

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

Suriya Mudiyanselage Ukkuhami (Deceased)
of Madulupitiya, Tharana,
Udawela.

C.A. Case No.24/1999 (F)

PLAINTIFF

D.C. Kuliyapitiya Case No.5223/P

Dissanayaka Mudiyanselage Abeyrathne
of Madulupitiya, Tharana,
Udawela.

Substituted-PLAINTIFF

-Vs-

1. Suriya Mudiyanselage Gunasekara
of Muththettuwa watta, Tharana,
Udawela.
2. Adikari Mudiyanselage Kiri Mudiyanse
of Madulupitiya, Tharana,
Udawela.
- 2A. Adikari Mudiyanselage Dingiri Amma
of Madulupitiya, Tharana,
Udawela.
3. S.M. Podi Appuhami
of Madulupitiya, Tharana,
Udawela.
4. Suriya Mudiyanselage Gunarath Menike
of Madulupitiya, Tharana,

Udawela.

5. Suriya Mudiyanselage Podihami
of Madulupitiya, Tharana,
Udawela.
6. Hapu Arachchilage *alias* Suriya Arachchilage
Punchi Menika (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 6A. Hapu Arachchilage Jayawardena
of Madulupitiya, Tharana,
Udawela.
7. Hapu Arachchilage Punchi Menike (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 7A. Hapu Arachchilage Jayawardena
of Madulupitiya, Tharana,
Udawela.
8. S.M. Punchi Banda (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 8A. Wijesinghe Mudiyanselage Dingiri Banda
of Madulupitiya, Tharana,
Udawela.
9. S.M. Herath *alias* Herath Singho (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 9A. Jayasinghe Koralalage Biso Menike
of Madulupitiya, Tharana,
Udawela.

10. S.E. Thennakoon (Deceased)

of Nagollagoda, Nagollagoda Post.

10A. Adikari Mudiyanselage Dingiri Amma

of Madulupitiya, Tharana,

Udawela.

11. Wijesinghe Adikari Mudiyanselage Ukku Banda
(Deceased)

of Madulupitiya, Tharana,

Udawela.

11A. Wijesinghe Adikari Mudiyanselage Dharmadasa

of Madulupitiya, Tharana,

Udawela.

12. Wijesinghe Mudiyanselage Dingiri Banda

of Madulupitiya, Tharana,

Udawela.

DEFENDANTS

AND

Adikari Mudiyanselage Dingiri Amma

of Madulupitiya, Tharana,

Udawela.

2A & 10A Substituted DEFENDANT-APPELLANT

-Vs-

Dissanayaka Mudiyanselage Abeyrathne

of Madulupitiya, Tharana, Udawela.

Substituted-PLAINTIFF-RESPONDENT

1. Suriya Mudiyanselage Gunasekara
of Muththettuwa watta, Tharana,
Udawela.
3. S.M. Podi Appuhami
of Madulupitiya, Tharana,
Udawela.
4. Suriya Mudiyanselage Gunarath Menike
of Madulupitiya, Tharana,
Udawela.
5. Suriya Mudiyanselage Podihami (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 5A. Dissanayake Mudiyanselage Asoka Padmini
Dissanayake
of Madulupitiya, Tharana,
Udawela.
6. Hapu Arachchilage alias Suriya Arachchilage
Punchi Menika (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 6A. Hapu Arachchilage Jayawardena
of Madulupitiya, Tharana,
Udawela.
7. Hapu Arachchilage Punchi Menike (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 7A. Hapu Arachchilage Jayawardena
of Madulupitiya, Tharana,
Udawela.

8. S.M. Punchi Banda (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 8A. Wijesinghe Mudiyanselage Dingiri Banda
of Madulupitiya, Tharana,
Udawela.
9. S.M. Herath *alias* Herath Singho (Deceased)
of Madulupitiya, Tharana,
Udawela.
- 9A. Jayasinghe Koralalage Biso Menike
of Madulupitiya, Tharana,
Udawela.
11. Wijesinghe Adikari Mudiyanselage Ukku Banda
(Deceased)
of Madulupitiya, Tharana,
Udawela.
- 11A. Wijesinghe Adikari Mudiyanselage Dharmadasa
of Madulupitiya, Tharana,
Udawela.
12. Wijesinghe Mudiyanselage Dingiri Banda
of Madulupitiya, Tharana,
Udawela.

DEFENDANT-RESPONDENTS

BEFORE	:	A.H.M.D. Nawaz, J.
COUNSEL	:	M.C. Jayaratne with M.D.J. Bandara for the 2A and 10A Substituted-Defendant-Appellant Dr. Mahinda Ralapanawa with Nisansala Fernando for the 6A Defendant-Respondent

Kumar Dissanayake for the 7A and 8A Defendant-Respondent

S.A.D.S. Suraweera for the Substituted-Plaintiff-Respondent

Decided on : 07.01.2019

A.H.M.D. Nawaz, J.

The original Plaintiff one S.M. Ukkuhamy filed this partition suit in order to partition the land described in the 1st schedule to the plaint as *Galgodewatta* and the contiguous land described in the 2nd Schedule as *Galgodahena*, both being demarcated in Final Village Plans as Lots 64 and 65 respectively. In the amended plaint dated 30th June 1985, the Plaintiff pleaded a pedigree and sought to partition the aforesaid contiguous lands among her and the 1st to 5th Defendants in terms of the share allotment given in paragraph 7 of the amended plaint. She cited 12 Defendants in the amended plaint but sought partition to take place only among herself and 1st to 5th Defendants.

The 6th Defendant's Statement of Claim

The 6th Defendant Punchi Menika put forward her claim to Lot 64 (Lot 1 in the preliminary plan) before the surveyor who went to perform the preliminary survey. The surveyor confirms her presence on Lot 1 in his report. Admitting that the land had originally belonged to one S.M. Bandaappuhamy and S.M. Mudalihamy, the 6th Defendant pleaded that S.M. Mudalihamy had been exclusively possessing only Lot 65 and since 1932, the 6th Defendant Punchi Menika had been in possession of Lot 64 (Lot 1 in the preliminary plan). The claim of the 6th Defendant had been one of prescription accompanied by undisturbed and uninterrupted possession. The possession of Lot 64 (Lot 1) had been continuing even at the time of the institution of this action and as I said before, the surveyor confirms this in his report. Punchi Menika (the 6th Defendant) had built a house on Lot 1 and planted trees thereon. The Lot in her possession-Lot 1 had been separated from Lot 2 by a live wire fence. By virtue of her long possession and prescriptive

rights, the 6th Defendant sought an exclusion of Lot 1 from the corpus. Alternatively the 6th Defendant sought a declaration of ownership to Lot 1 if Lot 1 is included in the corpus and claimed the house and the plantation thereon. Prior to the commencement of the trial, the 6th Defendant passed away and the 6A Defendant-Respondent was substituted.

Substituted 2A and 10A Defendant-Appellant

It has to be stated at the inception that the 2nd Defendant was one Adhikari Mudiyanselage Kirimudiyanse who was substituted with her daughter Adhikari Mudiyanselage Dingiri Amma (substituted 2A Defendant-Appellant). It has to be borne in mind that the Substituted 2A and 10A Defendant-Appellant is one and the same person- Adhikari Mudiyanselage Dingiri Amma.

It is crystal clear that the 2A Defendant and 10A Defendant-Appellant (the one and the same person) had not filed a statement of claim in the case but her father Adhikari Mudiyanselage Kirimudiyanse (the 2nd Defendant) had been allotted the 1/4th share by the Plaintiff in the plaint. Even in the amended plaint the Plaintiff showed share allotments only up to the 5th Defendant, whilst the 6th, 7th, 8th, 9th, 10th, 11th and 12th Defendants were not given any shares at all in the amended plaint. The share allotments up to the 5th Defendant in the plaint went as follows:-

▪ Plaintiff	-	1/8
▪ 1 st Defendant	-	1/4
▪ 2 nd Defendant	-	1/4
▪ 3 rd Defendant	-	1/8
▪ 4 th Defendant	-	1/8
▪ 5 th Defendant	-	1/8

In fact one S.E. Thennakoon the 10th Defendant who was the predecessor in title of 10A Defendant-Adhikari Mudiyanselage Dingiri Amma claimed before the surveyor that he had derived his interests from the 1st Defendant. Before I deal with the case of the Appellant namely Adhikari Mudiyanselage Dingiri Amma, let me first deal with the claim of the 6th Defendant which was to the effect that Lot 1 must be excluded from the corpus. The four

issues that had been raised on behalf of the 6th Defendant Punchi Menika had put in issue the question of exclusion of Lot 1.

Whilst giving evidence at the trial, the substituted Plaintiff (the husband of the original Plaintiff) admitted in examination in chief that the house standing on Lot 1 was in the occupation of the 6th Defendant who also enjoyed the cultivation therein. The substituted Plaintiff expressly admitted that the house and cultivation in Lot 1 belonged to the 6th Defendant. The 2A and 10A Defendant (one and the same person Dingiri Amma) also gave evidence to the effect that the house and cultivation in Lot 1 belonged to the 6th Defendant. These two admissions emanating from the substituted Plaintiff and the 2A and 10A Defendant-Appellant would amount to statements against their proprietary interest and the distinctive aspect of these statements against proprietary interest was that it was an intra curial statement made in Court. Thus the Court could act on these statements on the basis that they are true.

The 6A Defendant too testified in order to bolster his claim that Lot 1 has to be excluded. There was also another witness Irene Somawathie who supported the testimony of 6A Defendant. Both testified that Lot 1 and the house in Lot 1 had been in the occupation of the 6th Defendant and later the 6A Defendant for more than 30 years.

In addition to these items of evidence there was the testimony of 2A and 10A Defendant (Dingiri Amma) to the effect that Punchi Menika (the 6th Defendant) had been living in Lot 1 and that Dingiri Amma would not claim any interest in Lot 1. Thus it is evident that the evidence for exclusion of Lot 1 in favour of 6A Defendant was overwhelming.

Upon a totality of the evidence in the case, the learned Additional District Judge of Kuliypitiya arrived at the conclusion that Lot 1 of the preliminary plan bearing No.763 must be excluded and I see no reason to disturb that finding.

As for the claim of the 2A Defendant-Appellant it was contended by Mr. M.C. Jayaratne that even though the 2A Defendant-Appellant had not filed a statement of claim, she gave evidence at the trial and produced deeds in order to establish the fact that she had ½ share in the land sought to be partitioned. She had not raised any points of contest but had been

represented right throughout the trial by counsel. She was summoned to give evidence and nobody had objected to 2A Defendant-Appellant testifying in court though there was no statement of claim nor were there any points of contest raised on her behalf.

Her half a share in the land was quite convincingly established by the adduction of deeds marked as 12V1, 12V2 and 12V3. A 1/4th share had devolved on her from her father, whilst the other 1/4th share devolved on her from her mother. It was established that one half of the subject-matter had devolved on her with the house in Lot 2.

The learned Additional District Judge of *Kuliyapitya* took into account the fact that 2A Defendant-Appellant had not filed a statement of claim nor was there any point of contest on the record. The learned Additional District Judge took the view that now that Lot 1 had been excluded, one half of Lot 2 along with the house must be kept unallotted and ordered the balance one half of Lot 2 to be partitioned among the Plaintiff, 3rd, 4th, 5th, 8th and 9th Defendants. Having gone through the share allotment made by the learned Additional District Judge, I take the view that he arrived at the right decision but as for his decision to keep unallotted one half of Lot 2, I take a different view.

No doubt 2A Defendant-Appellant is debarred from filing a statement of claim without the leave of court and Section 25(2) of Partition Law No.21 of 1977 reiterates that a party in default shall not be entitled, without the leave of court, raise any contest or dispute the claim of any other party to the action at the trial.

It would appear that this provision had not been borne in mind by any of the parties and even at the hearing before me no contention was raised as to the invalidity or otherwise of the proceedings that took place. Nobody argued that when 2A Defendant-Appellant placed her evidence before the learned Additional District Judge asserting her right to one half of the corpus, it was an improper reception of evidence. Needless to say, the deeds produced by the 2A Defendant-Appellant established her interest and right in one half of the property but this documentary evidence came up on the record with the leave of the learned Additional District Judge though the leave was implied. I do not see any adverse interest to this one half and no party has been substantially prejudiced.

Section 167 of the Evidence Ordinance enacts: The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the Court before which such objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

Section 167 is applicable to both civil as well as criminal cases. This section deals with two important aspects of the admission and rejection of evidence in proceedings, namely, 1) evidence that should not be admitted if it is improperly admitted, and 2) evidence that is to be admitted is improperly rejected. The object of the section is that the Court of Appeal, in appeal or in revision, should not disturb a decision of a lower court on the ground of improper admission or rejection of evidence, if in spite of such reception, there is sufficient material in the case to justify the decision.

In my view there cannot be multiplicity of suits or proceedings and if the decision to keep the shares unallotted is allowed to remain, it will only add to the woes of the 2A Defendant and lead to protracted proceedings. The appeal before me is not a case which throws up the same issues as were, encountered in the case of *David Dantanarayana v. Nonahamy* 79 (2) N.L.R 241. In that case it was held that a practice has evolved in our Courts for allotting unallotted shares on proof of title even after interlocutory decree has been entered. In contrast, in this case there is clear proof of title long before interlocutory decree and the party claiming title to such an unallotted share has already given evidence in proof of her title. There had been an implied grant of leave on the part of the learned Additional District Judge to the adduction of evidence and it is bound to wreak injustice if this Court denies 2A Defendant the one half share merely because there were no points of contest or a statement of claim. The testimony led with the permission of court had supplied the omission with no objection having been raised to the adduction of evidence. In any event Section 167 of the Evidence Ordinance validates the evidence for the Court to take it into account and the Court itself had arrived at its findings on the evidence. The trial Court has acted on the evidence.

No objection was raised to the maintainability of this appeal on the basis that the 2A Defendant has suffered only *damnum absque injuria* or *damnum sine injuria*-Damage without wrongful act-Loss or harm that is incurred from something other than a wrongful act-a usual argument that is taken to show that the Appellant is not an aggrieved party because he had not complained by way of a statement of claim-see Dheeraratne, J. in *Mendis v. Dublin de Silva and two others* (1990) 2 Sri L.R 249.

The truth is to the contrary in this case and I take the view that whilst affirming that part of the judgement dated 24.11.1998 excluding Lot 1 in favour of 6A Defendant-Respondent, I proceed to set aside the other part of the judgment that keeps the one half unallotted.

Accordingly I would allow the appeal of the 2A Defendant-Appellant and direct the learned District Judge of Kuliapitya to enter the interlocutory decree in the following manner:-

1. Lot 1 of the preliminary plan bearing No.763 must be excluded in favour of the 6A Defendant-Respondent.
2. One half of Lot 2 with the house therein must be allotted to the 2A Defendant-Appellant.
3. The balance one half of Lot 2 has to be allotted among the Plaintiff, 3rd, 4th, 5th, 8th and 9th Defendants (1/12 share each).

JUDGE OF THE COURT OF APPEAL