WILISINDAHAMY v. KARUNAWATHI AND OTHERS

COURT OF APPEAL
VICTOR PERERA, J. & L. H. DE ALWIS, J.
C. A. (S.C.) 105/72 F. D.C. GALLE 6920/L
MAY 15, 1980

Declaration of title – Notaries Ordinance, sections 31 (9) and 33 – Evidence Ordinance, section 68 – Misjoinder of parties and causes of action.

Action was filed for declaration of title and ejectment of defendants by the plaintiff as administratrix of her late husband. Various incidents which took place between 1955 and 1963 were averred in the plaint. The children and husband of the first defendant were made defendants. The dispute was originally for the house and thereafter for both the house and the land. Submission was made in appeal that the notary who executed the title deed of the plaintiff failed to comply with the provisions of section 31(9) of the Notaries Ordinance.

Held:

The learned District Judge had misdirected himself in holding that the averments in the plaint constituted several causes of action which were embodied in one action. The plaint refers to one cause of action against all the defendant respondents though various incidents which had taken place between 1955 and 1963 were mentioned. On the facts pleaded and proved in the case there was no misjoinder of parties and causes of action. The title deed was properly proved in terms of section 68 of the Evidence Ordinance. There was no issue as to whether the notary complied with the provisions of section 31(9) of the Notaries Ordinance and no questions had been asked from him regarding that when he gave evidence.

Cases referred to:

(1) *Lowe* v. *Fernando* 16 NLR 393.
(2) *London & Lancashire Fire Insurance Corporation* v. *P & O Co.* 18 NLR 15.
(3) *Wismaloma* v. *Alapatha* 53 NLR 568.
(4) *Fernando* v. *Fernando* 39 NLR 145.

APPEAL from the Order of the District Court of Galle

Nimal Senanayake with *A. B. Dissanayake* for the Plaintiff-Appellant.

H. W. Jayewardene, Q.C. with *Mrs. P. Seneviratne* for the 1st Defendant-Respondent.

Cur adv vult.

15th May, 1980
VICTOR PERERA, J.

The plaintiff-appellants in the above case filed this action on the 20th December 1963 against the 1st to 11th defendants-respondents for a declaration of title to the premises described in the Schedule to the plaint for ejectment of the defendants and for damages. The plaintiff-appellant alleged in her plaint that by virtue of the Final Decree entered in case No. 25091 D.C. Galle, lot 1 in Plan No. 1016 filed of Record marked P22 was allotted to Y. L. George de Silva and that by the said decree Lot 8 in the said Plan was allotted to one Christinahamy. The said Christinahamy by Deed No. 538 of 1930 sold the said Lot 8 to the said George de Silva who thus became the owner of both Lots which were consolidated to form the premises described in the Schedule to the plaint. He pleaded that Y. L. George de Silva by his Deed No. 4196 of 7.10.47 transferred the said premises to H. E. U. Wijewardena who on Deed No. 3604 dated 30.3.48 sold the same to P. de S. Wimalasundera who by Deed No. 6190 dated 17.7.53 sold the same to Y. L. George de Silva. The said Y. L. George de Silva by Deed No. 8191 dated 17.7.53 sold the same to Francis J. Goonewardena. By agreement No. 8192 of 17.7.53 the said Francis J. Goonewardena agreed to reconvey the said premises to George de Silva within two years from the said date. Thereafter the said Francis J. Goonewardena by Deed No. 261 dated 14.10.54 conveyed the same to George de Silva who on the same date by Deed No. 262 conveyed the same to the said Francis J. Goonewardena.

The plaintiff-appellant pleaded that Francis Goonewardena had allowed Y. L. George de Silva to occupy the house on the said land and that after his death the 1st defendant his widow was allowed to occupy the said house temporarily. The said Francis J. Goonewardena died on 31.3.60 leaving an estate which was being administered by the plaintiff in testamentary suit No. 8814 and George de Silva died leaving as his heirs the 1st defendant his widow and his children the 2nd to 11th defendants-respondents.

The plaintiff-appellant pleaded further as follows:–

(7) Though the said Francis Jayawickrema Goonewardena requested her to leave the said buildings the 1st defendant has been unlawfully and wrongfully in possession of the house on the said land since 26h July 1955 and continued to do so.

(8) Though the 1st defendant is openly in wrongful and unlawful possession of the said house which is a tiled wattle house of

11 cubits and its appurtenance on the said land and continued to do so, by her answers filed in cases Nos. L 5721 and L 6360 of this Court she seems to be disputing the title to the rest of the premises too and she and her children are stealthily plucking nuts from the trees on the land for a period of about 3 years immediately preceding the date of this action and it has therefore become necessary to have the plaintiff declared entitled to the entirety of the premises described in the schedule hereto.

(9) The 2nd to 11th defendants are the children of the said Y. L. George de Silva who have been disclosed by the 1st defendant and who are living with her in the said buildings on the said land as heirs of her late husband and they are joined as parties as they are acting in concert with their mother the 1st defendant in disputing the plaintiff's title to the premises is dispute.

In paragraph 13 the plaintiff-appellant pleaded that a cause of action had accrued to her to sue the defendants jointly and severally for a declaration of title to the said premises, to recover damages and for ejectment.

The 1st defendant filed an answer dated 3.3.66 pleading *inter alia*, that there was a misjoinder of parties and causes of action. The 1st defendant denied the several averments in the plaint and specially pleaded that Deed No. 262 of 14.10.54 was not signed or executed by Y. L. George de Silva and put plaintiff to the proof thereof. The 1st defendant denied the plaintiff-appellant's title and he pleaded that she was in exclusive possession of the said premises even during the life time of Y. L. George de Silva and claimed a title in her by prescription. The 2nd to 11th defendants filed a separate answer dated 17.3.76 denying the several averments in the plaint denying that George de Silva their father executed or signed Deed No. 262 and putting the plaintiff to the strict proof thereof. These defendants too denied the plaintiff's title and they claimed prescriptive title by their long possession for over 10 years. They too pleaded that there was a misjoinder of parties and causes of action and that the 1st defendant's interests were adverse to their interests.

After various vicissitudes with two appeals to the Supreme Court which were disposed of on 27.6.67 and 3.10.70 the case ultimately came up for trial on 29th January 1971.

The case proceeded to trial on several issues which included *inter alia* the following issues raised by the defendants-respondents:-

(9) Is there a misjoinder of parties and causes of action?

(15) Is deed No. 262 dated 14.10.54 referred to in paragraph 4 of the plaint the act and deed of Y. L. George de Silva?

(16) If it is not, do any rights flow to F. J. Goonewardena and to the plaintiff to have and maintain this action?

After evidence was recorded the learned District Judge delivered judgment holding that the plaintiff-appellant was entitled to the land on the title pleaded by her but dismissed her action on the ground of misjoinder of parties and causes of action.

At the hearing of this appeal the first point raised was the question of the alleged misjoinder of parties and causes of action referred to in issue 9.

On an examination of the plaint dated 20.1.63, it is clear that in paragraphs 2, 3 and 4 the plaintiff-appellant had set out and pleaded all the necessary ingredients in regard to her late husband's title to the land in dispute and the subsequent devolution on her. In paragraph 5 she pleaded that George de Silva had been allowed to occupy the buildings on the land temporarily and that after his death his widow the 1st defendant was allowed to occupy the said buildings temporarily. In paragraph 6 she averred that her husband died on 31.1.60 and that she was the administratrix of his estate duly appointed as such in testamentary suit No. 8814 D.C. Galle and in paragraph 10 she pleaded a title to the said land by prescription as well. In paragraph 12 the plaintiff-appellant set out her damages and in paragraph 13 the plaintiff-appellant clearly set out her cause of action as follows:–

"13. A cause of action has therefore accrued to the plaintiff as administratrix aforesaid to sue the defendants jointly and severally for a declaration of title to the said premises and to recover damages aforesaid and to have the defendants ejected from the said premises and to recover costs.

The main controversy centered around the averments in paragraphs 7, 8 and 9. It was the contention of the plaintiff-appellant that the averments therein set out in chronological order the various events that had taken place after 26th May 1955 after the deed in favour of her late husband was executed, and which culminated in her having to file this action in this particular way in December 1963. She alleged that during the lifetime of F. J. Goonewardena, her husband, he had requested the 1st defendant to leave the house and then since 26th July 1955 she continued in occupation. Thereafter she refused to vacate the same and was in wrongful and unlawful

occupation. She pleaded that in case No. 5712/L D.C. Galle filed by her late husband against the 1st defendant and in case No. 6360/L D.C. Galle filed by her that the 1st defendant in her answer seemed to dispute **her title not only to the house but to the land also** and that she and her children were stealthily plucking nuts from the land for a period of about 3 years prior to this action. In paragraph 8 she definitely pleaded that it had therefore become necessary to file an action for a declaration of title to the entirety of the premises described in the Schedule to the plaint. In paragraph 9 she alleged that 2nd to 11th defendants were living with the 1st defendant-respondent in the same buildings and that they were acting in concert with their mother in disputing her title to the premises in dispute. A careful study of these averments show clearly that the dispute which started in 1955 in regard to the occupation of the buildings developed in the course of time to a dispute in regard to the buildings and as well as the land and enlarged into a dispute with the 2nd to 11th defendants also taking a part. The plaintiff-appellant therefore crystallised her cause of action as a dispute by all the defendants-respondents in December 1963 to the buildings and the land, namely the entirety of the premises described in the Schedule to the plaint.

No doubt the 1st defendant-respondent and the 2nd to 11th defendants filed two separate answers on the 3rd March 1966 and the other on the 17th March 1966. The 1st defendant-respondent in her answer denied all the averments in paragraphs 2 to 13 of the plaint and put the plaintiff respondent to the strict proof of the several averments therein. She denied that deed 262 of 1954 was ever executed by or signed by her husband the late Y. L. George de Silva. She claimed a title by prescription to the said premises commencing even during the life time of her husband. She specially pleaded that there was a misjoinder of parties and causes of action.

The 2nd to 11th defendants-respondents in their answer denied the averments in paras 2 to 13 of the plaint; they denied the Deed 262 was ever executed or signed by their father Y. L. George de Silva. However, in paragraph 6 of their answer they pleaded that they had been in undisturbed and uninterrupted possession of the premises adversely to the plaintiff-appellant and claimed a title by prescription. These defendants pleaded that the interests of the 1st defendant were adverse to these of theirs and that therefore there was a misjoinder of causes of action.

To my mind the averments in the plaint, if proved, clearly constituted one cause of action against all the defendants-respondents. It is therefore necessary to examine the several

averments in paragraphs 7, 8 and 9 of the plaintiff in the light of the evidence led and the documents to see whether they were proved.

In P13 the plaint in D.C. 5712/L filed by F. J. Goonewardena in October 1955 against the 1st defendant-respondent he has specially pleaded that he had allowed 1st defendant to occupy the house on the land, and that the 1st defendant was disputing his rights to the house. He sought a declaration of title to the house only and ejectment therefrom. In P14 the answer filed by the 1st defendant-respondent she denied the title of the plaintiff on Deed No. 262, **she pleaded the house and land belonged to her late husband George de Silva** who died leaving her and her ten children of whom seven were minors and therefore she **as such** was in possession of the properties of her deceased husband. In paragraph 11, she specially averred that this action had been **wrongly constituted against her alone.** However, when the case came up for trial it was found that there was no house on the premises described in the schedule to the plaint in that case and accordingly the plaintiff was permitted to withdraw the action on 13.10.58 with liberty to bring fresh action (vide 1D2B).

The averments in the answer in this case (P44) establish that at least from January 1956 the 1st defendant-respondent started asserting title **to the house and land on behalf of herself and her children** the present 2nd to 11th defendants as successors in title of her husband George de Silva and indicated that her children should also have been joined as defendants, by implication, in her special plea of non-joinder.

Immediately after the dismissal of case No. 5712/L, the present plaintiff-appellant as administratrix of the estate of George de Silva filed case No. 6360/L. D.C. Galle. The plaint in that case had not been produced but the answers dated January 1961 (P16) and (P17) and the amended plaint dated 27th January 1963 (P15) had been produced. In the amended plaint the present plaintiff-appellant has averred that the 1st defendant had been originally allowed to occupy the home but in her answer filed in case No. 5712/L she had raised dispute to the land as well and therefore she was **seeking a declaration of title to the entire premises.**

In paragraph 9 of her plaint she averred that the 2nd to 11th defendants were the children of George de Silva who were disclosed by the 1st defendant and who were living with her in the buildings on the land in dispute and though no damages were claimed against them they were made parties in order to get a binding decree against them as well. The 1st defendant-respondent and 2nd to 11th defendants-respondents filed separate answers (P16 and P17).

The1st defendant-respondent again denied the execution of deed No. 262 by George de Silva and claimed title in herself. The 2nd to 11th defendants-respondents *inter alia* pleaded that **they together with the 1st defendant-respondent had been in undisturbed and uninterrupted possession of the premises adverse to the plaintiff** and they together with the 1st defendant had acquired a title to the said premises by prescription. The plaintiff was permitted to withdraw that action on 8.12.63 (P21) with liberty to file a fresh action.

The pleadings in the said case No. 6360/L were sufficient justification for the plaintiff-appellant to file the present action as presently constituted in December 1963 against all the defendants-respondents seeking a declaration of title to the entire property as on that date it had become one dispute by all the defendants. The oral evidence led in the case too supported this position completely.

Several authorities were cited before us in regard to the misjoinder of parties and causes of action but on a careful examination of the facts in each of these cases, it is clear that on the facts in this case the plea of misjoinder of parties and causes of action could not prevail. In the case of *Lower v. Fernando,*[1] the plaintiff claimed title to the entirety of a block of land and complained that the defendants were severally in possession of separate and defined portions of it and that the court correctly held that there was a clear misjoinder. The case of *London and Lancashire Fire Insurance Co.* v. *P & O. Company*[2], does not really have a bearing on the facts of this case. In the case of *Wismaloma v. Alapatha,*[3] the plaintiff has instituted an action for a declaration of title to a land against five defendants claiming that acting jointly and in concert they were in unlawful and forcible possession of the land. It was established that the subject-matter of the action was a land which consisted of separate allotments which were possessed by separate groups of defendants independently and without concerted action. The Court correctly held that there was a misjoinder of parties and causes of action. But in the instant case the defendants-respondents themselves claimed the identical land of having belonged to their predecessor George de Silva, claimed a title thereto by prescription and joint possession in the answer filed in the earlier case, though the 1st defendant also took up the position that she had acquired a title by prescription against her husband George de Silva.

The case of *Fernando v. Fernando* [4], was different. The plaintiff in that case joined two causes of action in the same action against two defendants in one of which it was claimed that the defendants were jointly liable and in the other that one defendant was solely liable. Therefore it was a clear case of misjoinder.

The learned District Judge has misdirected himself in holding that the several averments in the plaint constituted several causes of action which were embodied in this one action. As I have already indicated the plaint refers only to one cause of action against all the defendants-respondents though various incidents have taken place between 1955 and 1963. I hold that on the facts pleaded and proved in this case there was no misjoinder of parties or causes of action and that the plaintiff was entitled to the relief claimed.

The next point raised by Mr. H. W. Jayewardena, Q.C. was that there was no proof of the due and proper execution of Deed No. 262 by which Y. L. George de Silva was alleged to have sold his interests to F. J. Goonewardena. He referred us to Section 31(9) of the Notaries Ordinance (Chap. 107) which lays down as the duty of a Notary that he shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or at least to two of the attesting witnesses thereto and in the latter case he shall satisfy himself before accepting them as witnesses that they are persons of good repute and that they are well known and acquainted with the executant and knew his proper name, occupation and residence and the witnesses shall sign a declaration to that effect. In this case, the Notary was known to the witnesses but the witnesses were known to him and to the executant.

Section 33 of the Notaries Ordinance, however, provides that–

> "No instrument shall be deemed to be invalid by reason only of the failure of any Notary to observe any provisions of any rule set out in Section 31 in respect of any matter of form:
>
> Provided that nothing herein shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions **of any other written law**".

The validity of the deed was not challenged on any ground other than that the said Y. L. George de Silva had not signed the deed and that it was not his act and deed. There was no suggestion at any stage of the trial that this deed was invalid for want of due and proper attestation as required by Section 31(9) of the Notaries Ordinance or that there was non-compliance with any other written law. The defendants-respondents merely contended that Y. L. George de Silva did not and could not have signed the deed owing to his illness.

There do appear to be very suspicious features in regard to the execution of the Deed Nos. 261 and 262 which had the effect of wiping out an undertaking to reconvey the premises within a given period to Y. L. George de Silva the husband of the 1st defendant,

particularly as there was evidence of his illness in October 1954. There is also evidence that George de Silva had signed different documents in different ways. But there was no cogent evidence adduced which could establish that the deeds were not in fact signed and that the signatures on the deeds were not those of George de Silva.

Mr. Nimal Senanayaka, senior counsel for the plaintiff-appellant, however, contended that this position of due execution in terms of the Notaries Ordinance was not an issue raised at the trial. The issue raised in the pleadings and at the trial was whether Deed No. 262 of 14.10.54 was the act and deed of Y. L. George de Silva. Mr. Senanayaka's contention was that he had only to prove that the Deed No. 262 which was a deed required to be attested had been executed by Y. L. George de Silva. In terms of Section 68 of the evidence Ordinance, one witness at least had to be called to prove the Deed. The Notary was called, he testified that the deed was executed before him and attested by him. He did not know the executant. One witness who testified that he knew the executant gave evidence of the signing of the Deed by Y. L. George de Silva. So as far as Section 68 of the Evidence Ordinance was concerned there was proof of execution if the evidence of this witness was believed, which permitted the deed to be used as evidence. The two witnesses have signed a declaration that they were well acquainted with the executant and that they knew his proper name, occupation and residence. What the Notaries Ordinance Section 31(9) states is that a Notary **had to satisfy himself that the witnesses were persons of good repute and that they knew the executant's proper name, occupation and residence.** Not a single question was put to Mr. A. E. Seneviratne, the Notary in examination or in cross-examination to find out whether he had complied with Section 31(9) strictly as there was no issue on this matter.

We are satisfied that the Deed No. 262 was correctly used as evidence of title as it had been proved in terms of the Evidence Ordinance and we agree with the District Judge's finding that Deed 262 was in fact executed by Y. L. George de Silva.

In the result we set aside the judgment and decree of the District Court and direct that judgment and decree be entered for the plaintiff-appellant as prayed for with costs.

The appeal is allowed with costs.

L. H. de ALWIS, J. – I agree.

Appeal allowed.