

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

*In the matter of an application for Leave to appeal
under Section 5C (1) of the High Court of the
Provinces (Special Provisions) Act No. 19 of 1990 as
amended by Act No. 54 of 2006.*

SC Appeal No. 172/ 2010

SC/HCCA/LA/195/10

WP/HCCA/KAL/62/2008 (F)

D.C. Panadura Case No. 1430/L

Freddy Kuruppu Nanayakkara,
No.15, Weerasinghe Lane, Panadura.
and presently,
No. 160/2, Central Avenue, Laverton, Victoria,
Australia.

PLAINTIFF

Vs.

Thellamurege Don Yasapala Padmasiri
Samaranayake,
No. 13, Weerasinghe Lane, Panadura.

DEFENDANT

AND BETWEEN

Thellamurege Don Yasapala Padmasiri
Samaranayake,
No. 13, Weerasinghe Lane, Panadura.

DEFENDANT-APPELLANT

Vs.

Freddy Kuruppu Nanayakkara,
No.15, Weerasinghe Lane, Panadura.
and presently,
No. 160/2, Central Avenue, Laverton, Victoria,
Australia.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Thellamurege Don Yasapala Padmasiri
Samaranayake (deceased),
No. 13, Weerasinghe Lane, Panadura.

DEFENDANT-APPELLANT-APPELLANT

Thellamurege Don Pubudu Mangala
Samaranayake (Substituted),
No. 13, Weerasinghe Lane, Galle Road,
Pananura.

SUBSTITUTED DEFENDANT-APPELLANT-
APPELLANT

Vs.

Freddy Kuruppu Nanayakkara (deceased),
No.15, Weerasinghe Lane, Panadura.
and presently,
No. 160/2, Central Avenue, Laverton, Victoria,
Australia.

PLAINTIFF- RESPONDENT-
RESPONDENT

1. Priyanthi Kuruppu Nanayakkara,
2. Indra Lakshman Kuruppu Nanayakkara,
3. Ashanka Dananjaya Kuruppu
Nanayakkara,

All of No. 160/2, Central Avenue, Laverton,
Victoria, Australia.

SUBSTITUTED PLAINTIFF-
RESPONDENT-RESPONDENTS

Before: P. Padman Surasena, J. (as His Lordship the Chief Justice was then)

Mahinda Samayawardhena, J.

Sobhitha Rajakaruna J.

Counsel: Rohan Sahabandu, PC with Chathurika Elvitigala, instructed by Sarath Welgama for Substituted Defendant-Appellant-Appellant.

Saliya Peiris, PC with Nisal Hennadige for Substituted Plaintiff-Respondent-Respondent.

Argued on: 07.02.2025

Decided on: 09.10.2025

Sobhitha Rajakaruna J.

This Court granted Leave to Appeal on the following Question of Law set out in paragraph 15(a) of the Petition dated 23.06.2010:

“Did the High Court err in holding that the Respondent had acquired a title to a right of way by prescription over the portion of the land situated adjoining the Eastern Boundary in ‘Lot C’ depicted in Plan bearing No. 3159 marked ‘P1’?”

The Plaintiff-Respondent-Respondent (‘Plaintiff’) instituted an action in the District Court of Panadura against the Defendant-Appellant-Appellant (‘Defendant’), seeking, inter alia, a declaration that, through prescriptive rights, the Plaintiff is entitled to use the current right-of-way over the consolidated strip of land described in Nos. 1, 2, and 3 of the 3rd Schedule to the Plaint of the Plaintiff. Alternatively, the Plaintiff sought a declaration that he is entitled to use the land described in No. 1 of the 3rd Schedule to the Plaint as a right-of-way of necessity. The Plaintiff claims that he became the owner of the land described in the 1st Schedule to the Plaint through the final decree issued in the partition action bearing case No. 20241 of the District Court of Kalutara.

The Defendant filed an answer, admitting only the averments in paragraphs 9 and 11 of the Plaintiff’s Plaint. The stand taken by the Defendant in the District Court was that the Plaintiff had another roadway other than the right-of-way claimed through the District Court Action. The learned District Judge of *Panadura*, delivering her judgment on 09.05.2008, answered the issues in favour of the Plaintiff and decided that the Plaintiff has a right to possess, during his lifetime, the land described in the 1st Schedule of the Plaint. Thereafter, the District Court decided that the Plaintiff is entitled, based on prescription, to use the land described in Nos. 1, 2, and 3 of the 3rd Schedule (the roadway used by both parties) the Plaint of the Plaintiff and also that the Plaintiff is entitled to use the land described in No. 1 of the 3rd Schedule as a right-of-way. Additionally, the District Court decided that the Plaintiff is entitled to a right-

of-way of necessity over the land specified in No. 1 of the 3rd Schedule to the Plaintiff on the footing that there is no other roadway providing access to the land described in the 1st Schedule to the Plaintiff. The District Court observed that the Defendant did not establish the existence of an alternative road for the Plaintiff, despite the Plaintiff having used the eastern boundary. The Court further noted that there was no evidence to confirm that the Plaintiff used a roadway to access his land along the eastern boundary of the Defendant's property. Moreover, the District Court determined that the Plaintiff's use of the road was not based on any permission or license from the Defendant.

The Defendant filed an appeal against the said District Court judgment of the District Court in the Provincial High Court, exercising civil jurisdiction in the Western Province, holden in Kalutara ('High Court'), but the appeal was dismissed. The Defendant challenges both the said judgments of the High Court and the judgment of the District Court. The learned Judge of the High Court, affirming the Judgment of the District Court, queried how the Plaintiff could have used the disputed roadway with the consent of the Defendant when the Plaintiff was already residing on the property before the Defendant moved into his block of land.

The Plaintiff became the owner of his land by way of the transfer deed No.4208, attested on 12.11.1970 ('P8'). Thereafter, by Deed of Gift No. 26747 ('P9'), attested on 15.11.1985, he gifted the said property (described in the 1st Schedule to the Plaintiff) to the Plaintiff's sons, who are the second and third Substituted Plaintiff-Respondent-Respondents. Apparently, the Plaintiff constructed a house with an asbestos roof in the year 1972. Meanwhile, the Defendant acquired ownership of the block of land (described in the 2nd Schedule to the Plaintiff) by way of Deed No.224 dated 17.10.1976 ('V1'), which lies adjacent to the southern boundary of the land described in the 1st Schedule to the Plaintiff. The Plaintiff claims that he has gained right-of-way by prescription over the lands described in Nos. 1, 2 and 3 of the 3rd Schedule to the Plaintiff as shown in Plan No. 255 ('P3') made on 19.10.1971.

The Defendant contends that by virtue of the said Deed No. 4208 marked 'P8', the Plaintiff was granted a roadway located on the eastern side of the Plaintiff's land as described in the 1st Schedule to the Plaintiff, which connects to a public road. As such, the Defendant asserts that the Plaintiff cannot claim a lack of access to their land, as the Plaintiff has an alternative

roadway besides the right-of-way claimed. Nonetheless, the Plaintiff argues that the roadway the Defendant claims to exist on the Plaintiff's land does not physically exist and was not present even when the Plaintiff purchased the land. The Plaintiff states that he never used a roadway across the land known as *Thimbirigahawatta*, although such roadway is referred to in the title deeds and anyhow it was not physically identifiable at the time of purchase. The Plaintiff highlights the testimony of Buddadasa Karunaratne Costa, Licensed Surveyor, who stated that he had not observed the Plaintiff using any other road other than the road which is the subject matter of this case, marked as 'C' in Plan 'P1' presented at Trial, and no other road to access the Plaintiff's land. The Plaintiff asserts that the Defendant purchased their land five years after the Plaintiff purchased his land, and thus, it is the Defendant's duty to establish whether the Defendant granted consent for the Plaintiff to use the roadway described in the 3rd Schedule to the Plaintiff.

The Plaintiff further argues that he produced adequate evidence to demonstrate his acquisition by prolonged use of the right-of-way over the said land described in the 3rd Schedule to the Plaintiff and his use of the said roadway since purchasing his land described in the 1st Schedule. The Plaintiff has accessed electricity and water facilities through this strip of land, which are registered in their name, clearly indicating continuous and active possession of the said strip. Additionally, the Plaintiff argues that when he gifted the land to his children, the same schedule from the original deeds was used by the Notary drafting the Deed of Gift and the mere omission of a reference to the roadway in the schedule does not undermine the prescriptive claim supported by ample evidence during the Trial showing it was the only road used. The Plaintiff contends that the dispute arose when the Defendant suddenly attempted to block access after the Plaintiff's land was advertised for sale in newspapers and accordingly, the Defendant has been disputing the Plaintiff's right-of-way since 06.07.1999. The Plaintiff states that if the reliefs sought by the Defendant were granted, it would leave the Plaintiff's land inaccessible, effectively forcing the Plaintiff to abandon the land to the Defendant's benefit.

The Plaintiff, placing reliance on the dicta in *Mercin v Edwin* [1984] 1 Sri L.R. 224, submits that when a person establishes physical user of a right-of-way for the prescriptive method, he is entitled to succeed in a claim of prescriptive user and mere enjoyment of the right is proof

of the adverse user. The Plaintiff contends that the Defendant has not successfully challenged or disputed the Plaintiff's use of the roadway since purchasing the land in 1970. The Plaintiff claims rights not through a formal title but through prescription, asserting adverse use of the roadway against all others, including the Defendant, for over a decade before the District Court case began. Additionally, the Plaintiff points to Surveyor's Plan No. 3159 ('P1'), which indicates that the disputed roadway is the only connection between 'Weerasinghe Mawatha' and the Plaintiff's land, with the surveyor's testimony confirming the Plaintiff's undisturbed and continuous use of the roadway since taking possession of the land described in the 1st Schedule of the Plaintiff.

A cogent argument of the Defendant is that the Plaintiff's title deed from 1970 ('P8') and the Deed of Gift ('P9') to his children in 1985 make no mention of any right-of-way. Consequently, the Defendant asserts that no right-of-way was conveyed through these deeds, and the Plaintiff failed to prove as to when the road usage began. Another aspect of the submissions made on behalf of the Defendant is that the Plaintiff's alleged "unchallenged and uncontradicted" 20-year residence in Australia undermines any claim to prescriptive rights over the disputed strip of land through usage. The Defendant, placing reliance on *Fernando v Wijesooriya* 48 NLR 320, *Siman Appu v Christian Appu* 1 NLR 288, *Saddhasena Terunnanse v Sumanatissa Thero* 36 NLR 422 and *Silva et al. v Kumarihamy* 25 NLR 449 submits that the High Court as well as the District Court have erred in law by concluding that the Plaintiff has prescribed to the subject roadway shown in the said Plan No.255 ('P3'), which shows that the roadway was made in 1999 after the District Court action was instituted. The Defendant further asserts that the said Plan No. 255, does not actually depict the roadway. Moreover, the Defendant argues that the key issue is not who occupied the land first, but whether there is evidence to confirm the existence of the alleged roadway and the duration of the Plaintiff's use of it.

The Defendant asserts that the Plaintiff bears the full responsibility of proving, with clear and compelling evidence, the existence of a roadway across the Defendant's land, a burden the Plaintiff has failed to meet. The Defendant notes that the Plaintiff did not present any independent witnesses or provide documentary evidence to support the claimed prolonged use of the aforesaid strip of land. Without such evidence, the Defendant submits that the

decisions of the District Court and High Court Judges are based on speculation rather than solid proof. The Defendant also argues that the lower Courts failed to consider the principle that a claim for prescriptive rights must fail if there is significant doubt about when or how continuously the alleged use occurred. According to the Defendant, the cited legal authorities establish that uncertainty regarding the timing and nature of the use is detrimental to such a claim. Thus, it is the Defendant's contention that even if there were occasional or incidental uses of the land which the Defendant does not concede, these would not be sufficient to grant the Plaintiff a legal right-of-way.

To claim prescriptive title, a plaintiff must meet three key legal conditions: first, their possession of the property must be continuous and undisturbed; second, this possession must be independent of or adverse to the Defendant's title; and third, it must have lasted for at least ten years immediately before the lawsuit. The principle of "adverse user" is fundamental to claiming a prescriptive title. The law, however, provides a clear framework for establishing this hostility through a well-defined shift in the burden of proof. At the trial, licensed surveyor Karunaratne Costa testified, confirming the existence of the roadway and its role as the only access to the Plaintiff's land. Documentary evidence included Plan No. 3159 ('P1'), Plan No. 255 ('P3'), and the Police Complaint ('P7'). The Plaintiff also presented a building plan ('P10') and a sketch ('P11'), both of which identified the roadway as the access to the Plaintiff's block of land. Additionally, utility bills and assessment notices ('P14' to 'P37') were submitted, showing the property was consistently identified and assessed based on its access from 'Weerasinghe Mawatha'. Substantial evidence presented to the District Court demonstrates that the Plaintiff has been using the roadway from the outset, starting five years before the Defendant acquired his land.

Thus, upon an overall consideration of the evidence, I agree with the Trial Judge's conclusion that the Plaintiff had uninterrupted use of the roadway since 1970, thereby establishing continuous possession. This use, which began before the Defendant acquired the adjacent property, was adverse, as it did not depend on any permission or acknowledgement of the Defendant's rights. I see no reason to disturb the findings reached by the learned District Judge and the learned High Court Judge, both of whom properly invoked the legal principle that, once long-term physical use is proven, the onus shifts to the Defendant to establish that

the use was permissive. The Defendant's failure to discharge this burden, compounded by the fact that the Plaintiff's use began before the Defendant owned the land, makes his arguments untenable.

The Defendant's challenge to the continuity of possession, citing the Plaintiff's absence, is not strong enough without proof that the possession of the roadway actually ceased. Wigneswaran, J in *Leisa and another v Simon and Another* [2002] 1 Sri. L.R 148 observed that possession and occupation are two important concepts in land law. Based on the evidence adduced at the Trial, it cannot be assumed that the Plaintiff's possession was ousted due to his alleged visit to Australia. No evidence was led to confirm that the Plaintiff's absence was not temporary or that he could not return and re-enter the property at any moment, upon his choice, without anybody's permission. Thus, the Defendant's argument that the prescription claim would be untenable due to the Plaintiff leaving for Australia will fail as it lacks sufficient supporting evidence on the above aspects.

The Plaintiff also sought a right-of-way of necessity as an alternative relief, which the District Court granted and the High Court upheld. The Defendant's primary objection to this claim was the alleged presence of an alternative roadway. However, both the District Court and the High Court found that this alternative road "does not exist and did not exist when the Plaintiff purchased the land." A challenge to this finding on appeal would require the Defendant to demonstrate a legal error in the factual determination. A right-of-way of necessity is a praedial servitude where a land is landlocked and has no access to a public road. I am satisfied with the conclusion of the District Court and the High Court upon the right-of-way of necessity. I have examined such issue on right of way of necessity, noting that the conclusions of both the High Court and the District Court upon that aspect strengthen the Plaintiff's claim to prescriptive title.

Furthermore, I take the view that the Defendant's argument that this Appeal is futile, allegedly based on the demise of the Plaintiff (who owns his property subject to life interest) pending lawsuit, will not affect the question of law upon which this Court has been invited to adjudicate this Appeal. The Defendant's attempts to rely on irrelevant or misapplied legal precedents further weaken his position.

Upon a comprehensive review of the evidence and legal arguments presented, I find that the Plaintiff has satisfactorily established his claim to a prescriptive right-of-way over the land described in Nos. 1, 2, and 3 of the 3rd Schedule to the Plaint, as well as a right-of-way of necessity over the land described in No. 1 of the 3rd Schedule. The Plaintiff has demonstrated continuous, uninterrupted, and adverse use of the roadway since 1970, predating the Defendant's acquisition of the adjacent property, supported by substantial evidence, including Surveyor testimony, documentary plans, and utility records. The Defendant has failed to discharge the burden of proving permissive use or the existence of an alternative roadway. Similarly, the Defendant's challenge to the continuity of possession, based on the Plaintiff's alleged absence, lacks merit without evidence that the roadway's use ceased.

For the reasons stated above, I answer the aforesaid question of law on which Leave to Appeal was granted, in the negative. The judgments of the High Court (dated 13.05.2010) and the District Court (09.05.2008), are hereby affirmed and the instant Appeal is dismissed without costs.

Judge of the Supreme Court

P. Padman Surasena, CJ.

I agree.

Chief Justice

Mahinda Samayawardhena, J.

I agree.

Judge of the Supreme Court