

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

C A (PHC) Application

No. 135/ 2008

High Court of Chillaw case

No. HCR 19 / 2007

Magistrate's Court of Marawila case

No. 13243 / 66

Officer in charge,  
Police Station,  
Dankotuwa,

**COMPLAINANT**

-Vs-

1. Rajapakshe Pathiranage Winifred  
Hemalatha,  
Katukenda West,  
Dankotuwa.

**1<sup>ST</sup> PARTY**

2. Kristhoguge Leela Ranjanie Fernando,  
Katukenda West,  
  
Dankotuwa.

**2<sup>ND</sup> PARTY**

**AND**

Rajapakshe Pathiranage Winifred  
Hemalatha,  
Katukenda West,  
Dankotuwa.

**1<sup>ST</sup> PARTY PETIONER**

-Vs-

Krithoguge Leela Ranjanie Fernando,  
Katukenda West,  
Dankotuwa.

**2<sup>ND</sup> PARTY RESPONDENT**

Officer in charge,  
Police Station,  
Dankotuwa.

**COMPLAINANT RESPONDENT**

**AND NOW BETWEEN**

Rajapakshe Pathiranage Winifred  
Hemalatha,  
Katukenda West,  
Dankotuwa.

**1<sup>ST</sup> PARTY PETIONER APPELLANT**

-Vs-

1. Krithoguge Leela Ranjanie Fernando,

Katukenda West,  
Dankotuwa.

**2<sup>ND</sup> PARTY RESPONDENT**  
**RESPONDENT**

2. Officer in charge,  
Police Station,  
Dankotuwa.

**COMPLAINANT**                      **RESPONDENT**  
**RESPONDENT**

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

**P. Padman Surasena J**

Counsel     : Chandana Weerasooriya for the 1<sup>st</sup> Party Petitioner Appellant  
                 Hilary Livera for the 2<sup>nd</sup> Party Respondent Respondent.

Decided on: 2016-09-19

**JUDGMENT**

**P Padman Surasena J**

Learned counsel for the 1<sup>st</sup> Party Petitioner Appellant and for the 2<sup>nd</sup> Party Respondent agreed when this case came up on 2016-06-29 before us, to rely fully on their written submissions. They requested this Court to pronounce the judgment after considering the written submissions they had filled and informed this court that they do not intend to make oral

submissions. Therefore this judgment would be based on the material that have been adduced by parties in their pleadings and written submissions.

The Officer in Charge of Police Station, Dankotuwa filed an information in terms of section 66 (1) (a) in the Magistrate's Court of Marawila reporting that a dispute between the 1<sup>st</sup> party Petitioner - Appellant (hereinafter referred to as the Appellant) and the 2<sup>nd</sup> party Respondent - Respondent (hereinafter referred to as the Respondent) pertaining to a land had arisen and that dispute would result in a breach of peace.

Learned Magistrate after inquiry pronounced his order on 2007-06-13 holding that the Respondent was entitled to the possession of the land in dispute.

The Appellant thereafter made an application for revision to the Provincial High Court of the North Western Province at Chillaw against the order of the learned Magistrate.

Journal entries of the High Court record show that the said revision application has been filed in the High Court of Chillaw on 2007-06-22. The application was supported on 2007-06-28 and the court had issued notice on the Respondent and an interim relief staying further proceedings in the Magistrate's Court.

Thereafter this case had come up in the High Court of Chillaw a number of times. According to the journal entries it was on 2007-07-26 that the Respondent had first moved for time to file objections. The Respondent has tendered his objections on 2008-02-07. Argument has been fixed for 2008-10-02. A motion on behalf of the Appellant has been submitted on 2008-09-25 requesting permission of court to file counter objections. However learned High Court Judge has made no order on that request and has ordered that the argument be held on 2008-10-02.

On 2008-10-02, which is the date fixed for argument, learned counsel for the Appellant has requested court to re-fix the argument submitting a copy of full set of proceedings of the Magistrate's Court case.

It was the submission of the learned counsel for the Appellant before the learned High Court Judge on 2008-09-25 due to a lapse on the part of the Attorney-at-Law who appeared on behalf of the Appellant an application had not been made to file counter objections. It was on that basis that the learned counsel for the Appellant sought permission from the learned High Court Judge to have the date of argument re-fixed and to file counter objections. It has to be noted that this application has been made on 2008-09-25.

Learned High Court Judge having heard submissions of both parties had rejected the application made by the Appellant and confirmed the date fixed for argument as 2008-10-02.

Even on the date of argument i.e. on 2008-10-02, learned High Court Judge had heard submissions of both parties with regard to this issue. It is appropriate at this juncture to turn to the rules relevant to this issue.

Rule 3 (1) (a)<sup>1</sup> states as follows:

Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such documents later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mere mortu or at the instance of any party, dismiss such application:

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<sup>1</sup>Court of Appeal (Appellate Procedure) Rules 1990

(b) Every application by way of revision or restitutio in intergrum under Article 138 of the constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of First Instance, tribunal or other institution to which such application relates. ...."

....."

(13) It shall be the duty of the petitioner to take such steps as may be necessary to ensure the prompt service of notice, and to prosecute his application with due diligence.

(14) Where the parties fail to comply with the requirements set out in the preceding rules, the Registrar shall without delay, list such application for an order of court.

(15) These rules shall also apply, mutatis mutandis, to applications made to the Court under any provision of law, other than Articles 138, 140 and 141 of the Constitution, subject to any directions as may be given by the Court in any particular case.

....."

It is the submission of the learned counsel for the Appellant,

- I. that the Respondent had not moved for the dismissal of the application and therefore the learned High Court Judge erred in law to dismiss the entire application of the Appellant,
- II. that the learned High Court Judge should have taken the case up for argument in which event the Appellant could have taken up the position that she had tendered all the material documents she relied on for her case, in terms of Rules 3 (1) (a) and 3 (1) (b).
- III. that there was no material prejudice caused to the Respondent as Rule 3 (1) (a) and (b) were substantially complied with even at a later stage.

Learned counsel for the Appellant has drawn the attention of this court to the case of Kiriwanthe and another Vs Nawarathne and another<sup>2</sup>.

This case was decided on then applicable rule 46 of the Supreme Court Rules of 1978. One has to be mindful of the fact that this rule<sup>3</sup> did not specifically provide for dismissal for non-observance and therefore has no direct application to the instant case in which the issue is a question of

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<sup>2</sup> 1990 (2) S L R 393

<sup>3</sup> Rule 46 of the Supreme Court Rules of 1978.



interpretation of Rule 3(1) (a)<sup>4</sup> where it has specifically provided that the Court may, ex mere mortu or at the instance of any party, dismiss such application Where a petitioner fails to comply with the provisions of this rule.

In the case of Shanmugawadivu Vs Kulathilake<sup>5</sup> the Supreme court has held as follows "..... the new Rules permit an applicant to file documents later, if he has stated his inability in filing the relevant documents along with his application, and had taken steps to seek the leave of the Court to furnish such documents. In such circumstances, the only kind of discretion that could be exercised by Court is to see whether and how much time could be permitted for the filing of papers in due course.

The appellant had made no such statements in her petition and the Court of Appeal had rightly decided that in the absence of the relevant documents, the Court is "unable to exercise its revisionary powers in respect of the order sought to be revised" by the appellant. ...."

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<sup>4</sup> Court of Appeal (Appellate procedure) Rules 1990

<sup>5</sup> 2003 (1) S L R 216

It has to be noted that the motion that the Appellant had filed on 2008-09-25 has been filed without notice to the Respondent. It was in that motion that the Appellant had sought permission of High Court to file counter objections.

It has been brought to the notice of this court by the Respondent that the Appellant had filed another revision application also on the same matter bearing case No. CA (PHC) APN No. 68 / 2013 in the Court of Appeal which had later been withdrawn.<sup>6</sup>

It is to be observed that the Appellant had undertaken in the petition<sup>7</sup> he filed in the High Court to produce the documents marked **P 02** to **P 06** no sooner, he receives them. The Respondent has filed her objections in the High Court of Chillaw on 2008-02-07 and took up the position therein<sup>8</sup> that the Appellant had failed to submit certified copies of the relevant documents of the Magistrate's Court. Further the Appellant had failed to file counter objections also. Thus, the Appellant has neither controverted the position taken up by the Respondent with regard to non-tendering of

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<sup>6</sup> Paragraph 16 of the written submissions of the Respondent

<sup>7</sup> Paragraph 02, Prayer (e) of the Petition and the journal entry dated 2007-06-22

<sup>8</sup> Paragraph 02, 05-10, of the objections filed by the Respondent in the High Court

certified copies of Magistrate's Court proceedings nor had taken any step to address that issue .

Further it has to be noted that the motion filed on 2008-09-29 is dated 2007-07-10. It could also be seen that the Appellant had obtained a certified copy of the Magistrate's Court proceedings on or around 2007-07-10 and had kept holding on to it until 2008-09-25 which is more than 01 year after filing of the application.

When one reads Rule 03 (1) as a whole, the purpose that these rules are expected to serve is to avoid unnecessary delays and have the cases disposed as quickly as possible by keeping the litigating parties within the rules. Our courts have consistently held that the compliance of these rules are mandatory. There is no acceptable reason as to why the Appellant could not have complied with this rule at the proper time. Date of the argument is certainly not the time for a defaulting party to make an application to take steps to furnish material certified copies of the documents he relies upon, particularly when that matter has been taken up as a preliminary objection by the opposing party. If it is made imperative for the judges to allow such applications as argued by the Appellant, no one will need to comply with Rule 03 (1) (a) at the time of filing petition or

even thereafter, for he could be sure he would get the opportunity of tendering such documents on the date of argument when the opposing party raises it as a preliminary objection. That is certainly not the purpose that the Rules are expected to serve.

Brown & Co. Ltd. and another Vs. Ratnayake, Arbitrator and others<sup>9</sup> is a case where the dismissal by the Court of Appeal of an application for a Writ on the basis of a failure on the part of the petitioner in that case to annex to the petition, certified copies of relevant proceedings with regard to the particular dispute. The Supreme Court referring to Rule 46 of the Supreme Court Rules of 1978 which required the petition to be supported by affidavit and to be accompanied by original or duly certified copies of documents material to the case in the form of exhibits stated thus ".... So the fact that the record was subsequently made available to court is not an excuse for failure to comply with basic requirements of the rule. To hold otherwise would lead to unfairness. The Rule itself is a commonsense response to litigants wanting the disturbance of an order or award. It is no more than a normal procedural step deemed necessary to inform both

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<sup>9</sup>1994 (3) SLR 91

*court and respondents of the matters of complaint. It is consistent with ordinary practice. One cannot claim a right to proceed to the next step without compliance with a valid invocation of jurisdiction in the first place. Such would lead to uncertainty, unreasonableness and oppressive results. In this sense the rule is mandatory. ...*<sup>10</sup> (emphasis effected in the above quotation is mine)

It is noteworthy that the Supreme Court has taken this view despite the fact that this rule<sup>11</sup> did not specifically provide for dismissal for non-observance of Rule 46.

Thus it could be seen that the compliance of this rule is mandatory and that such compliance is necessitated in order to avoid uncertain, unreasonable and oppressive results.

It has to be noted that this is a case in which the petitioner had obtained an ex-parte interim relief namely a stay order staying further proceedings in the Magistrate's court. It was the position of the petitioner that he had undertaken to furnish the certified copies of the relevant Magistrate's court

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<sup>10</sup>(Ibid) at page 100

<sup>11</sup> Rule 46 of the Supreme Court Rules of 1978.

proceedings no sooner he receives them. However the petitioner has breached this undertaking and that breach would be with impunity, if this court is to excuse that breach.

Next question that this court should consider is whether the relevant Magistrate's court proceedings that the petitioner failed to furnish could be considered material in dealing with this revision application.

The petitioner in his petition complains inter alia,

- i. that the learned Magistrate's order is against the material adduced by the parties.
- ii. that his conclusion is erroneous.
- iii. that there has been a miscarriage of justice.

In these circumstances it becomes necessary for the court to examine the relevant court proceedings with the view of evaluating the above arguments. It is therefore clear that the Magistrate's court proceedings of this case is very much material for the maintainability of this revision application.

In these circumstances, we see no reason to interfere with the findings of the learned High Court Judge. Thus we decide that this appeal should stand dismissed.

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda PC J**

I agree,

**PRESIDENT OF THE COURT OF APPEAL**