

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

C.A. Appeal No. 1243/96 F  
D.C. Kandy No. 15556/L

Madadeniye Gedara Upananda,  
99, Dingiriyadeniya,  
Kondadeniya,  
Katugastota

**Substituted 1<sup>st</sup> Defendant**  
**Appellant Petitioner**

Vs

Kumarapathi Vithanage  
Dona Chamari Janaki Perera  
103, Gohagoda,  
Konadeniya,  
Katugastota

**Plaintiff Respondent Respondent**

Maldeniye Gedara Sundra,  
99, Gogahagoda, Kondadeniya, Katugastota

**2<sup>nd</sup> Defendant Appellant Respondent**

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Before: A.W.A. SALAM, J.

Counsel: S Rajapakse for the Substituted 1<sup>st</sup> Defendant Appellant Petitioner  
and A A De Silva PC for the Plaintiff Respondent.

Argued on: 14.03.2011

Decided on: 25.04.2011

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A.W.Abdus Salam, J.

[REDACTED] This is an application to set aside an order of abatement of appeal preferred by the 1<sup>st</sup> and 2<sup>nd</sup> defendant appellants. The application has been made by the substituted 1<sup>st</sup> defendant petitioner who has been substituted in the place of the 1st defendant appellant (deceased) for the limited purpose of maintaining the present application.

The facts briefly are that the plaintiff-respondent filed action against the 1st and 2nd defendant-respondents for a declaration of title to the subject matter and their ejection. After a contested trial the learned district judge by judgment dated 21 January 1997 granted relief to the plaintiff-respondent as prayed for in the plaint. Being dissatisfied with the said judgment and decree the 1st defendant-appellant preferred an appeal by petition dated 20 March 1997. After the death of the 1st defendant-appellant no steps had been taken for substitution either by the 2nd defendant-appellant or the heirs of the deceased 1st defendant-appellant despite notices having been issued on several occasions. A perusal of the minutes maintained by this court indicates that notices have been issued on the 2<sup>nd</sup> defendant- appellant and his registered attorney as well requiring them to take steps in relation to the deceased appellant. In addition notices have been issued at the address of the deceased 1st defendant-appellant. As no steps had been taken the appeal preferred against the said judgment has been abated on 30 August 2010.

The petitioner in his petition states that his mother the 1st defendant-appellant passed away on 1<sup>st</sup> November 1998. He admits having received a letter addressed to his mother requiring her to deposit the brief fees but did not take steps presuming that on the demise of the appellant the matter could not be proceeded. He further states in his petition that he got to know through a relative that the appeal can be prosecuted by substituting the heirs of the deceased appellant and thereafter consulted an attorney-at-law in Kandy and obtained further instructions on the matter. Eventually, he had come to Colombo and made inquiries from the Registry of the Court of Appeal to find that the appeal had been abated on 30 August 2010 for

non-prosecution. Subsequently, the petitioner has filed the present application on 25<sup>th</sup> January 2011.

As far as the application of the substituted-1st defendant-appellant-petitioner is concerned there are several difficulties that stand in his way. Firstly, he has been absolutely lethargic in persecuting the appeal of his mother. He has received notice that was addressed to his mother requiring her to deposit brief fees. As a matter of fact M G Somawathie has paid the brief fees amounting to Rs 1425/- as far back as in August 1997 and she has died on 1<sup>st</sup> November 1998. The petitioner or the 2<sup>nd</sup> defendant appellant has failed to take steps for nearly 12 years. The excuse offered by the petitioner for not taking steps is totally unacceptable.

For having not taken steps for nearly 12 years, what made the petitioner to suddenly check the status of the appeal remains a mystery. As has been submitted by the learned President's Counsel, the petitioner having slept over his rights had suddenly made this application when the original court had been informed of the order of abatement. This appears to be quite probable and therefore the excuse offered by the petitioner appears to be merely imaginary. Moreover the ignorance of law pleaded by the petitioner is no excuse to set aside the order of abatement. As the petitioner had failed to prosecute the appeal with due diligence, I see no reason to set aside the order of the abatement. Application of the petitioner to set aside the order of abatement refused.

No costs.

Judge of the Court of Appeal