

**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 section 5C of the Act No. 19 of 1990 amended by the Act No. 54 of 2006 of the Provincial High Court of the North Western Province (exercising Civil Appellate jurisdiction at Kurunegala) in Case No. NWP/HCCA/KUR/73/2009 (F). DC Kuliapitiya Case No. 13044/L.

W.M. Raymond Peter Fernando, of
Karanthippola
Kuliapitiya

Plaintiff-Respondent-Appellant

SC Appeal No. 145/12
SC. HC CALA 509/2011
NWP/HCCA/KUR/73/2009F
DC Kuliapitiya Case No.13044/L

Vs.

K. Stanley Wilfred, of
No. 94, Hettipola Road
Kuliapitiya

Defendant-Appellant-Respondent

Before	:	K. Sripavan, CJ Priyasath Dep, PC. J H.N.J. Perera, J.
Counsel	:	Dr. S.F.A. Coorey with Ms. Sudarshani Coorey for the Plaintiff-Respondent-Appellant.
		Faiz Musthapa PC with Anuruddha Dharmaratne for the Defendant-Appellant-Respondent
Argued on	:	13.07.2016
Decided on	:	08.11.2016

Priyasath Dep, PC. J

01. The Plaintiff –Respondent- Appellant (herein after referred to as the ‘Plaintiff’) instituted action in the District Court of Kuliyapitiya in Case bearing No. 13044/L against the Defendant –Appellant –Respondent. (herein after referred to as the ‘Defendant’). The learned District Judge gave judgment in favour of the Plaintiff. The Defendant being aggrieved by the judgment filed an appeal to the Provincial High Court of North Western Province holden in Kurunegala in Case bearing No. NWP/HCCA/KUR/73/2009F. The learned Judges of the High Court set aside the judgment of the District Court and dismissed the Plaintiff’s action. Being aggrieved by the judgment, the Plaintiff filed a leave to Appeal Application and obtained Leave.
02. The Plaintiff in his Plaintiff averred that;
 - i) The land described in the 1st schedule to the plaint which is 18 ½ acres in extent was at one time owned by three brothers namely: Warnakulasooriya Mahalekamge John Fernando, Warnakulasooriya Mahalekamge Kasmeru Fernando and Warnakulasooriya Mahalekamge Peduru Fernando.
 - ii) The land referred to in the first schedule was amicably partition among the three co owners and each co-owner became entitled to 1/3 of the land and the father of the Plaintiff Warnakulasooriya Mahalekamge John Fernando thus became entitled to 1/3 of the land which is described in the Second schedule to the Plaintiff.
 - iii) Warnakulasooriya Mahalekamge John Fernando by his last will which was proved in the District Court of Kuliyapitiya in Case No 4962/T bequeathed his share of the land to his son the Plaintiff who became the owner of the land described in the 2nd schedule to the plaint.
 - iv) The Plaintiff from time to time sold portions of land and what remain with him is described in the 3rd Schedule to the plaint which comprised 3 Roods and 20.05 Perches in extent.
 - v) Warnakulasooriya Mahalekamge John Fernando in 1942 had given leave and license to Jeramius Fernando, the father of the Defendant who had been an employee of his to occupy the hut in a portion of land within the 2nd schedule to the Plaintiff which is presently falling within the land now referred to in the 3rd schedule to the Plaintiff.
 - vi) Jeramius Fernando lived in the house with his wife and children including the Defendant until his death in 1985. After his death the Defendant chased out his mother and sisters and occupied the house.

- vii) The Defendant on or about August 1993 without the consent of the Plaintiff started to build a permanent house on the rear side of the hut situated on the land described in the 3rd schedule to the plaint.
- viii) The Plaintiff objected to the construction of the house and a dispute arose between the parties and the police filed action in the Magistrate Court of Kuliyanpitiya in Case No3775/66 under section 66 of the Primary Court Act. The Court made order restoring the possession to the Defendant.
- ix) The Plaintiff thereafter instituted this action against the Defendant. The Plaintiff sought the following reliefs:
 - (a) Declaration of title to the land more fully described in the 3rd schedule to the plaint,
 - (b) Ejectment of the defendant and all those who are holding under him.
 - (c) Damage in a sum of Rs. 25,000/- up to the date of filing the plaint, and
 - (d) Costs of suit and such other reliefs as to court shall deem meet.

The Defendant in his answer stated:

- 03. The Defendant whilst admitting that he is living in the given address, denied that he is in possession of a portion of land described in the third schedule to the Plaintiff. The Defendant further averred in his answer that his father Jeramious Fernando had been an employee (driver) of Warnakulasooriya Mahalekamge Kasmeru Fernando (one of the co-owners of the land described in the 1st schedule to the Plaintiff) who permitted him to reside in the land and that the said Jeramious Fernando had been living in the land with his family since 1942. The said Jeramious Fernando had prescribed to the land in question and as the Defendant being one of his children, he too has prescribed to the land in question. The Defendant in his answer stated that the Plaintiff should get his land properly surveyed and produce a survey plan to identify his land.
- 04. In addition to his plea of prescription, the Defendant also took up the position that if the Defendant is in occupation of the land with leave and license of the Plaintiff as stated by the Plaintiff, the Plaintiff should take steps according to law to send a notice to quit. The Defendant stated that due to this reason, the Plaintiff cannot have and maintain this action.

05. The Defendant in his answer prayed for:

- (a) Permit him to join other members of his family who also had prescribed to the land as Defendants.

- (b) a declaration that he and members of the family had prescribed to the land which they are in possession.
- (c) dismissal of the action of the plaintiff

06. At the trial the following admissions were recorded.

1. Jurisdiction of Court
2. A case was filed in the in the Magistrates Court of Kuliyapitiya bearing No. 3775/66.
3. The Defendant was given possession of the land in dispute by the judgement of the said case.
4. The Defendant's father one Jeremious Fernando was employed as a driver under Kasmeru Mudalali
5. Jeremious Fernando had died.
6. The Plaintiff's father is John Fernando.

07. The case proceeded to trial on 22 issues. Thirteen issues were raised by the Plaintiff and 9 issues were raised by the Defendant.

08. The action filed by the Plaintiff against the Defendant is a re-vidicatio action. In order to succeed in his action, he has to establish the title to the land, identity of the land and that the defendant is in unlawful possession of the land.

In *Wanigaratne Vs. Juvanis Appu* it was held that:

“in an action re vindicate the plaintiff must prove and establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established.”

This decision was followed in *Dharmadasa Vs. Jayasena* (1997 3 SLR 327), *Lathif Vs. Mansoor* (2010 2 SLR page 332) and several other cases.

09. In order to prove his case, the Plaintiff himself gave evidence and called Licensed Surveyor Ranjith Yapa, Kumara Seneviratne, representative of the Registrar, District Court of Kurunegala, B.A. Meththananda, representative of the Secretary Kuliyapitiya Urban Council and one Simon Singho Kotalawala and read in evidence documents marked Pe 1- 16 (G).
10. The Plaintiff in his evidence stated that his father Warnakulasooriya Mahalekamge John Fernando, Warnakulasooriya Mahalekamge Kasmeru Fernando and Warnakulasooriya Mahalekamge Pedruru Fernando became the owners of the land by virtue of the deeds marked P11 and P12. His father Warnakulasooriya Mahalekamge John Fernando died leaving a Last Will wherein he bequeathed the property to the Plaintiff. The last will was proved in DC Kuliyapitiya 4962/T and thereby he became co-owner of 1/3rd of the property depicted in schedule 1. Thereafter this land was amicably partitioned and he became the owner of Lot B which is depicted in schedule 2 of the plaint.

11. The Plaintiff from time to time sold portions of this land and what remains is depicted in schedule 3 to the Plaintiff and the extent is 3 roods and 20.5 perches. Before the institution of the action he got this land surveyed by Licensed Surveyor Y.M. Ranjith Yapa who prepared the plan No. 7173B which was marked as P1. In the course of his evidence, the Plaintiff also marked as P9 the Plan No.3120 made by G.A.N. Gunasiri, Licensed Surveyor dated 10/01/2003 on a commission issued by the Court on the application made by the Defendant.
12. Plaintiff stated that the defendant is occupying a portion of the land belonging to him within the land depicted in schedule 3 to the plaintiff. He stated that the Defendant's father occupied the portion of the land initially with leave and license of his father and thereafter under him.
13. In the year 1993, the defendant started constructing a new house behind the hut occupied by him and as a result a dispute arose between the parties and the matter was referred to the Magistrate Court. In the Magistrate Court case bearing No. 3775/66 the possession was given to the Defendant. Thereafter the Plaintiff filed this action to vindicate his title and to evict the Defendant from the land described in the third schedule.
14. Licensed Surveyor Y.M. Ranjith Yapa who was summoned by the Plaintiff gave evidence to the effect that he on the request of the Plaintiff surveyed the land depicted in the third schedule and he prepared the plan No. 7173B which was marked as P1. The extent of the land is given as 3 roods and 20.5 perches. The land was divided into 2 lots and the defendant is occupying a portion of the land on the northern side of lot 2.
15. The plaintiff summoned B.H. Meththananda, an officer of the Kuliapitiya Urban Council, who gave evidence regarding the entries made in the assessment register pertaining to the land and premises bearing assessment No. 94 Hettipola Road, Kuliapitiya. He produced a certified copy of the Rates Register marked P2. According to the Register from 1959 to 14.07.1996 the owner of the premises bearing assessment No. 94 which had a cadjan thatched house was W.M.J. Fernando (father of the Plaintiff). The defendant's name Stanley was inserted in the register as the owner of the premises from 1996.07.15 onwards. The defendant after obtaining possession from the Magistrates Courts, on the strength of the order got his name entered as the owner of the premises and the house was described as a cadjan thatched house. From the year 2000 the house was described as 'tiled house' instead of cadjan thatched house.
16. The Plaintiff made a complaint to the police on 20th August 1993 which was marked as (P 14A) when the defendant started to construct a new house. The defendant in his statement to the police admitted that he is occupying a portion of land belonging to the Plaintiff. However, he took up the position that he and his

predecessors had prescribed to the land. (P14 D). The Plaintiff closed his case reading in evidence “Pe 1” to “Pe 14g”.

- (17) Thereafter the Defendant gave evidence. The Defendant denied that he is in occupation of a portion of land belonging to the Plaintiff. He stated that his predecessors and he prescribed to the land depicted in the Plan No.3120 made by G.A.N. Gunasiri Licensed Surveyor.
- (18) The Defendant marked as V11 a Transfer Deed No. 1949 dated 12-02-1996 attested by G.P. Gunathileke, Notary Public by which the Defendant had transferred the land in question to one Mary Lily Violet. The Defendant had transferred 14 perches by the said Deed which is out of six acres and three perch land. According to the schedule the transfer is in respect of the land and premises bearing assessment no 94, Hettipola road. This transfer was subject to the condition that it will be transferred back to the Defendant.
- (19) The learned Counsel for the Plaintiff submitted that the extent of land in the schedule which is a larger land is exactly the extent given in the 2nd schedule to the Plaintiff. It was submitted by the learned Counsel for the Plaintiff that it is abundantly clear that the Defendant is residing in a portion of the land belonging to the Plaintiff
- (20) The learned trial judge in his judgment had commented on the contradictory positions taken up by the Defendant regarding the extent of land claimed by him based on prescription. In his answer dated 05-03-2002 he had taken up the position that Kasmeru Fernando, an uncle of the Plaintiff under whom Jeramius Fernando, the Defendant’s father was employed permitted his father to reside in 6 perches of land which the defendant claims that his father and family members had prescribed. In the Plan No. 3120 dated 10-012003 prepared by Licensed Surveyor Gunasiri, relied on by the defendant and in his evidence he claims that he is occupying 20 perches of land. However, this being a re vindicate action Plaintiff cannot rely on the weaknesses of the defendant’s title.
- (21) The learned District Judge rejected the plea of prescription put forward by the defendant. The learned District Judge held that only in 1993 the defendant disputed the title of the Plaintiff when he started to construct a new house to which the plaintiff objected to. The Plaintiff instituted this action on 19th September 2001.
- (22) The defendant raised an objection to the maintainability of the action. The Defendant in his answer took up the position that the Plaintiff cannot maintain the action due to the failure on his part to issue a quit notice as the Plaintiff had claimed that the defendant is a licensee. Learned Judge correctly held that as the defendant had denied the title of the Plaintiff, there is no legal requirement to terminate the license or to send a quit notice. The learned District Judge relied on the judgements in Fredrick vs Mendis 62 NLR 471, Sundra Amal vs. Jusey Appu 36 NLR 400.

- (23) After both parties filed their written submissions, the learned District Judge in his judgment held with the Plaintiff and gave judgment in favour of the Plaintiff.
- (24) Being aggrieved by the said Judgement, the Defendant appealed to the High Court of North Western Province. After hearing the arguments, the learned High Court Judges held that there is no evidence that the Defendant is in occupation of the land in dispute or whether the Defendant is residing within the boundaries as described in the 3rd schedule to the Plaintiff. The learned Judges held that this could have been easily ascertained by superimposing one plan on the other. The learned High Court Judges allowed the appeal of the Defendant and the Plaintiff's action was dismissed.
- (25) Being aggrieved by the said Judgement of the High Court, the Plaintiff filed this leave to appeal application and obtained leave on all questions of law set out in the Petition. This matter was argued before us and both parties submitted comprehensive written submissions.
- (26) As this is a re vindicatio action, the Plaintiff has to prove that he has title to the land and establish the identity of the land and that the Defendant is unlawfully in possession of the land. The Plaintiff by giving evidence and producing title deeds established the title to the land referred to in schedule 3 of the Plaintiff. The question that arises is whether the Defendant is residing within the land described in the 3rd Schedule or not.
- (27) The Plaintiff by calling the Licensed Surveyor Ranjith Yapa produced the plan bearing 7173/B dated 21-11-2000 and established the identity of the land and according to the surveyor the defendant is residing within Plaintiff's land.
- (28) It is an admitted fact that the Defendant is occupying the land bearing assessment No. 94, Hettipola Road, Kuliapitiya. The representative of the Urban Council Kuliapitiya produced the assessment register and proved that the original owner was Plaintiff's father and thereafter the defendant had got his name entered as the owner in 1996 on the strength of the order given by the Magistrate restoring him to the possession of the premises.
- (29) When the Plaintiff made a complaint against the defendant when the Defendant commenced constructing the house, the defendant in his statements to the police had admitted that he is in possession of the land owned by the Plaintiff and that he had prescribed to the land. This admission can be used against him under Section 17 read with section 21 of the Evidence ordinance.
- (30) The Plan No. 3120 prepared by P.A.N. Gunasiri, licensed surveyor on a commission issued by Court on an application made by the defendant also strengthened the case for the Plaintiff. This plan was marked as P 9 by the

Plaintiff and marked as V13 by the Defendant. According to the Surveyor he surveyed the land bearing assessment No.94 as shown by the Defendant. In these two plans two boundaries tally. Western boundary is the Kuliyapitiya - Hettipola Road and the northern boundary is a parapet wall. The land on the eastern and southern side of the corpus belongs to the Plaintiff. As regards to these two boundaries the Defendant had stated to the Surveyor that land belongs to the Plaintiff and he had sold the land and he does not know who are the present owners. This itself indicates that the defendant is living in a portion of land belongs to the plaintiff.

(31) When considering the totality of the evidence it was proved on a balance of probability that the defendant is living in a land falling within the 3rd schedule. In the circumstances, there is no need to superimpose the plan No. 3120 drawn by P.A.N. Gunasiri, licensed Surveyor on the plan no. 7173/B drawn by Licensed Surveyor Ranjith Yapa.

For the reasons stated above, I hold that the learned High Court judges erred when they held that the Plaintiff failed to establish that the Defendant is in possession of the land in dispute or whether the Defendant is residing within the boundaries as described in the 3rd schedule to the Plaintiff. Therefore, I set aside the judgment of the Provincial High Court of North Western Province in Case No. NWP/HCCA/KUR/73/2009 (F) and affirm the Judgement of the District Court of Kuliyapitiya in Case No. 13044/L.

Appeal allowed. No costs.

Judge of the Supreme Court

K.Sripavan,C.J.

I agree.

Chief Justice

H.N.J. Perera, J

I agree.

Judge of the Supreme Court

