

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

C.A.No.80/97 (F)

D.C.Kulutara No.4370/P.

Hettige Dona Maggie Nona
Jorsy Goda,
Maha Iduruwa,
Iduruwa.

2nd Defendent Appellant

Vs.

Hettige Dona Punchi Nona
Iddagoda,
Mathugama.

Complainant Respondents

C.A.No.80/97 (F)**D.C.Kulutara No.4370/P.**

Before : K.T.Chitrasiri,J.

Counsel : 2nd Defendant-Appellant is absent and unrepresented.

Lahiru Abeysekare for the 6th , 11th, 12th and 18th Defendant-Respondents.

Argued and Decided on : 01.03.2013.

K.T.Chitrasiri J.

When this matter was mentioned on the 10th February 2011, it was brought to the notice of Court that the 2nd defendant-appellant namely Hettige Dona Maginona is dead. The 6th, 11th, 12th and 18th defendant-respondents who are present today also inform Court that the 2nd defendant-appellant died 5 years before, leaving her 3 children. Those heirs of the appellant had not taken steps to have them substituted in the room of the deceased 2nd defendant-appellant for the purpose of proceedings with this appeal. Such inaction of the heirs of the 2nd defendant-appellant shows that they are not interested in prosecuting this appeal.

When the appellant is dead and no steps are being taken to substitute the heirs of the deceased-appellant, the appeal cannot be proceeded with. Accordingly, this Court makes an order abating the appeal. Appeal is abated and therefore the proceedings in this Court are terminated.

At this stage, it must be noted that the order that is to be challenged by this Court does not fall within the category of a "Judgment" in order to file a final appeal. The order that is being canvassed in this appeal is the order dated 28/1/1997 that was made pursuant to the application made by the petition dated 09/7/1996 (Page 142 of the brief). The said order is clearly not a judgment. Therefore the 2nd defendant-appellant should have first obtained leave of this Court for her to proceed with this appeal. On that ground too the appeal cannot be sustained.

The Registrar of this Court is directed to keep the original record in this Court for a period of two months and thereafter to send the same back to the District of Kalutara for necessary action according to law.

Learned Counsel for the Respondent at this stage submits that the learned District Judge is yet to deliver the judgment in this case

though the trial Judge has already concluded the trial . On a perusal of the record, it is seen that due to several interim applications made, pending the delivery of the judgment, learned District Judge was prevented from delivering the same. Therefore, the present District Judge is free to adopt the evidence that has already been recorded, if the parties so wish, and to deliver the judgment thereafter.

Accordingly, appeal is abated and the proceedings in this Court are terminated.

Proceedings terminated.

JUDGE OF THE COURT OF APPEAL

WC/