

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

In the matter of an appeal against  
judgment of Provincial High Court  
exercising its revisionary jurisdiction.

C A (PHC) 170 / 2010

Provincial High Court of Western

Province (Kalutara)

Revision Application No. 06 / 2010

Primary Court of Matugama

Case No. 15 / 2009

Kalinga Edwin Gunathilaka,

Keeranthidiya,

Nauththuduwa.

**2<sup>nd</sup> PARTY - PETITIONER -**

**APPELLANT**

-Vs-

1. Officer in charge,  
Police Station,  
  
Matugama.

**COMPLAINANT - RESPONDENT -**

**RESPONDENT**

2. Mayanthuge Sunethra Jayasiri,  
  
Keeranthidiya,  
  
Nauththuduwa.

**1<sup>st</sup> PARTY - RESPONDENT -**

**RESPONDENT**

3. Hon Attorney General,

Attorney General's Department,

Colombo 12.

**RESPONDENT - RESPONDENT**

**Before: P. Padman Surasena J (P/CA)**

**K K Wickremasinghe J**

Counsel : 2<sup>nd</sup> Party – Petitioner – Appellant is absent and unrepresented.

K V Sirisena for the 1<sup>st</sup> Party – Respondent - Respondent.

Decided on: 2018 - 02 - 28

**JUDGMENT**

**P Padman Surasena J (P/CA)**

Learned counsel for the 1<sup>st</sup> Party Petitioner Appellant agreed when this case came up on 2017-07-28 before us, to rely fully on his written submissions. He requested this Court to pronounce the judgment after considering the written submissions. Therefore this judgment would be based on the material adduced in the pleadings and written submissions.

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

Learned Primary Court Judge after inquiry pronounced his order on 2010-02-22 holding that the Respondent was entitled to use the disputed right of way.

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

Perusal of the judgment dated 2011-09-26 pronounced by the learned Provincial High Court Judge shows that the Appellant has failed to serve copies of the documents produced marked **P 2**, **P 3**, **P 4**, **P 5**, **P 6** and **P 7** on the Respondent.

It appears that the Appellant has not explained as to why he could not provide the above material along with his application. He has neither

undertaken nor sought leave of Court to tender the said documents even at a subsequent occasion. Admittedly learned Primary Court Judge had considered these documents when he made the impugned order.

Thus, it is clear that the Respondent has had no opportunity of considering these documents in order to formulate arguments in preparation of their case.

In addition to the above ground the learned Provincial High Court Judge has also held that there is no exceptional circumstance to invoke the revisionary jurisdiction of the Provincial High Court.

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

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

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.

(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.

Learned Provincial High Court Judge has referred to the case of Kiriwanthe and another Vs Nawarathne and another<sup>2</sup>.

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

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 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.

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

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

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

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.

The relevant documents have been considered by the learned Primary Court Judge and hence 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.

**PRESIDENT OF THE COURT OF APPEAL**

**K K Wickremasinghe J**

I agree,

**JUDGE OF THE COURT OF APPEAL**