESPONDENT]**

BEFORE

: A. L. Shiran Gooneratne, J.
Menaka Wijesundera, J.
M. Sampath K. B. Wijeratne J.

COUNSEL

: S. A. D. S. Suraweera with Ashinika Perera
instructed by Seetha Ranjani for the Plaintiff-
-Respondent-Petitioner-[Appellant].

Sudarshani Coorey instructed by Diana
Stephanie Rodrigo for the Defendant-
Appellant-Respondent- [Respondent].

ARGUED ON

: 22.10.2025

DECIDED ON

: 06.08.2026

Introduction

The Plaintiff-Respondent-Appellant (hereinafter referred to as "the Plaintiff") instituted this action seeking a declaration of title to the allotment of land marked Lot 9A, depicted in plan No. 4482 prepared by W. S. S. Perera, Licensed Surveyor, and more fully described in the Fifth Schedule to the plaint, together with the ejectment of the Defendant-Appellant-Respondent (hereinafter referred to as "the Defendant") therefrom.

In her plaint, the Plaintiff averred that the *corpus* described in the Fifth Schedule thereto, depicted as Lot 9A in the aforesaid plan No. 4482, forms part of a larger extent of land described in the First Schedule to the plaint.

According to the Plaintiff, the said larger extent of land, comprising nine contiguous allotments amalgamated into a single parcel of land, was originally owned by Sinhala Gurunnanselage Jenovepha Catherine Perera *alias* Jane de Arc Catherine de Alwis. It is further averred that, by deed No. 27177 dated March 7, 1961, attested by M. L. de S. Karunathilaka, Notary Public, marked 'P3', she gifted her rights in the said land to Watuthanthrige Mary Silvia Hyacinth de Alwis.

Thereafter, by deed of Revocation No. 5242 dated June 19, 1976, attested by S. de A. Rajapaksha, Notary Public, marked 'P4', the former renounced whatever right, title, interest, and right of revocation that had been reserved under deed No. 27177.

Subsequently, by Agreement No. 5902 dated January 23, 1979, attested by S. de A. Rajapaksha, Notary Public, marked 'P5', Sinhala Gurunnanselage Jenovepha Catherine Perera *alias* Jane de Arc Catherine de Alwis reaffirmed the same conditions contained in deed No. 27177, with the concurrence of the donee, Watuthanthrige Mary Silvia Hyacinth de Alwis.

Thereafter, Hyacinth de Alwis possessed the contiguous lands as one land more fully described in the 1st schedule to the plaint and caused those lands to be surveyed by W. S. A. Costa, Licensed Surveyor, who prepared plan No. 1967

dated June 19, 1996, marked 'P6'/'V3', depicting the land as Lots 2 and 4¹ in an extent of 3 acers 3 roods and 21.4 perches. Subsequently, she caused part of the said land in an extent of 1 acer 2 roods 6. 25 perches to be resurveyed by W. S. S. Perera, Licensed Surveyor, who prepared plan No. 3923 dated September 9, 1998.

Thereafter, Mary Silvia Hyacinth de Alwis transferred Lot 1, as depicted in plan No. 3923, to Sri Ecus Milroy Niranjana Fernandopulle by deed No. 388 dated November 22, 2000, attested by K. A. P. Perera, Notary Public, marked 'P7'. The said Sri Ecus Milroy Niranjana Fernandopulle subsequently re-transferred the said allotment of land to Mary Silvia Hyacinth de Alwis by deed No. 389 dated November 27, 2000, attested by K. A. P. Perera, Notary Public, marked 'P8'.

Having thus reacquired title to the said land, Mary Silvia Hyacinth de Alwis caused the land depicted in plan No. 3923 to be resurveyed by W. S. S. Perera, Licensed Surveyor, who prepared the plan No. 4482, marked 'P2'. Thereafter, by deed No. 5120 dated June 14, 2001, attested by C. P. Ganepola, Notary Public, marked 'P9', she transferred Lot 9A depicted in the said plan, which forms the subject matter of the present action, to the Plaintiff.

The Plaintiff contends that the Defendant is the owner of the land situated to the East of the Plaintiff's land and that, on or about February 1, 2002, the Defendant removed the concrete boundary posts and encroached upon a portion of the Plaintiff's land.

At the instance of the Plaintiff, a commission was issued to W. D. Nandana Senaviratne, Licensed Surveyor, who tendered plan No. 6210B dated August 3, 2004, marked 'P1'. In the said plan, the Commissioner superimposed the relevant lots depicted in plan No. 4482 and identified an encroachment by the Defendant, which is depicted therein as Lot 4.

The Defendant, in her answer, averred that she purchased the land situated to the East of the Plaintiff's land by deed No. 3918 dated November 20, 2001, and deed

¹ Paragraph 4 of the Plaintiff.

No. 4115 dated March 18, 2002, both attested by Dilrukshi Fernando, Notary Public, and marked 'V5' and 'V6', respectively.

The land so purchased is described in the Schedule to the answer and the aforesaid deeds as Lots 1, 2, and 3 depicted in plan No. 151A prepared by W. S. S. Fernando, Licensed Surveyor. At the trial, plan No. 151A was produced marked as 'V4'.

Plan No. 151A states that the land depicted therein is a resurvey and subdivision of Lots 20 to 23 depicted in plan No. 3156 prepared by Lakshman H. Fernando, Licensed Surveyor. Although the Defendant failed to produce a copy of plan No. 3156, a careful examination of plan No. 151A, together with the boundaries referred to therein, clearly demonstrates that the land depicted in plan No. 151A forms part of Lot 4 depicted in plan No. 1967, marked 'P6'/'V3'.

The Defendant obtained a commission to W. S. Witharana, Licensed Surveyor, who tendered plan No. 5360 marked 'V1'. In the said plan, Mr. Witharana superimposed a portion of plan No. 1967 and plan No. 151A.

Upon a perusal of all the plans produced together with the title deeds, it is clear that the Plaintiff has traced title to a divided allotment of land out of Lot 2 depicted in plan No. 1967, while the Defendant claims a portion of Lot 4 in the same plan.

It is significant that Lot 2 in plan No. 1967 was subsequently resurveyed and subdivided by plan No. 3923 dated September 9, 1998. Plan No. 4482, being the last plan in the Plaintiff's chain of title, was prepared based on plan No. 3923, wherein Lots 1 and 2 depicted in plan No. 3923 were amalgamated and subdivided.

The Plaintiff has neither produced plan No. 3923 nor caused the said plan to be superimposed by the Commissioner on plan No. 6210B marked 'P1', which was prepared in connection with this action. Had plan No. 3923 been superimposed, the Court would have been in a position to ascertain the continuity of the subdivisions claimed by the Plaintiff and the title traced by him, particularly in relation to the location of the disputed Eastern boundary.

Similarly, the Defendant has failed to produce plan No. 3156 and has also failed to have the said plan superimposed on the Commissioner's plan No. 5360 marked 'V1'.

However, as stated earlier, Mr. Witharana, in his plan No. 5360, has superimposed plans No. 1967 and 151A. According to the said superimposition, the line depicted over the disputed portion of the land in plan No. 1967 does not correspond exactly with the line depicted in plan No. 151A, thereby demonstrating a variation in the disputed boundary between the two plans.

It is significant to note that the Western boundary of Lot No. 4 in both plan No. 1967 and plan No. 151A constitutes the Western boundary of the Defendant's land.

If the common boundary between Lots 2 and 4 in plan No. 1967 is considered to be the common boundary between the two lands as depicted in plan No. 5360 prepared at the instance of the Defendant, there would be no encroachment by the Defendant upon the Plaintiff's land. However, if the superimposed boundary depicted in plan No. 151A is taken into consideration, the Defendant has encroached upon a portion of the Plaintiff's land, as the Western boundary of Lot 4 in plan No. 1967 does not correspond with the Western boundary of Lot 1 in plan No. 151A.

In the District Court, the learned District Judge, in his judgment, has relied upon the plan bearing No. 6210B, marked as 'P1', prepared by Mr. Nandana Seneviratne, Licensed Surveyor, and has entered judgment in favour of the Plaintiff. The learned District Judge has analyzed the evidence of both surveyors and has taken into consideration the aforementioned infirmities in plan No. 6210B marked as 'P1'. However, he has chosen to disregard them, treating them as minor defects. Accordingly, the learned District Judge has preferred to rely on plan No. 6210B and, consequently, has entered judgment in favour of the Plaintiff.

Thereafter, the Defendant appealed to the High Court of Civil Appeal of the Western Province holden in Negombo, where the learned Judges of the High Court observed the infirmities in the superimposition made by Mr. Nandana

Seneviratne, Licensed Surveyor, in his plan No. 6210B marked as 'P1'. The learned Judges were of the view that such infirmities gave rise to a reasonable doubt as to the correctness and reliability of the said plan. Accordingly, the judgment of the learned District Judge was set aside, and the Plaintiff's action was dismissed.

Being aggrieved by the judgment of the learned Judges of the High Court, the Defendant sought leave from this Court to appeal against the said judgment. This Court granted leave on the questions of law set out in sub-paragraphs "c" and "e" of paragraph 13 of the Petition, which read as follows:

c). Did the learned judges of the said provincial high court err in law in placing a heavy reliance upon the minute discrepancy in the extent of the Plaintiffs land at a time when the court commissioner had very clearly explained the reasons for the discrepancy?

e). Did the learned judges of the Provincial High Court err in law arriving at the conclusion that the superimposition based on plan No. 4482 cannot be considered on a valid basis?

Superimposition Done in plan No. 6210B Made in Execution of Commission Issued at the Instance of the Plaintiff

The Plaintiff's action is based on an alleged encroachment, which is denied by the Defendant. Therefore, in support of her case, the Plaintiff has relied upon the plan bearing No. 6210B, marked as 'P1', prepared by Mr. W. D. Nandana Seneviratne, Licensed Surveyor, in execution of the commission issued by the Court.

The Defendant, in her answer, has admitted that her land lies to the East of the Plaintiff's land. Therefore, the crux of the matter is whether the superimposition made by the Commissioner, Mr. Seneviratne, could be relied upon.

Upon examination of plan No. 6210B marked as 'P1', the Commissioner has resurveyed Lot No. 9A in plan No. 4482 and after superimposition, identified Lots No. 1 to 7 as parts of Lots No. 4, 5, 9A, 9B of plan No. 4482 marked as 'P2'. Plan No. 4482 states that the allotments depicted therein are subdivisions

of Lots 1 and 2 in plan No. 3923 prepared by Mr. W. S. S. Perera, Licensed Surveyor.

The Plaintiff has purchased Lot 9A depicted in plan No. 4482, which is referred to in her title deed bearing No. 5120, attested by C. P. Ganepola, Notary Public, marked as 'P9'. The schedule to the said deed states that Lot No. 9A depicted in plan No. 4482 is a subdivision of Lot 1 in plan No. 3923 aforesaid.

The Plaintiff's vendor, Mary Silvia Hyacinth de Alwis, had purchased the property by deed No. 389, attested by K. A. P. Perera, Notary Public, marked as 'P8'. The Schedule to the said deed states that the land transferred thereby is Lot 1 depicted in plan No. 3923. Deed No. 389 does not make any reference to plan No. 1967.

It appears that the deeds marked as 'P3' to 'P5', by which Mary Silvia Hyacinth de Alwis obtained title, do not refer to any survey plan. However, while the property was vested in Mary Silvia Hyacinth de Alwis, plan No. 1967 marked as 'P6' was prepared. Thereafter, when Mary Silvia Hyacinth de Alwis executed deed of Transfer No. 388 marked as 'P7', she did not refer to plan No. 1967 but based the transfer on plan No. 3923.

Therefore, it is clear that the nexus between plan No. 1967 marked as 'P6' and plan No. 4482 marked as 'P2' is plan No. 3923, which was neither produced in evidence nor superimposed on the Commissioner's plan. Accordingly, it appears that, in proof of the Plaintiff's case, a vital plan has neither been produced nor superimposed. This infirmity has been rightly taken into consideration by the learned Judges of the High Court of Civil Appeal.

Be that as it may, the report attached to plan No. 6210B does not state whether the Commissioner based his superimposition on any points of fixation. Upon comparison of the two plans, it may be assumed that he had used the Northern boundary of Lots 4 and 5 in plan No. 4482, the Southern boundary of Lot 4 and 9B of the same plan, and a substantial portion of Lots 6 and 13 in plan No. 4482 as points of fixation. This assumption could be made as there are no other lines appearing separately from the black lines in plan 'P1'.

However, it appears that the Commissioner, in his evidence, has failed to identify or explain any points of fixation upon which the superimposition could be relied. The Commissioner, in his evidence (at page 159), has stated that the fixation is a successful one (“සාර්ථක අධිස්ථාපනයක්”). However, the basis upon which he arrived at such a conclusion, and the material relied upon by him in expressing such opinion, have not been stated either in his report or in his evidence.

Section 51 of the Evidence Ordinance provides thus:

“Whenever the opinion of any living Person is relevant the grounds on which such opinion is based are relevant.”

The illustration to Section 51 reads as follows:

“An expert may give an account of experiments performed by him for the purpose of forming his opinion.”

Therefore, not only the opinion of the expert but also the material relied upon in forming such opinion constitutes relevant evidence for the Court to determine whether the expert’s opinion could be relied upon. In the case at hand, I am of the view that both the Commissioner, Mr. Seneviratne, and the Plaintiff have deprived the Court of the opportunity to make a precise determination as to the accuracy of the superimposition carried out by Mr. Seneviratne, by failing to adduce evidence regarding the points of fixation relied upon in superimposing plan No. 4482 on plan No. 6210B.

The main factor considered by the learned Judges of the High Court of Civil Appeal was the discrepancy in the extents shown in plan ‘P1’ (No. 6210B prepared by the Commissioner) and plan ‘P2’ (No. 4482). In plan ‘P2’ bearing No. 4482, Lot 4 is depicted as having an extent of 12.5 perches and Lot 5 as having an extent of 14.5 perches, together amounting to an extent of 27 perches. The same area is depicted in plan ‘P1’ as Lots 1 and 2, containing an extent of 26.66 perches. Accordingly, the difference in extent between the allotments depicted in the two plans is 0.34 perches.

Similarly, Lot 9B in plan 'P2' is stated to contain an extent of 7 perches, whereas the same area depicted as Lots 3, 4, and 5 in plan 'P1' contains an extent of 6.69 perches, which is 0.31 perches lesser than the extent shown in plan 'P2'.

Mr. Nandana Seneviratne was cross-examined on this aspect. He admitted that, according to his plan, the extent of the Plaintiff's land, including the alleged encroachment, is greater than the extent of the land depicted in plan 'P2'. The Commissioner, in his evidence, has not explained the reason for this discrepancy, except that during re-examination he stated that it could have been due to a computation error in plan 'P2'.

If the discrepancy was merely due to a computation error, Mr. Seneviratne could have computed the extent in plan 'P2' and provided a clear and precise explanation for the difference. However, it must be observed that no clear and satisfactory evidence has been adduced to explain the reason for the discrepancy. This too was a factor rightly considered by the learned Judges of the High Court of Civil Appeal.

Plan No. 5360 made by W. Witharana, Licensed Surveyor, in Execution of Commission Issued at the Instance of the Defendant.

Mr. Witharana, in his plan No. 5360, has superimposed plan No. 1967, which is the very first plan referred to in the Plaintiff's pedigree. It is the same plan upon which the Defendant has also based her title. The Defendant has purchased a divided allotment depicted in plan No. 151A marked as 'V4', which is a subdivision of Lot 4 in plan No. 1967. Mr. Witharana has not only superimposed plan No. 151A marked as 'V4', but also plan No. 1967 marked as 'P2' / 'V3'.

Mr. Witharana was cross-examined regarding the accuracy of his superimposition of No. 151A. However, it appears that learned Counsel for the Plaintiff had chosen not to challenge the superimposition of plan No. 1967.

In the Supreme Court case of *L. Edrick De Silva vs L. Chandradasa De Silva*² it was observed that the failure to challenge a material fact placed in

² 70 NLR 169.

evidence by the opposing party during cross-examination leads to the inference that the evidence on that point has been admitted, in the following manner;

“Where the petitioner has led evidence sufficient in law to prove his status, i.e., a factum probandum, the failure of the respondent to adduce evidence which contradicts it adds a new factor in favour of the petitioner. There is then an additional " matter before the Court ", which the definition in section 3 of the Evidence Ordinance requires the Court to take into account, namely, that the evidence led by the petitioner is uncontradicted. The failure to take account of this circumstance is a non-direction amounting to a misdirection in law”

Therefore, it appears to me that the superimposition of plan No. 1967 on plan No. 5360 marked as ‘P1’ could be considered as having been accepted by the Plaintiff.

According to the said superimposition in plan No. 5360 (‘V1’), Lot 4 depicted therein falls within Lot 4 in plan No. 1967, although it does not fall within the boundaries of plan No. 151A. Based on the superimposition of plan No. 1967, it appears that a portion of the land claimed by the Plaintiff could well fall within Lot 4 in plan No. 1967.

However, I must state that a definitive conclusion cannot be reached on this aspect, as Mr. Witharana has not superimposed Lot 9A in plan No. 4482 marked as ‘P2’.

Upon examination of plan No. 5360, it appears that Lot 5 contains an extent of 1 rood and 16 perches, whereas Lots 1 to 4 in plan No. 151A contain an extent of 1 rood and 17.1 perches, showing an excess of 1.1 perches. Mr. Witharana was also unable to explain this discrepancy and, accordingly, stated that it was a mistake.

Mr. Witharana has stated that he used a part of the Southern and Northern boundaries of plan No. 151A as points of fixation. Upon examination of plan No. 5360, it appears that the Western boundary of Lot 1 in plan No. 151A does not align with the Western boundary of Lot 4 in plan No. 1967. This is suggestive of the fact that Lot 1 in plan No. 151A does not abut the Plaintiff’s land.

The Judgement of the Learned District Judge

The learned District Judge, in his judgment, has upheld the Plaintiff's title and the identity of the Plaintiff's land without having before him a copy of plan No. 3923. It appears that plan No. 3923 is vital for the identification of the Plaintiff's land, particularly in relation to the title claimed by the Plaintiff.

The learned District Judge has further formed the view that the aforesaid discrepancies in the extents of Lots 4, 5, and 9B in plan No. 4482 and the corresponding allotments in plan No. 6210B were merely errors in survey and that such discrepancies do not defeat the Plaintiff's case.

The Judgment of the Learned Judges of the High Court of Civil Appeals

The learned Judges of the High Court of Civil Appeal have considered the aforesaid discrepancies in extent as factors that cast a reasonable doubt as to the correctness and accuracy of the superimposition in plan No. 6210B marked as 'P1'. They have also taken into consideration the failure on the part of the Plaintiff to produce plan No. 3923.

The learned Judges of the High Court have further expressed the desirability of having plan No. 3923 superimposed in order to identify and determine the disputed boundary, particularly in a situation where the Plaintiff claims title based on plans No. 4482, 3923, and 1967. Such superimposition would have assisted in the clear identification of the disputed boundary.

Accordingly, the learned Judges of the High Court have set aside the judgment of the District Court and dismissed the Plaintiff's action.

Conclusion

I am mindful of the fact that a marginal discrepancy in extent between two survey plans could arise due to a computational error, commonly referred to as a "*marginal error*". However, the Court cannot conclude that the discrepancy in extent between plans 'P1' and 'P2' was attributable to a marginal error in the absence of expert evidence to that effect, especially considering that the

Plaintiff's land itself measures only 6.5 perches. In such circumstances, even a seemingly minor discrepancy in extent may be significant.

In *Cader Saibo vs Ahamadu*³ the then Supreme Court citing Privy Council case of *Kessarbai vs Jethabai Jivan* [(1928) A. I. R. Privy Council 277 at 281] observed that a Court should not form an opinion on a matter of fact falling within the expertise of an expert without the assistance of such an expert.

Mr. Nandana Seneviratne, Licensed Surveyor, in his evidence, has not testified that the discrepancy in extent between the two plans was caused by a computational error. During re-examination, he was afforded an opportunity to provide an explanation in this regard; however, he failed to give a definitive answer.

The extent of the Plaintiff's land, in respect of which she seeks relief, is 6.5 perches, while the alleged encroachment is only 0.37 perches. According to plan No. 6210B, Lot 5 depicted therein, which is said to be possessed by the Plaintiff, contains an extent of 5.66 perches. In addition, another encroachment to the North of the land claimed by the Plaintiff, depicted as Lot 3, contains an extent of 0.66 perches, together amounting to an extent of 6.69 perches.

Therefore, on the face of plan No. 6210B, if Lot 4, which represents the alleged encroachment, is also taken into consideration, the extent of the Plaintiff's land would exceed the extent of 6.5 perches by 0.19 perches. Having regard to the marginal difference in extent, it appears that accurate fixation by way of a proper superimposition was necessary.

Further, upon taking into consideration the superimposition of plan No. 1967 marked as 'V3' on plan No. 5360 marked as 'V1', it appears that there could possibly be no encroachment by the Defendant into the Plaintiff's land, which is a subdivision of Lot 2 in plan No. 1967. However, a definitive conclusion cannot be reached on this aspect, as Mr. Witharana has not superimposed Lot 9A in plan No. 4482 on his plan.

³ 50 NLR 303.

Therefore, it appears to me that the learned Judges of the High Court of Civil Appeal have rightly held that the Plaintiff has failed to prove her allegation that the Defendant encroached upon her land as depicted in plan No. 6210B.

Therefore, I answer the questions of law as follows:

(c) No.

(d) No.

Accordingly, I dismiss the appeal and affirm the judgment of the learned Judges of the High Court of Civil Appeal. Having considered all the facts and circumstances of the case, I make no order as to costs.

JUDGE OF THE SUPREME COURT

A. L. Shiran Gooneratne, J.

I agree.

JUDGE OF THE SUPREME COURT

Menaka Wijesundera, J.

I agree.

JUDGE OF THE SUPREME COURT