

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

In the matter of an appeal under and in terms  
Article 154(g)(6) and 136 of the Constitution of  
the Democratic Socialist Republic of Sri Lanka.

Damme Arachchilage Ubayasena  
Welgampola watta, Weragama,  
Udaniriella.

**Petitioner**

CA (PHC) No.111/2006  
HCR(RA)26/2003  
MC Rathnapura 14575

Vs.

1. Pinwatththa Wedaralalage Wimalasekara  
Weragama,  
Udaniriella.

2. M.U.Nissa  
Paragahahena  
Udaniriella.

**Respondents**

1. Pinwatththa Wedaralalage Wimalasekara  
Weragama,  
Udaniriella.

**1<sup>st</sup> Respondent-Petitioner**

Vs.

1. Damme Arachchilage Ubayasena  
Welgampola watta, Weragama,  
Udaniriella.

**Petitioner-Respondent**

2. M.U.Nissa  
Paragahahena  
Udaniriella

**2<sup>nd</sup> Respondent-Respondent**

And Between

1. Pinwatththa Wedaralalage Wimalasekara  
Weragama,  
Udaniriella.

**1<sup>st</sup> Respondent-petitioner-Appellant**

Vs.

Damme Arachchilage Ubayasena  
Welgampola watta, Weragama,  
Udaniriella.

**Petitioner-Respondent-Respondent**

2. M.U.Nissa  
Paragahahena  
Udaniriella.

**2<sup>nd</sup> Respondent-Respondent-Respondent**

1. Vijitha Malanie  
Paragahahena  
Udaniriella.  
2. Sumitha Kusumlatha  
Paragahahena  
Udaniriella.

**Respondents**

Before : **H.C.J. Madawala , J**  
&  
**L.T.B. Dehideniya, J**

Counsel : Dr. Sunil Cooray with Buddika Gamage for the Appellant  
Prabash Semasinghe for the Respondent

Written Submissions on : 15/ 07 /2016

Decided on : 26 / 09 /2016

### **H. C. J. Madawala , J**

The 1<sup>st</sup> party Petitioner Appellant preferred this appeal from the High Court of Rathnapura in HCR/ RA / 26/2003 to set aside the Learned Additional Magistrate's order 6/1/2003 and 22/4/2003. The 1<sup>st</sup> Respondent Petitioner Appellant Pinnawatta Wedaralalage Wimalasekara made an application for substitution for the deceased 2<sup>nd</sup> Respondent Respondent Respondent M.U.Nissa who had died on 15/3/2007 intestate leaving as his heirs the 1<sup>st</sup> and 2<sup>nd</sup> Respondents who are his children. He moved Court that in order to expeditiously dispose this appeal, that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents namely, Vijitha Malanie and Sumitha Kusumalatha be substituted in room of the deceased 2<sup>nd</sup> Respondent Respondent Respondent and be named as 2A and 2B Respondent Respondent Respondent.

The Petitioner Respondent Respondent objecting to this application submitted that the deceased died on 15/3/2007 and never being part of the cases in appeal except the 1<sup>st</sup> revision matter RA 92/95 which was decided in 1998 and now the Respondent attempt to substitute the deceased in the Court of Appeal. The order dated 6/1/2003 was morefully on the refusal to send further notice in the event of decease's default in appearance upon the fiscal notice.

Section 66(8) (b) of the Civil Procedure Code read as follows,

*“Where a party fails to appear or having appeared fails to file his affidavit and also his documents (if any) he shall be deemed to be in default and not be entitled to participate at the inquiry but the court shall consider such material as is before it respecting the claims of such party in making its determination and order.”*

It was contended that the deceased who at the time among the living, did not attend court upon several notices and finally even upon the fiscal notice, he was in default and has no right to participate thereafter. However that is the very order dated 6/1/2003 challenged by the appellant including the refusal to notice the deceased who among the living at that time *inter alia*. It was submitted that till his claimed death in 2007 the deceased has not taken any step against the said order against him dated 6/1/2003. The Appellant when he filed a revision in High Court (No 26/2003) and in appeal in this court made the deceased a party. However the Appellant wanted the deceased to be substituted, and it was contended that if the substitution take place it will make the order on 6/1/2003 in effective and by doing so they bypass the said order which refused to further notice the deceased. Further as the Appellant claimed there was no delay in executing the Primary Court order.

- a) There were three attempts of executing the order as shown in the paragraph 12 of the petition.
- b) All the attempts were blocked by the Appellant in illegal and violent manner disregarding the court and the officers of the court.

- c) If there is any delay, that was severely contributed by the destroying of the original court record by the fire erupted in the court premises and the time spend on the subsequent reconstruction of the case.
- d) In any event Appellant filed a series of appeals and revisions which the main Sec 66 matter finally decided by the Supreme Court in 2010 in Respondent's favour.

Accordingly it was submitted that the 1<sup>st</sup> Respondent is essentially deprived enjoying the rights safeguarded by the courts and entangle in an unnecessary and malicious filing of appeals and the Appellant unfairly misusing the system of administration of justice for his illegal gains while still unlawfully staying in the Respondents property breaching the peace and engaging suspected unlawful gem mining. Accordingly the Petitioner Respondent Respondent moved the court that the application of the Appellant may be dismissed subject to a heavy cost.

On consideration of the material before this court we find that the cause of action of the property in dispute does not survive and although the Primary Court Judge initially satisfied himself that there was a threat or likelihood of breach of peace and delivered his order. We find that the Appellant has filed appeals and revisions application where the main Section 66 matter finally decided in his favour.

Part VII of the Primary Court procedure Act is silent on substitution of persons on the death of parties. Section 78 permits to adopt the relevant procedure stipulated in the Civil Procedure Code in a like matter where the Primary Court Procedure Act has not provided for. The Section reads thus;

*If any matter should arise for which no provision is made in this Act, the provisions In the Code of Criminal Procedure Act governing a like matter*

*where the case or proceedings is a criminal prosecution or proceeding and the provisions of the Civil Procedure Code governing a like matter where the case is a civil action or proceedings shall with such suitable adaptations as the justice of the case may require be adopted and applied.*

Inquiry under part VII of the Primary Court Procedure Act is not a civil action but it is generally accepted that whenever necessary, especially on the procedural issues, the Civil Procedure Code can be applied. The Civil Procedure Code had provided for the substitution of persons on the death of parties. Section 398 of the Code for the substitution in pending cases and Section 760A provides for substitution in appeal. The Section 760A reads;

*“760A, Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to , the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.”*

Under this section the Court has to decide who the proper person to be substituted is. It has been held in the Case of **Careem Vs. Sivasubramaniam and Another (2003) 2 SLR 197** that;

- ii. *In the event of the death of a party substitution would be for the purpose of representing the deceased solely for the purpose of prosecuting the action and nothing more.*
- iii. *The inquiry to determine a “proper person” under section 760A is one to ensure the continuation of the appeal after the change of status in the action and not to decide the rights of parties.*

The substitution becomes unnecessary if the continuation of the appeal becomes futile. The basic purpose of an inquiry and a determination under part VII of the Primary Court Procedure Act is to prevent the breach of the peace. If there is no threat or a likelihood of the breach of the peace, or if the threat or the likelihood of the breach of the peace comes to an end, the requirement of making a determination ends.

Threat of creating a breach of the peace or the likelihood of committing a breach of the peace is a personal matter. With the death of the party, it ends. The dispute relating to the land may continue. The proper remedy is a civil action in a competent Court, not to substitute a person who is not a threat to the peace and to continue the action.

Substitution under section 398 of the Civil Procedure Code is also available only in a situation where the cause of action survives. The cause of action does not survive with the death of a party because the imminent danger of the breach of the peace comes to an end.

We draw our attention to the **Bar Association Law Journal 2015 Vol. XXI Page 59** by **Geoffrey Alagaratnam of President’s Counsel**, that a personal cause of action can end upon a death of a party. The *Maxim action personalis moritur cum*

*persona* is that, proceedings against a party are considered ended on the death of one party where the cause of action is purely personal.

In the Case of **Jayasuriya Vs. Samaranayake 1982(2) SLR 460** was an action involving revocation of a deed of gift given by a parent to a daughter on grounds of ingratitude. It was held that in so far as the Plaintiff's cause of action is concerned such being an action in personam, if the plaintiff dies the cause of action does not survive. In this action the stage of *litis contestation* had not been reached.

As there is no cause of action surviving after a death of a 2<sup>nd</sup> Respondent Respondent Respondents, it is not essential that heirs of the deceased should be substituted in order to proceed with this appeal. Hence we uphold the objections made by the Petitioner Respondent Respondent and refuse and disallow the application of the 1<sup>st</sup> Respondent Petitioner Appellant to substitute the two children of Vijitha Malanie and Sumitha Kusumalatha in room of the 2<sup>nd</sup> Respondent Respondent.

**Judge of the Court of Appeal**

**L.T.D.Dehideniya, J**

**I agree.**

**Judge of the Court of Appeal**