

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

In the matter of an application for leave  
to appeal

Court of Appeal No: CALA 496/2003

District Court of Colombo No: 19158/L

Lalith Kumarage & another

Defendant-Petitioners

Vs.

Ven Ahungalle Vimalanandatissa Thero  
& another

Plaintiff-Respondents

**Before: Eric Basnayake J**

**Counsel: Kuwera De Zoysa with Asela Rekewa for the Defendant-Petitioners**

**Jayantha Almeida Gunaratne P.C. with Lasitha Chaminda for the Plaintiff-Respondents**

**Written Submissions Tendered On: For the Plaintiff-Respondents: 9.9.2010**

**For the Defendant-Petitioners: 6.2.2008**

**Decided On: 22.8.2011**

**Eric Basnayake J**

By this application the defendant-petitioners (defendants) seeks *inter alia* "an order permitting the defendants to retain counsel and participate in the trial by cross examining the plaintiff's witnesses and

adducing evidence on behalf of the defendants". Leave was granted by this Court on 8.6.2009. Thereafter counsel for both parties invited court to make an order with regard to the appeal on written submissions.

The plaintiff-respondents (plaintiffs) filed this action in the District Court of Colombo on 31.1.2001 to have the defendants evicted and to claim damages. The defendants filed answer on 21.11.2001. Replication was filed on 16.1.2002. The trial commenced on 17.6.2002 with the raising of issues. Eleven issues were raised for the plaintiffs and five for the defendants. The plaintiffs objected to issues 12 & 14 raised for the defendants. The learned Judge after inquiry rejected the two issues. The defendants filed a leave to appeal application in the Court of Appeal (CALA 259/2002) against the order dated 17.6.2002. The Court of Appeal by order dated 31.1.2003 refused leave. This case was called in the District Court on 29.9.2003 on a motion filed for the plaintiffs to have the case fixed for trial. On 29.9.2003 the trial was fixed for 4.12.2003.

On 4.12.2003 when this case was taken up for trial both the defendants were present in court. They were represented by Mr. G.D. Piyasiri, attorney-at-law on the instructions of Vijitha Meegahawatte, attorney-at-law. Mr. Piyasiri tendered to court a revocation and a new proxy of Vijitha Meegahawatte. Mr. Piyasiri moved for a date on the ground that the counsel could not be present in court due to the short notice. He stated that the counsel had already accepted work elsewhere. The new proxy was dated 3.12.2003. The impression given was that the revocation was done just prior to the date of the trial and the defendants had hardly any time to make arrangements to retain lawyers. Hence they had to seek the assistance of Mr. Piyasiri to tender the proxy of Mr. Meegahawatte. Mr. Meegahawatte too was not present in court as he had to be present in another court.

The learned counsel for the plaintiffs objected for a postponement on the ground that this case was last heard on 17.6.2002. The case could not continue as a leave to appeal application was filed in the Court of Appeal. Leave was refused on 31.1.2003 and the defendants had enough time to get ready. The learned Judge accepted the revocation and the new proxy of Mr. Meegahawatte. However a postponement was refused. The learned Judge stated that if the trial date was not suitable for counsel

he had enough time to file a motion and obtain another date as this case was fixed for trial three months ago. As this was not done the learned Judge thought that there was no ground for a postponement and the application for a date was refused. Thereafter the evidence of the power of attorney holder of the plaintiff was taken. At the end of the examination in chief a date was moved for cross examination. The plaintiff objected and a date was refused. Thereafter the plaintiff's case was closed with documents marked P1 to P10. Again a date was moved to call for the defense. This was objected to and the learned Judge refused a date and fixed the case for judgment.

The learned President's Counsel for the plaintiffs had submitted that the refusal to grant an adjournment cannot be regarded as wrongful in as much as the application for same was not reasonable. The learned counsel posed the question whether the attorney showed sufficient cause justifying an adjournment. The learned counsel submitted that the defendants waited until the trial date to move for a date. The explanation that the defendants had taken steps to appoint a new registered attorney and that they wanted to retain a counsel is untenable. The defendants do not even disclose the date the previous registered attorney wished to withdraw from the case. Thus the learned counsel complained that the intention of the defendants was to prolong the proceedings.

Referring to the Court of Appeal case CALA 259/2002 the learned President's Counsel submitted that in the Court of Appeal the defendants made allegations of bias against the learned Judge and prayed for a transfer of the case to another court. The grounds averred are that the learned Judge refused to keep the case down until the arrival of the senior counsel from the Court of Appeal and again the Judge refused to consider a date suitable to counsel when fixing the case for trial. The Court of Appeal rejected the above circumstances as constituting bias.

It must be noted that the defendants never raised the above matters in this case in support of their argument that a postponement was unfairly refused. The new proxy marked A6 bears the date 3.12.2003. The reason to file a new proxy was the refusal of the registered attorney to appear in this case. Reasons for refusal not disclosed in the proceedings.

Everything that occurs in court may not be recorded. Although it does not bourn out from the record the two matters referred to above with regard to the conduct of the Judge are not denied by the respondents. On perusal of the proceedings dated 17.6.2002 it appears that this case commenced in the morning in the absence of the counsel for the defendants. However after the issues were framed for the plaintiff the case was taken up in the afternoon and the issues for the defendants were framed with the participation of the counsel for the defendant. Under those circumstances it would have been an embarrassment for the lawyers to go before the same Judge.

There is no indication with regard to the date or the time the previous registered attorney had intimated the intention to withdraw. It appears that the court had presumed that this intention was intimated on 29.9.2003. Apart from the presumption there is nothing to indicate the date of such intimation. The revocation itself is dated 2.12.2003 and the new proxy is dated 3.12.2003. No one was questioned to ascertain as to when the registered attorney-at-law intimated his intention to withdraw from the case and as to when Mr. Kasturiarachchi was retained. The defendants state in the petition that Mr. G.D.Piyasiri was retained only to get a date. Mr. G.D. Piyasiri's services had to be obtained as the services of the attorney-at-law to whom the new proxy was given could not be obtained. The defendants state that on 4.12.2003 another attorney-at-law was retained as they could not retain a counsel. However they obtained the free dates of the counsel of their choice (namely Mr. Kasturiarachchi).

It appears from the proceedings that Mr. Kasturiarchchi and Mr. Meegahawatte were not present in court on 4.12.2003. The reason for their absence appears to be that they did not have adequate notice of this case and that they had to be present in other courts for the work undertaken previously. No questions were put to either Mr. Piyasiri or the defendants as to why they waited till the date of trial to tender the revocation or the new proxy. The learned Judge thought that the intention to withdraw was intimated to the defendants by the previous registered attorney on 29.9.2003. In that case the defendants had ample time to retain another counsel. If counsel was retained in advance there would have been time to move for a date. The learned Judge assumed that Mr. Kasturiarachchi was retained about 29.9.2003 and therefore had ample time to file a motion and move for a date. As this was not done the Judge thought that there are no reasonable grounds to consider a postponement. However

there is nothing to indicate that the intention to revoke was intimated on 29.9.2003. There is nothing to indicate that Mr. Kasturiarachchi was retained on 29.9.2003.

Now I must examine the powers of courts with regard to postponements. Sections 82 and 143 of the Civil Procedure Code give ample power to court to grant postponements. Section 82 is as follows:-

When any case is in its turn called on for hearing upon the day appointed therefor the court may for sufficient cause to be specified in its written order, direct that the hearing be postponed to a day which shall be fixed in the order, upon such terms as to costs or otherwise as the court shall think fit; Proviso not reproduced

Section 143(1) is as follows:- The court may, if sufficient cause be shown at any stage of the action grant time to the parties or to any of them and may from time to time adjourn the hearing of the action;

Provided however that no adjournment in excess of six weeks may be granted except in exceptional circumstances and for reasons to be recorded.

(2) In all such cases the court shall fix a day for the further hearing of the action and may make such order as it thinks fit with respect to the costs occasioned by the adjournment (emphasis added).

Proviso not reproduced.

An order refusing or granting a postponement is a typical exercise of discretionary power with which the appellate court would be slow to interfere (Fernando vs. Fernando, 55 N.L.R. 119). I am of the view that the interference should be only in an exceptional situation like in the present case. In this case the proxy of the defendant was revoked and a new proxy had to be filed together with the revocation. The defendant had to get these documents tendered to court through another attorney-at-law as the attorney-at-law to whom the proxy was given could not attend court on the trial date to tender these documents. The attorney-at-law Mr. Piyasiri was retained only to tender the revocation and the new proxy and to get a date. Mr. Piyasiri informed court the circumstances that made him tender these documents to court and moved for a date. He had come ready with some free dates of the counsel. Under those circumstances Mr. Piyasiri could not have been ready to conduct the defense and to cross examine the plaintiff. He moved for a date to cross examine the plaintiff. That was refused. Then he

moved for date to call for the defense. The learned Judge having observed that the defense is not ready for the trial on 4.12.2003 refused a date for the defense.

I am of the view that the learned Judge erred in not considering the provisions of sections 82 and 143 of the CPC and not exercising her discretion judicially. The above sections give ample power to award costs. If needed the learned Judge could have even ordered incurred costs. The amount could have been determined by the Judge. When he makes such order he should state his estimate of the incurred costs and the ground on which he bases that estimate (Rajasekeram vs. Rajaratnam 57 N.L.R. 46). I am of the view that the learned Judge should have allowed the application for a postponement and permitted the plaintiff to be cross examined on a later date. The appeal is therefore allowed. In view of the facts of this case I direct the learned District Judge to hear this case de novo. In the circumstances of this case I make no order with regard to costs.

Judge of the Court of Appeal