

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

1. Kalinga Wimalawathie alias Ariyawathi,  
Millagahamulla,  
Walambagala,  
Elpitiya.

**2<sup>nd</sup> party Respondent-Appellant**

Court of Appeal Case No:  
**CA (PHC) 72/2016**  
H.C. Balapitiya Case No:  
**852/2012**  
M.C. Elpitiya Case No:  
**71147**

**-Vs-**

1. Kulasena Weedisinghe,  
“Gampathi Niwasa”,  
Walambagala,  
Elpitiya.

**1<sup>st</sup> party Petitioner-Respondent**

2. Officer in Charge,  
Police Station,  
Ratnapura.

**Applicant-Respondent-Respondent**

**Before : A.L. Shiran Gooneratne J.**

**&**

**Dr. Ruwan Fernando J.**

**Counsel :** Thanuka Nandasiri for the 2<sup>nd</sup> party Respondent-Appellant.

Tharanga Edirisinghe for the 1<sup>st</sup> party Petitioner-Respondent.

**Written Submissions:** By the 1<sup>st</sup> party Petitioner-Respondent on 04/04/2019

**Argued on :** 29/06/2020

**Judgment on :** 28/07/2020

**A.L. Shiran Gooneratne J.**

The Complainant-Respondent-Respondent filed an information in terms of Section 66 (1) (a) of the Primary Court's Procedure Act No. 44 of 1979, in the Magistrates Court of Elpitiya relating to a dispute between the 2<sup>nd</sup> Party Respondent-Respondent-Appellant (hereinafter referred to as the Appellant) and the 1<sup>st</sup> Party-Petitioner-Respondent (hereinafter referred to as the Respondent) over a disputed roadway. The learned Magistrate permitted the roadway to be used by the Appellant on the basis that the Respondent has not established his entitlement to a right in the land by title deeds, a decree of declaration of title or by

uninterrupted adverse possession. Aggrieved by the said order of the learned Magistrate dated 02/02/2012, the Respondent preferred a revision application to the Provincial High Court of the Southern Province holden in Balapitiya, where the learned High Court Judge by order dated 05/07/2016, set aside the said order of the learned Magistrate. The Appellant is before this Court to challenge the order dated 05/07/2016.

When this matter was taken up for argument, Counsel for both parties agreed that there is no dispute regarding the existence of a roadway. Accordingly, the learned Counsel for the Appellant limited his argument to be determined as to whether the learned High Court Judge failed to consider the failure of the Respondent to establish his servitude rights as required by law, therein, the Respondent has not established the length of time to acquire a right in the nature of a servitude to use the roadway and contends that a mere user does not acquire servitude rights.

*“Unlike in the case of a dispute relating to possession of immovable property, no timeframe has been laid down as to the length of time during which the right should have been enjoyed in relation to the purported entitlement. In resolving such a dispute the Judge of the Primary Court is expected to determine as to who is entitled to the right which is the subject of the dispute and make an order under Section 69(2).” (Ananda Sarath Paranagama Vs. Dhammadhinna Sarath Paranagama and Kamitha Aswin Paranagama, CA (PHC) APN 117/2013)*

In order to establish his entitlement of a user right, the Respondent has relied mainly on documents marked "103" to "1010" tendered with the affidavit filed of record. In document marked "103" the Project Officer has stated that he used the disputed roadway to provide relief-aid to the Respondent's tea plantation. In document marked "1010" the Grama Niladhari of the relevant division speaks of long term use of the roadway by the Respondent. It is also observed that by affidavits of persons related to the tea plantation marked as "104" and "105", affirmed to the existence of the roadway leading to the land of the Respondent for a long period of time. Certain others who used the roadway also have given affidavits. The position of the Appellant is that the Respondent never used the disputed roadway and in several instances prevented him from using it.

In terms of Section 69(1) of the Act, the learned Magistrate has to determine as to who is entitled to the right when a dispute arises regarding a servitude over a land to make an order under Section 69(2) of the Act. It is to be noted that such right does not depend on the title given, but merely to user right acquired by a party. Therefore, the key factor to be determined is whether such user right has been established as contemplated in terms of Section 69 of the Act.

It is trite law that a party does not need to establish a servitude right by cogent evidence as is usually considered in a Civil Court. The required proof of a user right in terms of Section 69 (1) of the Act is to consider a right in the nature of a servitude or long term use.

Accordingly, we find that upon consideration of all material facts placed before Court, the learned High Court Judge was correct in taking into consideration user rights of the Respondent which is the subject of the dispute, in order to set aside the judgment of the learned Magistrate.

Accordingly, we affirm the judgment of the learned High Court Judge dated 05/07/2016 and dismiss the appeal.

Appeal dismissed. We make no order as to costs.

**JUDGE OF THE COURT OF APPEAL**

**Dr. Ruwan Fernando, J.**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**