

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

Rajapakse Mudiyanse Rajapakse  
Muthubanda

No. 22, Uduwara,  
Demodara.

PLAINTIFF

C.A. Case No. 718/1999 (F)

D.C. Badulla Case No. 89/1989 P

-Vs-

1. R.M. Appuhamy  
No. 156, Mapakadawewa,  
Mapakada.
2. R.M. Punchibanda  
Pahalawelgolla, Uduwara,  
Demodara.
3. Nanda Rajapakse
4. Udeni Rajapakse
5. Parakrama Rajapakse
6. R.M. Rajapakse
7. R.M.B. Rajapakse  
all of (3<sup>rd</sup> to 7<sup>th</sup> Defendants)  
Walasbedda Kade, Uduwara,  
Demodara.
8. R.M. Abeykoon  
No. 22, Uduwara,  
Demodara.

DEFENDANTS

AND NOW BETWEEN

R.M. Abeykoon

No. 22, Uduwara,

Demodara.

8<sup>th</sup> DEFENDANT-APPELLANT

-Vs-

Rajapakse Mudiyanse Rajapakse  
Muthubanda (Deceased)

PLAINTIFF-RESPONDENT

E.R.M. Podimenike

No. 22, Uduwara,

Demodara.

Substituted PLAINTIFF - RESPONDENT

1. R.M. Appuhamy (Deceased)

1A. R.M. Karunaratne (Deceased)

both of No. 156, Mapakadawewa,  
Mapakada.

1B. Waraniee Subdra Fonseka

No. 156, Mapakadawewa,  
Mapakada.

Substituted 1<sup>st</sup> DEFENDANT-RESPONDENT

2. R.M. Punchibanda

Pahalawelgoda, Uduwara,  
Demodara.

3. Nanda Rajapakse

4. Udeni Rajapakse

2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> DEFENDANT-RESPONDENTS

5. Parakrama Rajapakse (Deceased)

5A. O.T.M.R.S.P. Kumarihamy

Substituted 5<sup>th</sup> DEFENDANT-RESPONDENT

6. R.M. Rajapakse (Deceased)

6A. Vidanage Swarna Sriyani

Substituted 6<sup>th</sup> DEFENDANT-RESPONDENT

7. R.M.B. Rajapakse

all of (3<sup>rd</sup> to 7<sup>th</sup> Defendant-Respondent)

Walasbedda Kade, Uduwara,

Demodara.

7<sup>th</sup> DEFENDANT-RESPONDENT

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Raja Peiris with Sarath Chandra Liyanage for  
the 8<sup>th</sup> Defendant-Appellant.

Shyamal A. Collure with A.P. Jayaweera and Ai  
Adachi for the Substituted Plaintiff-  
Respondent, Substituted 1B Defendant-  
Respondent and 2<sup>nd</sup> Defendant-Respondent.

Decided on : 29.05.2017

A.H.M.D. Nawaz, J.

This is a partition action where the learned District Judge of Badulla delivered judgment on 23.10.1998. The 8<sup>th</sup> Defendant who was dissatisfied with the judgment has preferred this appeal against the judgment to this Court by filing a Notice of Appeal dated 31.10.1998 which is within 14 days' time limit. The Counsel who appears for the Substituted-Plaintiff-Respondent and the 2<sup>nd</sup> Defendant-Respondent takes up a preliminary objection as follows:-

- 1 The Notice of Appeal has not been signed by the Attorney-at-law on record; and
- 2 Even though revocation of proxy had been filed along with the Notice of Appeal, no leave was obtained from the District Court in terms of Section 27(2) of the Civil Procedure Code.

Therefore, he submits that since there is no valid Notice of Appeal, there is no appeal properly constituted before this Court to hear this matter.

The question that has now arisen before this Court is whether the Notice of Appeal signed by the Appellant is in order or not.

In terms of Section 27(1) of the Civil Procedure Code, a proxy of a client to appoint a registered Attorney-at-Law to make any appearance or application, or do any act shall be in writing signed by the client and filed in court.

Section 27(2) of the Civil Procedure Code states:-

*“when so filed, it shall be in force until revoked with the leave of the court and after notice to the registered attorney by a writing signed by the client and filed in court or until the client dies, or until the registered attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.”*

A revocation of a proxy can be effected either by the client or by a registered attorney. If a registered attorney, for whatever reasons, wishes to discontinue his services to the client, he may sign a revocation at his office before seeking permission of court.

Similarly, if a client chooses to discontinue the services of his registered Attorney-at-Law he could do so with or without the prior permission of court. The contract of agency is always between the client and the Attorney-at-Law and either party is at liberty to terminate the contract. Hence I take the view that the words “Leave of the Court” in subsection (2) of Section 27 is directory and not mandatory.

What is important is the mutual agreement of the client and the registered attorney for the revocation. Even if a proxy is revoked without the leave of the court but the revocation is accepted by court and not rejected there is implicit leave immanent therein. Only when a fresh proxy is to be filed the revocation becomes necessary and it must be brought to the notice of court that the previous registered attorney has ceased to be the registered attorney of the particular party, because there shall not be two registered attorneys for one party in a civil action at a given time. There should be only one valid proxy at a time.

In the instant case the proxy that was given to Mr. Prabath Illangathilaka was revoked and a new proxy was filed along with the Notice of Appeal filed on 02.11.1998. The objection taken against this procedure is that on 02.11.1998 the new registered attorney had not signed the Notice of Appeal, but it was signed by the 8<sup>th</sup> Defendant-Appellant himself. In my view this cannot be faulted and this cannot be classified as irregular. For by the time the 8<sup>th</sup> Defendant filed his Notice of Appeal, on 31.10.1998, the earlier proxy had been revoked and there was no registered attorney for him.

The revocation of the earlier Attorney-at-Law is dated 31.10.1998 and on this date or thereafter until the new proxy was signed on 02.11.1998, there was no Attorney for the 8<sup>th</sup> Defendant. In the absence of an Attorney-at-Law the Appellant could file the Notice of Appeal -Section 755(1) of the Civil Procedure Code.

The law does not state that the revocation and proxy must be filed in the presence of the registrar. It only requires the instruments to be filed in the registry. So if the proxy was signed on 31.10.1998 and was date-stamped on 02.11.1998 it does not vitiate the appeal. If the court registry date-stamped it two days later, it cannot be construed that

the Notice of Appeal was filed on the latter day.

In *Nachchiduwa v. Mansoor* 1995(2) Sri L.R. 273, the Petition of Appeal was handed over to the Registrar by the registered attorney on 02.12.1994. The Registrar placed his initials and entered the time. According to the practice in the Registry, the petition of appeal had to be taken thereafter to the record room where it was to be entered in the Motion Book and filed in the record. These steps were not taken on 02.12.1994. The relevant entries were made only on 09.12.1994, after period of 60 days of the appealable period had elapsed.

When the Plaintiff made an application for execution of decree pending appeal under Section 763, his application was allowed and the petition of appeal was rejected on the ground that it was filed out of time. On appeal against this order, the Court of Appeal held, *inter alia*, that:-

1. The act of the registered attorney tendering the petition of appeal to the Registrar and the act of the Registrar in placing the date stamp and his initials on the petition of appeal constitute presentation of the petition of appeal.
2. The act of filing the petition of appeal and that of forwarding the record to the Court of Appeal are official acts of the District Court. Any delay in filing the petition of appeal in the record cannot be attributed to the Appellant.

Considering the steps taken in the instant case, it appears that the motion and the Notice of Appeal were both filed on 31.10.1998 but the court placed the date stamp on 02.11.1998, and therefore the appeal has been filed properly. I see no fault in the procedure followed in the filing of the Notice of Appeal and the petition of appeal in this case.

In my view the objection that the Notice of Appeal had been filed on 31.10.1998 without obtaining the leave of the Court is unsustainable. It is generally the procedure that after the filing of the instruments it must be brought to the notice of the court of the change of the registered attorney and the court permits it by recording it. At what stage the

permission of court must be obtained is not stated in Section 27(2) of the Civil Procedure Code.

Even in the case of leave to appeal, though the provision states that the leave of the Court must be first had and obtained, this procedure is followed only after the papers are filed-see Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act, No.54 of 2006. Hence, before filing the revocation and the new proxy the leave of the Court cannot be obtained and it can be obtained only after the instruments are filed.

I am, therefore, of the view that the preliminary objection taken against the filing of the Notice of Appeal and the Petition of Appeal is untenable and is overruled. I allow the appeal to proceed.

**JUDGE OF THE COURT OF APPEAL**