

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

Singakkara Nekathige Stephen

and 10 Others.

All Wellangalla,

Getahetta.

1st-11th Defendant-Appellants

CASE NO: CA/989/1995/F

DC AVISSAWELLA CASE NO: 17085/L

Vs.

Rev. Ambanwala Hemalankara
Thero,

Kirthi Sri Raja Maha Viharaya,

Maniyangama.

1A Plaintiff-Respondent

Singakkara Nekethige Magilin of
Welangalle, Getaheththa

12A Defendant-Respondent

And 5 Others.

12th-17th Defendant-Respondents

Before: A.L. Shiran Gooneratne, J.
Mahinda Samayawardhena, J.

Counsel: Gamini Marapana, P.C., with Navin
Marapana, P.C., and Uchitha Wickremasinghe
for the Defendant-Appellants.
Lakshman Perera, P.C., with Shalini Fernando
for the 1A Plaintiff-Respondent.

Argued on: 17.12.2019 and 18.12.2019

Decided on: 16.01.2020

Mahinda Samayawardhena, J.

The Plaintiff filed this action against the Defendants seeking a declaration that the Plaintiff is the owner of the land described in the schedule to the plaint (as the *Viharadhipathy* of *Maniyangama Keerthi Sri Raja Maha Viharaya*), ejectment of the Defendants therefrom, and damages. The Defendants filed the answer seeking dismissal of the Plaintiff's action and a declaration that the Defendants are the owners of the land described in the schedule to the answer. After trial, the learned District Judge of Avissawella entered Judgment for the Plaintiff. Hence this appeal by the Defendants.

On appeal, the learned President's Counsel for the Defendants mounted several arguments in challenging the Judgment of the District Court. Among them, the one in relation to the identification of the land in suit, in my view, goes to the root of the dispute in this case.

The land in suit, according to the schedule to the plaint, is as follows:

The land known as Nakathige Watta, formerly situated in Maniyangama but now situated in Wellangalla in Panawal Korale within Thunkorale in the Sabaragamuwa Province, bounded North by Nakathige Kumbura and Minuwangala Watta, East by Kandage Bima now Mr. Mahadewa's Watta, South by Kandage Watta alias Radage Watta, West by Kandege Radage Kumbura alias Radage Kumbura in extent of 2 Pelas and 5 Lahas paddy sowing area.

The Plaintiff filed the case on P1, which is the Register of Lands owned by the *Maniyangama Raja Maha Viharaya*, and P2, which is a *Sannasa*.

At the argument, the learned President's Counsel for the Plaintiff informed Court that the Plaintiff does not rely on P2.

Then the Court is left with only P1.

In P1, *Nakathige Watta* has been described as follows:

North by Nakathige Kumbura, East by Kandage Bima, South by Kandage Watta, West by Kandage Radage Kumbura in extent of 1 Pela.

Ex facie, there is a remarkable difference in extent between *Nakathige Watta* described in P1 and *Nakathige Watta* described in the schedule to the plaint, notwithstanding the description of the land in the plaint is admittedly based on P1. The former refers to 1 *Pela* and the latter refers to 2 *Pelas* and 5 *Lahas*. In

other words, P1 refers to a land in extent of 100 Perches, and the plaintiff refers to a land in extent of 250 Perches. No explanation was given for this difference at the argument.

The Plaintiff, in his evidence, has given different extents to *Nakathige Watta*, the subject matter of this case. In evidence in chief, at page 76 of the appeal brief, the Plaintiff has one time stated that it is about 6-7 Acres in extent. Immediately thereafter, the Plaintiff has stated that it is 2 *Pelas* of paddy sowing area in extent, which is 1 Acre and 1 Rood. Then, in cross examination, at page 85 of the brief, the Plaintiff has stated that it is 10 Acres in extent, and immediately thereafter, at page 86 of the brief, that he is unable to state the extent as there is no Plan. The extent of the land in suit is still an unresolved issue.

The Plaintiff, in his evidence, at page 76 of the brief, has categorically stated that *Nakathige Watta*, the land in suit, is a high land and not a paddy land.

At the argument, the learned President's Counsel for the Plaintiff made it abundantly clear that *Nakathige Kumbura*, which lies immediately to the North of *Nakathige Watta*, is a paddy land, but *Nakathige Watta* is a high land.

P3, which is *Paraweni Nilakarayas* Register for *Nakathige Panguwa*, and P4, which is the Plan for *Nakathige Panguwa*, are admittedly not relevant to the subject land in this case, which is *Nakathige Watta*.

The learned President's Counsel for the Plaintiff, at the argument, admitted that *Nakathige Panguwa*, which is a paddy land, is subject to *Panguwa*, where *Paraweni Nilakarayas* are, as seen from P3, Kiri Baba and Tikira, who are predecessors of the Defendants. *Nakathige Watta*, according to the learned President's Counsel for the Plaintiff, is not subject to *Panguwa*.

Citing the Full Bench decision in *Appuhamy v. Menike* (1917) 19 NLR 361, the learned President's Counsel for the Plaintiff himself admitted that *Paraweni Nilakarayas* are the owners of the lands comprised in the *Panguwa*. The learned President's Counsel for the Defendants cited the Privy Council decision of *The Attorney-General v. Herath* (1960) 62 NLR 145, which is also to the same effect.

If this is the position, the finding of the learned District Judge in the Judgment, at page 134 of the brief, that the Defendants are *Paraweni Nilakarayas* of the land in suit is unmistakably erroneous because *Nakathige Watta* is not subject to *Panguwa* and the Defendants are not *Paraweni Nilakarayas* of *Nakathige Watta*.

On the other hand, if the Defendants are *Paraweni Nilakarayas* of *Nakathige Watta*, as the learned District Judge holds, they are the owners of the land and therefore cannot be ejected from the land on the basis that the Plaintiff is the owner of the land.

The learned President's Counsel for the Plaintiff submitted that according to the Gemming Licence marked by the Defendants V5, *Nakathige Watta* lies to the South of the Defendants' land, and this goes to prove that the Defendants have encroached

upon *Nakathige Watta*. Then what is the extent of encroachment? Has the part of encroachment been shown by way of a Plan in order to eject the Defendants from the encroached portion? The answer is in the negative. This means, even if the decree is entered in favour of the Plaintiff, the decree will not be an executable decree.

The Defendants in their answer made a cross claim to a declaration of title to the following land:

The land known as Guralaye Watta alias Nakathige Watta, situated in Wellangalla in Panawal Korale within the District of Kegalle in the Sabaragamuwa Province, bounded North by Nakathige Kumbura alias Guralaye Kumbura and Hal Dola which separates Minuwangala Watta, East by Mahadewa Watta and Gal Atula, South by Siyabalagaha Watta and Uda Watta, West by Godaparagaha Kumbura in extent of about 10 Acres.

The learned District Judge in the Judgment, at page 137 of the brief, has stated that the land described in the schedule to the plaint and the land described in the schedule to the answer are clearly two different lands.

This is the position of the learned President's Counsel both for the Plaintiff as well as the Defendants. There is a consensus among the parties on this issue.

Nakathige Watta, which is, according to the plaint, in extent of 2 *Pelas* and 5 *Lahas* of paddy sowing area and claimed by the Plaintiff, is situated at *Maniyangama*. The Plaintiff also in his

evidence, at page 76 of the brief, stated that according to P1, there are 21 lands situated at *Maniyangama* belonging to the Plaintiff's temple, and *Nakathige Watta*, which is a high land, is one of those lands.

If *Nakathige Watta* is a high land, I cannot understand why the extent of land has been computed by paddy sowing area. Paddy sowing area is taken as a method to measure the extent of paddy lands.

Conversely, *Nakathige Watta* alias *Guralaye Watta*, which is about 10 Acres in extent and claimed by the Defendants, is situated at *Welangalla* (and not *Maniyangama*).

Although the Plaintiff, in the schedule to the plaint, states *Nakathige Watta* was formerly situated in *Maniyangama* but is now situated at *Wellangalla*, there is no evidence to say that the boundaries of the two villages were changed at any particular time so as to shift the land in suit from *Maniyangama* village to *Welangalla* village.

The learned District Judge answered the issues raised by the Defendants on that point in favour of the Defendants. They are as follows:

13. (a) *Has a land known as Nakathige Watta alias Guralaye Kumbura as described in the schedule to the answer is situated at Welangalla?*

Yes.

- (b) *Is that land about 10 Acres in extent?*

Yes.

14. *Are the original owners of Nakathige Watta alias Guralaye Kumbura mentioned in issue No. 13, Singakkara Nakathige Tikira and Singakkara Nakathige Baba Gura?*

No. They are Paraweni Nilakarayas.

According to these answers, the Defendants are *Paraweni Nilakarayas* of *Nakathige Watta* of about 10 Acres in extent situated at *Wellangalla*.

This is confusion worse confounded on the part of the learned District Judge.

It is abundantly clear that identification of the land in suit still remains a mystery.

Admittedly, Plan P4 tendered by the Plaintiff at the trial does not depict the land in suit. According to this Plan, *Nakathige Watta* lies to the South of *Dulkarayage Kumbura* and *Tammattankarayage Kumbura*, which is, as seen from P3, subject to *Nakathiya Panguwa*.

According to P3, the *Paraweni Nilakarayas* of *Nakathiya Panguwa* were predecessors of the Defendants. This means the Defendants are the owners of *Nakathige Panguwa*. The learned President's Counsel for the Plaintiff, at page 11 of his written submission, has stated that "*Nakathige Watta is a totally different land from Nakathige Panguwa which consist of Dulkarayage Kumbura and Tammattankarayage Kumbura.*"

There is no Plan prepared by the Plaintiff to identify the land in suit despite identification of the land being an issue from the very beginning of the case.

In the course of the argument, the learned President's Counsel for the Plaintiff was heard to say that the Defendants should have taken out a commission to identify the land claimed by them. I beg to disagree.

This action filed by the Plaintiff is a *rei vindicatio* action. There is no burden for the Defendants to prove. The burden of proof of the case for the Plaintiff lies, fairly and squarely, on none other than the Plaintiff himself. Whether the Defendants prove their cross claim is totally irrelevant. If the Defendants fail to prove their cross claim, the cross claim can be dismissed. That will in no way prove the Plaintiff's case. If the Plaintiff fails to prove his case, his case will be dismissed. The proof of the cross claim in that event has no significance. The Plaintiff, in the plaint, expressly states that the Defendants have been in adverse possession of the land in suit since 1964.

The law in this regard was lucidly set out by Herath J. in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167 at 168 in the following manner:

[I]n an action rei vindicatio the plaintiff should set out his title on the basis on which he claims a declaration of title to the land and must, in Court, prove that title against the defendant in the action. The defendant in a rei vindicatio action need not prove anything, still less, his own title. The plaintiff cannot ask for a declaration of title in his favour

merely on the strength that the defendant's title is poor or not established. The plaintiff must prove and establish his title.

It is clear that the Plaintiff has failed to identify the land in suit, which is of paramount importance to succeed in this action.

It is essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision. This becomes extremely important for the execution of the decree in the event the Plaintiff succeeds. (*David v. Gnanawathie* [2000] 2 Sri LR 352, *Gunasekera v. Punchimenika* [2002] 2 Sri LR 43)

It was held in *Peeris v. Savunhamy* (1951) 54 NLR 207 that a Plaintiff in a *rei vindicatio* action, such as this, must not only prove *dominium* to the land but also the boundaries of it, by evidence admissible in law.

In *Hettiarachchi v. Gunapala* [2008] 2 Appellate Law Recorder 70 at 79, it was held that if the Plaintiff fails to identify the land he claims *dominium* with the land on the ground, his action must fail.

Justice Marsoof in *Latheef v. Mansoor* [2010] 2 Sri LR 333 at 378 had this to say on this matter:


The identity of the subject matter is of paramount importance in a rei vindicatio action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated

must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the corpus to be identified with precision.

For the aforesaid reasons, I set aside the Judgment of the District Court and allow the appeal.

The Plaintiff's action shall stand dismissed.

I make no order as to costs.


Judge of the Court of Appeal

A.L. Shiran Gooneratne, J.

I agree.


Judge of the Court of Appeal