

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

C.A.No.1003/97(F)

K.B. Yapa

D.C.Nuwara Eliya No. 265/L

"Jayairi" Nildndahinna

Defendant-Appellant

Vs

K.M. Chandrawathie

Wewakele, Udamadura

Plaintiff-Respondent

BEFORE : Deepali Wijesundera J,

M. M. A. Gaffoor,

COUNSEL: Athula Perera with Chaturanie de Silva for the Defendant Appellant

Respondent is absent and unrepresented

ARGUED ON: 16.11.2015

DECIDED ON: 06.05.2016

Gaffoor J.,

The Plaintiff has filed this case against the Defendant for a declaration of title, ejection of the Defendant and for damages. Upon summons being served on the Defendant, he filed proxy on 15.01.1993 and moved for time to

file Answer. On 16.11.1993, which was the final date granted for the Defendant's answer he was not ready with the answer, and the learned District Judge fixed the case for ex-parte trial.

On 22.3.1994, the ex-parte trial was taken. After the Plaintiff's evidence was recorded, the learned District Judge had entered the judgment in favour of the Plaintiff as prayed for in the Plea and Decree was entered and a copy of the decree had been served on the Defendant on 14.5.1994 which happened to be a Saturday.

On 01.06.1994, the Defendant in terms of Section 86(2) of the Civil Procedure Code tendered his petition and affidavit to purge his default and to vacate the ex-parte decree entered in the case. The matter was fixed for inquiry and the learned District Judge dismissed the Defendant's application to set the ex-parte decree..

The Defendant has appealed against this order to this Court.

It is common ground that the decree was served on the Defendant on 14.05.1994 and the Defendant filed his Petition and Affidavit to purge default on 01.06.1994. Section 86(2) of the Civil Procedure Code requires that the Defendant, within 14 days of the service of the decree entered against him for

default, with notice to the Plaintiff to make his application to vacate the Judgment and Decree entered against him. This is a mandatory requirement. The question before this court is whether the Defendant has complied with this requirement.

The Counsel for the Defendant Appellant has referred to the Fuel Conservation Five Day Week Act No.11 of 1978 and the case of Dharmadasa and others vs Kumarasinghe - 1981(2) Sri Lanka Law Reports 113, in support of his contention that Saturday is not a working day and therefore, serving of the decree on the Defendant on a Saturday (14.05.1994) is not a valid service. I do not agree with the contention, because service of summons, notice or decree cannot be done only on public holidays but can be done on a Saturday.

In the case of Mohideen Natchiya vs Ismail Marikar, 1982(2) Sri Lanka Law Reports 714, the Supreme Court held that "In computing 14 days in terms of Section 756(4) of the Civil Procedure Code, Saturdays should be counted." It was further held that , in the case of Dharmadasa vs Kumarasinghe, (referred to by the Defendant's counsel above) was not correctly decided and should not be followed. Therefore service of the decree on a Saturday can be counted as good service.

Section 2 of the Holidays Act No. 29 of 1971 declares that *“every full moon poya day and every Sunday (a) shall be a public holiday and (b) shall be a Bank holiday. In this Act the first and second schedule contains what are the public holidays and Bank holidays. Accordingly, Saturday is not a public holiday. I therefore reject the contention of the defence counsel .”*

Section 8(3) of the Interpretation Ordinance states :

“where a limited time not exceeding six days from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act as the taking of any proceedings in a court or office, every intervening Sunday and public holiday shall be excluded from the computation of such time.”

According to this provision only Sundays and public holidays should be excluded from computing 14 days. A copy of the calendar for the year 1994 is filed by the defence which shows in the month of May 1994, 15th, 22nd and 29th are Sundays and 24th and 25th are vesak poya day and the day following vesak poya day. These five days should be excluded from the 14 days. From 14th May 1994 to 1st of June 1994,, there are 19 days, including Sundays and poya day. When the intervening 5 (Sundays and public holidays) holidays as stated above

are excluded from the 19 days, the remaining days are 14 and if the Petition and Affidavit is filed on the 1st June, 1994, the Defendant's application is within time.

In considering whether the application to purge the default has been filed within 14 days time limit, the Court has to take into consideration of Section 8(3) of the Interpretation Ordinance and the provisions of the Holidays Act. According to those laws, only Sundays and Public Holidays are excluded in computing the 14 days time limit.

Section 757(1) of the Civil Procedure Code provides that in the case of an application to Leave to Appeal, such application must be filed within 14 days and in computing the 14 days, the date of the order and the date of the presentation of the application for leave to appeal are also excluded. This provision is applicable to the application to purge the default under Section 86(2) of the Civil Procedure Code. If that be so, the date when the application filed, i.e. 1st June 1994 must also be excluded. Hence, it is clear that the Defendant has filed the application on the 13th day, which is well within the 14 days time limit.

In the circumstances, I set aside the Order of the learned District Judge rejecting the Defendant's application and the ex-parte judgment entered and direct the court to allow the Defendant to file Answer.

I make no order as to costs.

JUDGE OF THE COURT OF APPEAL

Wijesundera J.,

I agree.

JUDGE OF THE COURT OF APPEAL