

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

**SRI LANKA**

**C.A. No. TR. 295/2014**

D.C. Maho. No. 4618/P

In a matter of an application for Transfer of Case No. DC Maho 4618/P in the District Court of Maho under Article 138(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 46 of the Judicature Act No. 2 of 1978.

Joe Franko Fransisko,

No. 11, Madurugama, Maho.

**Plaintiff – Petitioner**

**-Vs-**

1. Wijekoon Mudiyansele Kapurubanda  
(Deceased),

In front of Udugama Kowila,

Nagollagama Road, Maho.

2. Wannu Atapattu Mudiyansele  
Kumarapala (Deceased),

Nelumpathwewa, Maho.

3. Pannipitiye Gemithi Ralalage Malini  
Dayaratna Manike,

In front of Udugama Kowila,

Nagollagama Road, Maho.

4. C.M. Balalla,

Wewa Rauma, Kurunegala.

5. M.B. Podimanika.
6. M.B. Ranbanda.
7. W.R.M. Ameresekara.
8. Amerasinghe Arachchige Sirinelis Appuhamy.
9. W.A. Heenmenika.  
All of Court Road, Maho.  
And 8 others

**Defendants – Respondents**

- 1A.Pannipitiye Gemithi Ralalage Malini Dayaratne Manike.
- 2A. I.I.A. Disna Priyanjani.
- 11A.Ratnayakalage Nandawathie,  
Rest House Road, Maho.
- 17A.Lokuyakdehige Karunadasa,  
Court Road, Maho.
- 17B.Lokuyakdehige Sanath,  
Court Road, Maho.

**Substituted – Defendant – Respondents**

**BEFORE** : **Vijith K.Malalgoda PC J ( P/CA) & A.H.M.D. Nawaz, J.**

**COUNSEL** : **Lakshman Amarasinghe with Ms. K.K. Farooq for the Petitioner.**

**Argued on** ; 20.01.2015

**WRITTEN** : 26. 01.2015  
**SUBMISSIONS**

**Decided on** : 05.06. 2015

**A.H.M.D. NAWAZ, J.**

The plaintiff-petitioner (hereinafter referred to as the petitioner) has preferred this application seeking an order under section 46 of the Judicature Act No 2 of 1978 for the transfer of the partition action pending in the District Court of Maho (DC Maho No 4618/P) to the District Court of Colombo or Kurunegala or any other District Court. It is to be observed at the very outset that the Defendants-Respondents (hereinafter referred to as the Respondents) have continued to be absent and unrepresented notwithstanding the fact that notices have been issued on them a number of times.

This partition litigation as could be gathered from the petition and affidavit read together with the relevant records filed before this Court displays the long trajectory of the case. The litigation began on a plaint dated 27<sup>th</sup> November 1997 for the purpose of partitioning the land described in the schedule to the plaint. Upon the Respondents settling their statements of claims, the Learned District Judge of Maho had made a request of the Judicial Service Commission to assign another judge to hear the case as he did not wish to proceed with the adjudication of the litigation on personal grounds. A certified copy of such request made by the District Judge has been produced before us as P2 wherein the personal grounds are expatiated more fully in that the District Judge who sought a recusal stated that both 4<sup>th</sup> Defendant-Respondent and Counsel who was watching the interests of the 4<sup>th</sup> Defendant-Respondent were all practicing Attorneys-at-Law in the District Court of Maho. In

fact the journal entry dated 2<sup>nd</sup> August 2004 which has been annexed to the petition and affidavit as P2A confirms that the learned District Judge of Maho had directed the Registrar to transmit a reminder to the Judicial Service Commission on his request for recusal.

Be that as it may, the trial had proceeded in the District Court of Maho and upon its conclusion, the Additional District Judge of Maho delivered the judgment dated 25<sup>th</sup> February 2008 dismissing the action of the petitioner.

The aggrieved Petitioner exercised his right of appeal in the North Western Provincial High Court holden in Kurunegala which allowed the appeal of the petitioner setting aside the judgment of the District Court.

The 1<sup>st</sup> A and 3<sup>rd</sup> Defendant-Respondents who were aggrieved by the Judgment of the Civil Appellate Court preferred their Leave to appeal against that judgment to the Supreme Court but the focus in the Supreme Court had been the complaint made by the original 6<sup>th</sup> Defendant who sought to intervene in the leave to appeal application. In an intervention petition he complained to the Supreme Court that his rights had been prejudiced in the litigation as he was not afforded an opportunity to put forward his claims upon an erroneous statement made by a learned counsel to the District Court on 6.03.2006 namely he had passed away when he was in fact alive as large as life. His grievance before the Supreme Court was that on the same day as that erroneous information was given, the 16<sup>th</sup> Defendant-Respondent had been substituted in his room and the substitute had no relationship whatsoever to him. Having investigated the veracity of this complaint the Supreme Court held by its judgment dated 25<sup>th</sup> March 2014 that the 6<sup>th</sup> Defendant (the intervenient petitioner) before the Supreme Court) had been deprived of a hearing in both the District Court and the appellate proceedings in the Civil Appellate Court. Accordingly the Supreme Court set aside the judgments of both the Civil Appellate Court as well as the District Court remitting the case to the District Court of Maho for a Trial de novo but subject to the points of contest that have already been raised at the trial.

So much for the history of this case which shows how an alleged death of a defendant as erroneously represented to the District Court when he was very much alive led to an abortive trial in the end.

The application before us as averred in the petition and affidavit raises another aspect of due process. The petitioner pleads before this Court that no attorney-at-law is willing to represent him at the trial de novo in the District Court of Maho as the 4<sup>th</sup> Defendant in the case is a practising Attorney-at-Law in that Court and the subject matter of the partition action is also alleged to be in close proximity to the law offices.

The petitioner avers that since the receipt by him of a notice from the District Court of Maho to appear on the 13<sup>th</sup> July 2014 for the trial de novo he has made his best efforts to retain an Attorney-at-Law to appear for him but all his attempts have proved futile as almost all the Attorneys-at-Law practising in Maho have refused to appear for the Petitioner.

The Petitioner also states that the Attorney-at-law who represented him in the abortive trial has already passed away and these causes have had the effect of hampering him from prosecuting his case in the District Court of Maho.

It is pertinent to observe that none of these statements of fact have been contradicted or denied by any of the Respondents though they were noticed to appear by this court on a number of occasions and we hold that statements of fact that remain uncontradicted and unimpugned are relevant matters that a Court may take into account in the assessment of evidence before it to arrive at the conclusions required by law. It is not altogether irrelevant to recall the jurisprudence laid down by H.N.G.Fernando CJ in the context of an election petition in ***Edrick de Silva v Chandradasa de Silva*** 70 NLR 169 at 179 that if a respondent does not contradict evidence led by the petitioner it is an additional matter before Court. This Court would adopt the pertinent observation to be applicable to the uncontradicted statements of fact averred by the Petitioner as to his inability to prosecute the conduct of his case in the District Court of Maho.

In the circumstances this Court is disinclined to disbelieve the truth of the causes of disability alleged by the Petitioner contained in his the petition and affidavit and we would observe that it is a cardinal principle of law that a litigant who seeks to vindicate his rights or defend himself in an action or proceedings, whether it be criminal or civil in nature, must enjoy the unfettered right to legal representation and such right cannot be interfered with or derogated from.

This Court has on an earlier occasion echoed a similar principle in the case of ***Ratnayake Manike v. Dayananda and Others*** 2003 Sri.LR 57 where the petitioner faced an identical predicament in retaining a lawyer from the Kuliypitiya Bar because of the fact that one of the defendants was a practitioner at the same bar

Identically as in this case the Respondent in that case had not placed any material to contradict the averments in the petition and affidavit of the Petitioner. The Court of Appeal had no hesitation in transferring that case from the District Court of Kuliypitiya to the District Court of Marawila.

***In Sivasubramaniam v. Sivasubramaniam*** 1980 (2) Sri. LR 58 the Petitioner sought to make an application under Section 46 of the Judicature Act which came into force only after the application was made. Hence, by consent of parties the Court heard the application as one made under Section 10 of the Civil Procedure Code. In the case the petitioner agitated the same ground for transfer as in this case but the distinguishing feature of that case was that unlike in the instant case before us and ***Ratnayake Manike v. Dayananda and Others*** (supra), the affidavit of the petitioner had been contradicted by the lawyers whom she alleged were prevented by the Respondents from appearing for her. Hence the non transfer of the DC action was the consequence in that case.

Section 46 (1) of the Judicature Act No 2 of 1978 that regulates the transfer of a case or proceedings lays down the following.

*Wherever it appears to the Court of Appeal*

*a) that a fair and impartial trial cannot be had in any particular court or place; or*

b) *that some questions of law of unusual difficulties are likely to arise; or*

c) *that a view of the place in or near which any offence is alleged to have been committed may be required for the satisfactory inquiry into or trial of the same; or*

d) *that it is so expedient on any other ground.*

*the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any other court and accordingly in every such case, the court in which any such action, prosecution, proceeding or matter is so transferred shall, notwithstanding anything to the contrary in this or any other law, take cognizance of and have the power and jurisdiction to hear, try and determine such action, , prosecution, proceeding or matter as fully and effectually to all intents and purposes as if such court had an original power and jurisdiction.*

We prefer to anchor the ground of transfer of the instant case before us more particularly on “*expedience*” as stipulated by section 46 (1) (d) of the Judicature Act No 2 of 1978 and in ***Majeed v New Eastern Bus Company Ltd*** (2006) 2 Sri.LR 35 the Court of Appeal observed that the word “*expedient*” in the context of section 46 (1) (d) of the Judicature Act No 2 of 1978 would mean “*advisable in the interests of justice.*”

I would add that the word “*expedient*” would also connote a judgment that the Court of Appeal would reach in the end that it would be “*beneficial not only for the petitioner but also for all litigants in the trial or proceedings to order a transfer*”. I further hold that the use of the word “*expedient*” in section 46 (1) (d) of the Judicature Act No 2 of 1978 which provides that the transfer must be permitted by the Court of Appeal if it appears to be expedient to do so should be interpreted to warrant a transfer only if there are “*reasonable grounds*” for ordering such a

transfer. We hold that such reasonable grounds have been made out in this application.

In our view justice for both parties would best be served by ordering a transfer of this case from the District Court of Maho to the District Court of Kurunegala which is not too distant as far as the parties are concerned.

Accordingly we order the transfer of D.C. Maho case No 4618/P to the District Court of Kurunegala.

JUDGE OF THE COURT OF APPEAL

**Vijith K. Malalgoda. PC J (P/CA)**

I agree

PRESIDENT OF THE COURT OF APPEAL

*Application allowed/ Case Transferred.*