

**LAKMINI RATWATTE WELGAMA**  
**v.**  
**ANOJA DEVI WIJESUNDERA**  
**AND ANOTHER**

COURT OF APPEAL  
ISMAIL, J., (P/CA)  
TILAKAWARDENE, J.  
C.A.L.A. NO. 243/97  
D.C. COLOMBO NO. 31166/T  
SEPTEMBER 15, 1998  
OCTOBER 17, 28, 1998  
NOVEMBER 25, 1998

*Civil Procedure Code SS 530, 531, 539, 539 (A), 712 – Testamentary Proceedings – Ex parte – Application to vacate Order Nisi – Evidence Ordinance S. 108 Amendment 10 of 1988 – Period of 7 years substituted by a period of 1 year – Due and proper inquiry.*

The respondents filed Testamentary proceedings claiming Letters of Administration in their capacity as sisters and intestate heirs of deceased Upali Wijewardena(U). An order nisi was granted *ex-parte*. The appellant thereupon moved to vacate the said Order on the ground that it had been made *per incuriam*, as an order under SS 530, 531 could be made only upon proof of the death of U which fact had then not been established.

Court made order refusing letters under S. 539A on the ground that there was no proof of death of U and the period of 7 years in S.108 Evidence Ordinance had not then elapsed.

S. 108 was later amended on 21. 4. 88 by substituting a period of 1 year for the period of 7 years. Appellant thereafter sought letters on 20. 5. 88 as the widow of U. The respondents consented to letters being issued to the appellant and withdrew their application. Inventory and Final Accounts were not filed for over a period of 4 years, the reason being that the respondents have not provided the Accounts of the estate of 'U's mother.

The respondents thereafter sought an order directing the appellant to file proper and sufficient Inventory / valuation of deceased's property as at the date of his death which was stated to be 13. 8. 83, the day the aircraft carrying 'U' disappeared. The appellants objected and contended that the date of death was

21.4. 88 and moved Court to hold a due and proper inquiry. Court postponed the order for 21. 8. 97, and on 21. 8. 97, court directed the appellant to file an additional inventory and final account on the basis that the date of death was 13. 2. 83. On leave being sought.

**Held:**

1. The explanation that the final account could not be submitted as the respondents have not been provided with the accounts of the estate of late 'U's mother cannot be accepted because the appellant could have taken proceedings under S. 712 C.P.C.
2. Appellant cannot rely on the provisions of S.108 of the Evidence Ordinance to fix the date of death as being 21. 4. 88 as there is no presumption as to the time or date of a person's death. This is a matter which has to be proved by evidence.
3. The appellant had not controverted the averments in the petition, nor had she specified that the date of the death of 'U' was different to that alleged by the respondents. The estate duty has been assessed on the declaration of the appellant on the basis that the date of death of 'U' was 13. 2. 83.
4. The learned District Judge was justified in making an order directing the appellant to file an additional inventory/final account on the basis that the date of the death of 'U' was 13. 2. 83, and no prejudice has been caused to the appellant.

**APPLICATION for Leave to Appeal.**

**Cases referred to:**

1. *Re Phene's Trusts* (1870) 5 Ch. App. 139.
2. *A. G. A. v. Fernando* – 12 NLR 83.

*K. N. Choksy PC, with Nihal Jayamanne PC, Upul Jayasuriya, Nihal Fernando, Lakshman Perera, V. K. Choksy and Ms. K. Wijetunga* for petitioner.

*P. A. D. Samarasekera PC, with Manohara de Silva and Ms. Kumudini Wijetunga* for 1st respondent.

*J. E. P. Deraniyagala with Harsha Cabraal, Kavinda Dias-Abeyasinghe* for 2nd respondent.

*Cur. adv. vult.*

January 11, 1999.

**ISMAIL, J. (P/CA)**

The respondents filed testamentary proceedings in DC Colombo Case No. 30927/T claiming letters of administration in their capacity as sisters and intestate heirs of the deceased Philip Upali Wijewardene. Pursuant to their application for the grant of letters of administration made under section 589 of the Civil Procedure Code, an *order nisi* was granted *ex parte*. The appellant thereupon filed a petition and moved that the said *order nisi* be vacated on the ground that it had been made *per incuriam*. It was pointed out that an *order nisi* could have been made under the provisions of sections 530 and 531 only upon proof of the death of Philip Upali Wijewardene which fact had then not been established.

The court then made order refusing the issue of letters of administration under section 539A of the Code on the ground that there was no proof of the death of the said Philip Upali Wijewardene and that the period of seven years referred to in section 108 of the Evidence Ordinance had not then elapsed.

Meanwhile section 108 of the Evidence Ordinance was amended by Act No. 10 of 1988 with effect from 21. 4. 88 by substituting a period of one year for the period of seven years referred to therein. The appellant then initiated proceedings on 20. 5. 88 in case No. 31166/T seeking the grant of letters of administration to her as the widow of the late Philip Upali Wijewardene. According to the terms of a settlement agreed upon by the parties in the Court of Appeal on 18th January '89, the respondents consented to letters of administration being issued to the appellant and withdrew their application for the issue of the same to them in case No. 30927/T.

The letters of administration were then issued to the appellant on 26.11.92. Thereafter, although several dates were nominated by court over a period of over four years for the appellant to file an inventory and a final account, the appellant does not appear to have filed the same.

The respondents then filed a petition on 2. 4. 97 for an order directing the appellant to file a proper and sufficient inventory and valuation of the deceased's property and effects as at the date of

his death which was stated to be 13. 2. 83, disclosing and including the assets set out in paragraph 5 of their petition. The respondents also prayed for an order directing the appellant to file in court as from the same date a final account of the estate of the deceased.

The appellant filed her statement of objections to this application on 29.7.97 and the matter was taken up for inquiry on 27. 10. 97. It was contended on behalf of the appellant that the date of the death of the deceased was 21. 4. 88 and as such that it was neither correct or possible for the appellant to file final accounts on the basis that the date of the death was 13. 2. 83. It was submitted that this matter could not be resolved by tendering written submissions but that a due and proper inquiry should be held for this purpose. The trial judge took time to consider the submissions and postponed his order for 21. 8. 97.

The appellant has averred in her present petition that she obtained an *order nisi* in the testamentary proceedings on the legal basis that Philip Upali Wijewardene was presumed dead on 21. 4. 88 and that the *order nisi* was made absolute of consent also on the basis that the presumption of death operated as from this date. She has further taken up the position that she is unable to tender the final accounts until the respondents submit and provide her with the accounts of the estate of the deceased's mother which was being administered by them and to which Philip Upali Wijewardene was also entitled to a considerable share.

Counsel for the appellant submitted that the learned Additional District Judge had proceeded to deliver an order on the entire issue when the counsel only asked for a proper inquiry to be held on the question as to the date of the death of the deceased. He further submitted that *in doing so* the Judge has proceeded on the incorrect premise that the documents A2 and A3 annexed to the application of the respondents have been admitted by the appellant to be correct.

The respondents in their application to the District Court stated in paragraph (4) (a) as follows:

"On 13. 2. 83 the deceased Philip Upali Wijewardene along with five other persons left Kuala Lumpur, Malaysia, on a Gates Learjet aircraft bound for Colombo. However, the said aircraft did not arrive

in Colombo or any other destination airport on 13.2.83 as scheduled or on any date thereafter. Land and sea search operations were launched in respect of the missing aircraft and passengers by Malaysian and Indonesian Government Authorities, but proved to be futile, apart from a aircraft wheel found by some fishermen off the coast of Sumatra, which was later positively identified as belonging to the said aircraft".

The respondents annexed to their affidavit photocopies certified as true copies of the letter dated 24.9.87 from Ms. Shook Lin & Bok (Advocates and Solicitors) of Kuala Lumpur, Malaysia, to their Attorneys-at-law together with an annexed letter and report from the Malaysian Department of Civil Aviation – A1 to A3.

It appears from the report A3 prepared by the Department of Civil Aviation, Malaysia, that on 13. 2. 83 the USA registered Learjet (LR35A) with registration No. 4820 belonging to 'Upali USA' left Kuala Lumpur International Airport at 20.41 local time for Colombo with six persons on board including Upali Wijewardene and at 21.09 this aircraft failed to give a position report overhead Medan to the KL Air Traffic Control Centre. According to paragraphs 3, 8 of the report it is stated that on 22. 2. 83 an aircraft wheel and a roller bearing were found by fisherman off Jakarta and that Stillwell Aviation Services, Singapore, had confirmed that the wheel belonged to the aircraft No. 4820 based on the markings on the wheel.

The appellant had in her objections merely denied the averments relating to the above set out in paragraph 4 (a) of the petition dated 2. 4. 97 filed by the respondents. The respondents had further averred that since 13. 2. 83 neither the deceased Upali Wijewardene nor any of his fellow passengers on the said aircraft were seen or heard by any of the persons who would normally have seen or heard of them if they were alive. The trial judge has considered whether in the circumstances evidence need be taken to decide on the date of the death of Upali Wijewardene. The appellant had not controverted the averments in the petition, nor had she specified that the date of the death of the deceased was different to that alleged by the respondents.

The only position taken up by the appellant was that as a matter of law in terms of section 108 of the Evidence Ordinance the date of the death should be deemed to be 21. 4. 88. As section 108 is

a proviso to section 107 both sections must be read together. Section 107 is as follows:

"When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is alive is on the person who affirms it."

Section 108 of the Evidence Ordinance, as amended by Act No. 10 of 1988 states:

"Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for one year by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

Thus, in terms of section 108 of the Evidence Ordinance if a person has not been heard of for one year by those who would normally have heard of him, had he been alive, the presumption of continuance of life under section 107 of the Evidence Ordinance ceases and the burden of proving him to be alive lies on the person asserting it by denying death. This has been referred to in the headnote in *Re Phene's Trusts*<sup>(1)</sup> which is as follows:

"If a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential."

Both the appellant and the respondents in this instance do not dispute the fact of the death of Philip Upali Wijewardene, but the appellant asserts that the date of the death must be deemed to be 21st April '88, the date on which the Evidence (Amendment) Act No. 10 of 1988 was certified. The appellant cannot however rely on the provisions of section 108 of the Evidence Ordinance to fix the date of death as being 21. 4. 88 as there is no presumption as to the time or date of a person's death. That is a matter which has to be proved by evidence. Thus a party who asserts that a person was alive at a certain date must prove such fact – *A. G. A. v. Fernando*<sup>(2)</sup>.

The appellant had not sought to challenge the evidence placed by the respondents in regard to the disappearance of the aircraft in which the deceased was a passenger after it left Kuala Lumpur airport at 21.09 hrs on 13. 2. 83. Besides the mere denial of the positive assertion that since 13. 2. 83 neither the deceased or any of the other passengers on the said aircraft were seen or heard of by any other persons who would normally have seen or heard of them, if they were alive, the appellant did not state anything to the contrary in her objections. While it was submitted that this is a serious question to be decided upon after leading evidence, the appellant did not give any indication as to how it was proposed to discharge the burden of establishing a date other than 13. 2. 83 as being the date on which the death of the deceased occurred.

The respondents also pleaded that the appellant has in her affidavit filed dated 28.4.88 containing the declaration of properties and inventory and in the estate duty declaration dated 28. 4. 88 confirmed and acted on the basis that the date of the death of the deceased was 13. 2. 83. The estate duty was duly assessed upon the said declaration and the appellant paid a sum of Rs. 1,346,586.00 in respect of which a Final Certificate was issued on 5. 10. 95 by the Inland Revenue Department. It was also contended that the appellant is estopped from denying that as a matter of fact that the deceased died on 13. 2. 83. The appellant has now taken up the position that the said estate duty was erroneously declared and paid and that this cannot override the statutory provisions of section 108 of the Evidence Ordinance.

Learned counsel for the respondents submitted that the appellant has not furnished a competing date of death and that in view of her unequivocal declaration that the death of her husband took place on 13. 2. 83 and considering further the failure of the appellant to controvert the facts set out in the documents A1 to A3, there was no difficulty in reasonably ascertaining that the death of Philip Upali Wijewardene occurred on 13. 2. 83. Thus, there was no need in these circumstances for the matter to be fixed for a formal inquiry for evidence to be taken to ascertain the date of the death of the deceased.

Learned counsel for the respondents submitted that there was no provision for an inquiry to be held when any person interested in the estate presents in terms of section 724A of the Civil Procedure Code

proof by affidavit that an administrator has failed to file such account as is prescribed in section 551. It has been pointed out that in terms of section 551 of the Code a duty is cast on every administrator to file a true and final account of his administration before the expiry of 12 months from the date upon which the grant of administration was issued to him. The appellant had also undertaken according to the terms of settlement entered into between the parties that she would furnish accounts in respect of each and every year of her administration commencing from 31st March, 1990.

The explanation of the appellant that the final account could not be submitted as the respondents have not provided her with the accounts of the estate of the late Upali Wijewardene's mother cannot be accepted because the appellant could have taken proceedings to discover property so withheld in terms of section 712 of the Civil Procedure Code. The appellant has failed to have recourse to such a proceeding during the period of about five years which have elapsed since the grant of letters of administration to her.

Taking the above matters into consideration, we are of the view that the District Judge was justified in making an order directing the appellant to file an additional inventory and final account on the basis that the date of the death of the late Philip Upali Wijewardene was 13th February, 1983. We are of the view that the alleged denial of an opportunity to the appellant to lead evidence at a further formal inquiry, for which there appears to be no specific provision, has not caused any prejudice to the appellant.

The application for leave to appeal from the order dated 28. 11. 97 is therefore refused. The application is dismissed with costs.

**SHIRANEE TILAKAWARDANE, J. – I agree.**

*Application dismissed.*