

**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 420/2003

District Court of Negombo No: 349/Probate

K.V.A.Rodrigo

6th Respondent-Petitioner

Vs.

K.S.C.A. Rodrigo

Petitioner-Respondent & six
others

Before: **Eric Basnayake J**
K.T. Chitrasiri J

Counsel: Ikram Mohamed P.C. with Ransiri Fernando and Mangala Niyarepola for the 6th
Respondent-Petitioner
Kuvera de Zoysa ~~for the~~ with Shabry Haleandeen for the Petitioner-Respondent

Argued on: 19.10.2010

Written submissions tendered on: For the Petitioner-Respondent: 25.3.2010
For the 6th Respondent-Petitioner: 18.1.2010

Decided on: 8.6.2011

Eric Basnayake J

The 6th respondent-petitioner (6th respondent) filed this application inter alia to have the order dated 21.10.2003 of the learned District Judge of Negombo marked E-5 set aside. By this order the court had rejected the objections filed by the 6th respondent. The court had also decided that the last will No. 7985 of 11.2.1991 has been proved and appointed the petitioner-respondent (petitioner) as the administrator of the estate of the deceased. Leave to appeal was granted by this court on 27.1.2004.

The deceased in this case died on 24.7.2002 leaving last will No. 7985 attested by L.P.E. Karunaratne Notary Public on 11.2.1991. The 6th respondent was appointed the executor. The petitioner filed this petition on 27.5.2003 with a copy of the last will attached praying for letters of administration in respect of the estate of the deceased. The deceased was the mother of the petitioner and 5th, 6th and 7th respondents and the mother-in law of the 1st respondent and grandmother of 2nd 3rd and 4th respondents. At the time of filing this case the petitioner moved court to have the 6th respondent noticed to produce the last will in whose custody it was kept. Thus a notice was issued on the 6th respondent requiring him to produce the will and to file objections if any by 7.10.2003. The petitioner also obtained an order to have the necessary paper publications.

When this case was called on 7.10.2003 the 6th respondent appeared in court and moved for time to file objections. The petitioner objected. Hence the case was postponed for the following day, namely, 8.10.2003. On 8.10.2003 the 6th respondent tendered his objections. The petitioner objected to the acceptance of these objections.

The objections should have been filed by 23.9.2003 as per the advertisement. However no objections had been filed. The learned Judge held that he has no power to extend that time. However the 6th respondent was given another date by the notice issued by court namely, 7.10.2003 to file objections. As the 6th respondent failed to file objections on the 7th, the court had refused to accept the objections tendered on 8.10.2003. Considering that the 6th respondent failed to deposit the will in court as required by law the learned Judge found the 6th respondent not suitable to be appointed as executor. Since there were no other objections, the court had appointed the petitioner as the administrator.

The learned counsel for the 6th respondent submitted that the learned District Judge had erred in law in holding that the court has no jurisdiction to grant an extension of time. The learned counsel submitted that the learned Judge had erred in law in holding that the 6th respondent is not entitled to probate and determining that the petitioner is entitled to letters of administration without holding an inquiry.

Section 529 (3) of the Civil Procedure Code require objections to be filed before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication. The section is as follows:-

529 (3): The notice published under sub section (2), shall call upon persons having objections to the making of an order declaring any will proved, or the grant of probate or letters of administration with or without the will annexed, or the issue of certificate of heirship to any person to whom the notice relates, to submit their written objections, if any, supported by affidavit, before such date as is specified in the notice, being a date not earlier than sixty days and not later than sixty seven days from the date of the first publication referred to in subsection (2) (emphasis added).

Sub section (4) not reproduced.

The learned counsel for the 6th respondent submits that sections 91A (1) & (2) make provision for court to enlarge time.

Section 91A (1) is as follows:-

Where a day is fixed or time appointed for doing any act or taking any proceeding by a party to the action, the court may, from time to time, upon the motions of such party and if sufficient cause is shown, fix another day or enlarge or abridge the time appointed, upon such terms, if any, as to it may seem proper.

Section 91A (2) is as follows:-

That the day may be re fixed or the time enlarged although the application for the same is not made until after the expiration of the day or time fixed or appointed

The learned counsel for the petitioner submitted that the 6th respondent's objections should be dismissed for the reason that the 6th respondent has not come to court with clean hands. The last will was in the custody of the 6th respondent which he failed to deposit in court for more than a year and three months. The objections were not filed on

7.10.2003. The learned counsel submitted that the 6th respondent should not be allowed to take advantage of his own wrongdoing.

The question in this case is whether the period stipulated by section 529 (2) is mandatory. According to the time frame the objections should have been filed by 23.9.2003. However the 6th respondent was given time to file objections till 7.10.2003 by court. This was by a separate notice. The 6th respondent appeared in court on the 7th and moved for time to file objections. Without giving time the court postponed the case till the following day. On the following day, namely, on the 8th the respondent was ready with the objections and the same was tendered to court. The learned Judge refused to accept the objections as the objections were not filed on the 7th itself.

I am of the view that section 91A (1) & (2) empower court to grant extensions. To that extent I am of the view that the learned Judge had erred by not granting an extension on the footing that he has no power to do it. It may be that the 6th respondent has not come to court with clean hands. The court can go in to that at a proper inquiry. It is very important that the court appoint the right person to administer the estate of the deceased. For the above reasons I set aside the order of the Judge refusing to accept the objections and direct the learned Judge to accept the objections and hold an inquiry and determine who should be appointed to administer the estate of the deceased. The appeal is allowed without costs.

Judge of the Court of Appeal

K.T. Chitrasiri J

I agree

Judge of the Court of Appeal