

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

1. Panapitiyage Chandrapala,  
Kanduboda South, Delgoda(**Deceased**)

1A. Panapitiyage Don Vijitha Kumara,  
No. 12, Kanduboda, Delgoda.

2. Heiyanthuduwage John Perera,  
No. 400, Heiyanthuduwa. (**Deceased**)

2A. Heiyanthuduwage Sirisena Perera,  
No. 400, Heiyanthuduwa.

**CA/APPEAL No.852/98F**  
**D.C. Gamapaha No. 30634/P**

3. Panapitiyage Don Jakolis Jayarathne,  
**(Deceased)**

3A. Vithange Hamynona,  
Kanduboda, Delgoda. (**Deceased**)

3B. Kamal Purage Sumanapala

3C. Panapitiyage Dona Sarojini,  
Both of No. 572/3, Walgama, Malwana.

*Substituted 1A, 2A, 3B and 3C Defendant-Appellants*

**Vs,**

1. Panapitiyage Don Babu Singho,  
Kanduboda, Delgoda. **(Deceased)**

1A. P.D. Anura, 34A Wewa Road,  
Kanduboda South, Delgoda.

***Substituted 1A Plaintiff-Respondent***

3. Ranpathi Pathirage Podihamine Perera,  
No.782, Waduwegama, Malwana.

24. Vithanage Chandrapala,  
Kanduboda South, Delgoda .

25. Rathnayaka Appuhamilage Karunawathy,  
Kanduboda South, Delgoda. **(Deceased)**

25A. Vithanage Sanjeeva Jayasanka,  
Kanduboda South, Delgoda.

**And 22 others**

***4<sup>th</sup> to 26<sup>th</sup> Defendant-Respondents***

**And now between in the matter of an Appeal to  
the Court of Appeal**

1. Panapitiyage Chandrapala,  
Kanduboda South, Delgoda. **(Deceased)**

1A. Panapitiyage Don Vijitha Kumara,  
No.12, Kanduboda, Delgoda.

2. Heiyanthuduwage John Perera,  
No. 400, Heiyanthuduwa. **(Deceased)**

2A. Heiyanthuduwage Sirisena Perera,  
No. 400, Heiyanthuduwa.

***Substituted 1A and 2A Defendant-Appellant-Petitioners***

3B. Kamal Purage Sumanapala

3C. Panapitiyage Dona Sarojini,  
Both of No. 572/3, Walgama, Malwana.

***Substituted 3B and 3C Defendant-Appellant-Petitioners***

**Vs,**

1. Panapitiyage Don Babu Singho,  
Kanduboda, Delgoda. **(Deceased)**

1A. P.D. Anura, 34A Wewa Road,  
Kanduboda South, Delgoda.

***Substituted 1A Plaintiff-Respondent-Respondent***

1. Ranpathi Pathrage Podihamine Perera,  
No.782, Waduwegama, Malwana.

24. Vithanage Chandrapala,  
Kanduboda South, Delgoda .

25A. Vithanage Sanjeewa Jayasanka,  
Kanduboda South, Delgoda.

**And 22 others**

*4<sup>th</sup> to 26<sup>th</sup> Defendant-Respondent-Respondents*

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

**Counsel:** C. Witharana for the 1A, 2A, 3B and 3C Defendant-Appellant-Petitioner  
Harsha Zoysa PC with Upendra Walgampaya for the 24<sup>th</sup>, 25A Defendant-Respondents  
Sandamal Rajapakshe for the Substituted plaintiff-Respondent

Written Submissions on: 10.03.2016

**Judgment on: 15.07.2016**

## **Order**

**Vijith K. Malalgoda PC J**

1A, 2A, 3B and 3C Defendant-Appellant-Petitioners (here in after referred to as Appellant-Petitioners) have come before this court by the present appeal seeking an order to vacate the order dated 04.09.2013 made by this court abating the appeal bearing No. 852/98F.

As observed by this court there were two separate appeals pending before this court bearing Nos. 852/98F and 852A/98/F. The present appeal was pending before this court since November 1987.

Since some of the parties to this appeal were dead, Appellant-Petitioners were directed to substitute them and since then the matter had gone down for years for substitution. When this matter was mentioned before this court finally on 30.05.2013 this court had observed as follows;

“When this matter was mentioned on the last occasion appeared to be a son of the 1<sup>st</sup> Plaintiff-Appellant was present in court.

He has under taken to file papers to have them substituted in place of the deceased 1<sup>st</sup> Plaintiff-Appellant. He is not present in court today. No papers have been filed so far to substitute the heirs of the Deceased 1<sup>st</sup> Plaintiff-Appellant. It is brought to the notice of court that the 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 9<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup> and 21<sup>st</sup> Defendant-Respondents are dead. This matter had been mentioned in this court since 2011 Appellants have not taken steps to substitute the heirs of the Deceased parties since then. However they are given one more date to file papers in order to substitute the heirs of the deceased parties, substitution papers are to be filed two weeks before the next date. Mention on 04.09.2013.”

Since the Plaintiff-Appellant (Appellant-Petitioners to present application before this court) have failed to substitute the parties as directed by this court, the court made order abating the appeal on 04.09.2013. It is also important to note that the said order was made inter parte. After the said order was made in September 2013 until February 2015, Plaintiff-Appellant had failed to take any steps to vacate the order made by this court on 04.09.2013.

I further observe that there was a journal entry dated 19.09.2014, taking steps to send the case record back to the District Court Gampaha since the Plaintiff-Appellant had failed to take appropriate steps to vacate the said order.

Even though there is no specific time period given for a party to come before this court to vacate an order made by this court, abating the proceedings and to get the matter re-listed, the aggrieved party should come before this court within a reasonable time. Supreme Court has taken this view with regard to the validity of an appeal which had been filed in the absence of statutory fixed time limits as follows,

In the case of *Mahaweli Authority of Sri Lanka V. United Agency Construction (Pvt) Ltd 2002 (1) Sri LR 8* the Supreme Court held, that “In the absence of any provision prescribing the time for an

application for leave to appeal under section 37 (2) or any rule made by the Supreme Court under section 43 of the Act, the Petitioner should make his application within reasonable period; and 55 days from the order of the High Court cannot, in all circumstances, be considered to be a reasonable period.

In the case of *George Stuart & Co. Ltd V. Lankem Tea and Rubber Plantations Ltd 2004 (1) Sri LR 246* the Supreme Court whilst confirming the above decision concluded that, an application made 108 days after the order of the High Court is unreasonable.

Whilst relying on the decision in *Nagappan V. Lankabarana Estate Ltd 75 NLR 488* where the Court of Appeal had held, that the Plaintiff is entitled to obtain an order setting aside the order of abatement on satisfying the condition, (as set out in section 403 of the Civil Procedure Code)

- a) That his application is made within a reasonable time
- b) That he was prevented by sufficient cause from continuing the action,

the Learned Counsel for the Appellant-Petitioners submitted that due to the death of several parties to the District Court Case, the Appellant –Petitioners could not file the substitution papers to substitute all the parties during the limited time granted to him by this court but steps have been taken to substitute some of the Deceased parties.

I cannot agree with the above submission made by the Appellant-Petitioners, as the record before me explains the number of dates obtained by the Appellant–Petitioners for more than two years to substitute the said parties.

When this court, on 04.09.2013 made order abating the appeal, Appellant-Petitioners had taken 18 months to file the present relisting application before this court, which cannot be considered as a “reasonable time” in the absence of any explanation is given to explain the delay.

I further observe that the Appellant-Petitioners had failed to inform this court the present position of the other appeal CA 852A/98F. It is brought to our notice by the 25A Defendant-Respondent-Respondent that the relisting application filed by 1A and 2<sup>nd</sup> Plaintiffs against the identical order of

abatement made by this court, was rejected by order dated 20.02.2015. Even though there was reference to the appeal CA 852A/98F in the pleadings before this court the Appellant –Petitioners have suppressed the said fact from this court.

When considering the material discussed above, this court is of the view that the Appellant–Petitioners,

- a) Have failed to prosecute the appeal before this court with due diligence, by failing to make the necessary substitution for nearly 2 years
- b) Have failed to explain the delay in coming before this court to vacate the order of abatement made by this court on 04.09.2013 for nearly 18 months

and therefore dismiss the present appeal for relisting with cost fixed at Rs. 10.000/-

**PRESIDENT OF THE COURT OF APPEAL**