

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

In the matter of an appeal in terms of Article 154P (6) read with Article 138 of Constitution against the Order dated 20.01.2014 of the High Court of the North Western Province Holden in Kurunegala in case No:HCW 4/2013.

Agampodi Ashoka Somaratne Mendis

No.09, Neatland Estate, Kalugamuwa.

**Petitioner-Respondent-Petitioner-Appellant**

**Court of Appeal Case No. CA(PHC) 17/2014**

**High Court Kurunegala Case No. HCW 4/2013**

**HCW 14/2012**

**NWP/HCCA/32/2011**

**Vs.**

1. Ambegoda Liyanage Methsiri

Uyandana Mallawapitiya,

Kurunegala.

Through Samarakom Mudiyansele

Peiris Abeyratne his duly appointed Attorney

No.208, Puttalam Road,

Kurunegala.

2. Dammulla Arachchige Nihal Premaratne

No.208, Puttalam Road, Kurunegala.

**Petitioners-Respondents-Respondents**

3. G.K.S.Chandralatha

Municipal Commissioner

Municipal Council

Kurunegala.

3A. R.M.W.S.Samaradiwakara

Municipal Commissioner,

Municipal Council,

Kurunegala.

3B. Pradeep Thilakerathne

Municipal Commissioner,

Municipal Council Kurunegala.

04. P.W.Senarathna

Chief Valuer

Department of Valuation

Valuation House

Maradana.

05. Anuradha Senevirathna

District Valuer

Government Valuation Department

North Western Regional Office

No. 257, Negambo Road,

Kurunegala.

Presently, Kandy Road ,Kurunegala.

06. Kurunegala Municipal Council

Kurunegala.

6A.R.M.W.S. Samaradiwakara

Municipal Commissioner  
Municipal Council  
Kurunegala.

6B. Pradeep Thilakerathne

Municipal Commissioner  
Municipal Council Kurunegala.

**RESPONDENTS-RESPONDENTS-  
RESPONDENTS-RESPONDENTS**

**Before:** K.K. Wickremasinghe J.

Janak De Silva J.

**Counsel:**

Suren De Silva for Petitioner-Respondent-Petitioner-Appellant

Lakshman Perera P.C. with Jagath Wickremanayake for 1<sup>st</sup> and 2<sup>nd</sup> Petitioners-Respondents-  
Respondents

Ranil Prematilleke for 3B and 6B Respondents-Respondents-Respondents-Respondents

Chaya Sri Nammuni for 4<sup>th</sup> and 5<sup>th</sup> Respondents-Respondents-Respondents-Respondents

**Written Submissions tendered on:**

Petitioner-Respondent-Petitioner-Appellant on 13.03.2018

1<sup>st</sup> and 2<sup>nd</sup> Petitioners-Respondents-Respondents on 13.03.2018

Argued on: 01.02.2018

Decided on: 19.<sup>07.</sup>~~06.~~2018

Janak De Silva J.

This is an appeal by the Petitioner-Respondent-Petitioner-Appellant (Appellant) in terms of Article 154P (6) read with Article 138 of the Constitution against the order of the learned High Court Judge of the North Western Province holden in Kurunegala dated 20.01.2014 in case no. HCW/4/2013.

When this matter was taken up for hearing on 01.02.2018 the learned President's Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners-Respondents-Respondents (1<sup>st</sup> and 2<sup>nd</sup> Respondents) raised a preliminary objection that the Appellant has by motion dated 10<sup>th</sup> March 2014 moved to withdraw the petition of appeal filed on 05.03.2014 and has submitted a new petition of appeal dated 10.03.2014 and that therefore there is no valid petition of appeal that has been filed as there is no provision in the rules to withdraw a petition of appeal and to have a new petition of appeal accepted.

Having heard counsel, we directed parties to file written submissions on this issue. This order is on this preliminary objection. The facts of the case have no bearing on the preliminary objection and hence I do not intend to refer to them in this order.

The following facts are not in issue between the parties:

- (1) The impugned judgement/order was delivered on 20.01.2014.
- (2) The notice of appeal was filed by the Appellant on 31.01.2014.
- (3) The petition of appeal was filed on 05.03.2014.
- (4) Thereafter, the Appellant filed a motion dated 10.03.2014 moving Court to withdraw the petition of appeal dated 05.03.2014 and to have the petition of appeal dated 10.03.2014 filed with the motion to be the petition of appeal of the Appellant.

- (5) When the petition of appeal dated 05.03.2014 was filed the learned High Court Judge made order to file the petition of appeal dated 05.03.2014 and to record the filing of the petition in the Appeals Register and to maintain a sub file and transmit the original record to this Court.
- (6) Thereafter, when the motion dated 10.03.2014 was filed, the learned High Court Judge made order directing to file the said motion and petition of appeal dated 10.03.2014.

The preliminary objections raised on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was somewhat premature as the Appellant did not seek to support the motion dated 10.03.2014 when the matter was taken up for argument on 01.02.2018. However, the Appellant has in his written submissions sought permission of Court to permit the application of the Appellant set out in motion dated 10.03.2014. In these circumstances, we are called upon to make a ruling on application made in the motion dated 10.03.2014.

The questions that arise for determination are:

- (a) Whether the applicable rules provide for the withdrawal of a petition of appeal and filing of a new petition of appeal
- (b) If so, which is the Court that has jurisdiction to allow such an application

I propose to answer question (b) first and then address question (a).

### ***High Court is Functus***

There is no dispute that the applicable rules are the Court of Appeal (Procedure for Appeals from High Courts) Rules of 1988 (Rules).

Rule 11(2) of the Rules provides for an appeal to be made to the Court of Appeal by giving notice of appeal to the High Court within such time and in form and manner as provided thereafter. Rule 11(3) of the Rules requires the notice of appeal to be presented by the party appellant or his registered attorney within a period of fourteen days from the order appealed against.

Rule 12(2) of the Rules requires the appellant to present a petition of appeal to the High Court. Rule 12(3) of the Rules requires the High Court to forward the petition of appeal together with all the papers and proceedings as speedily as possible to the Court of Appeal. The High Court has not been empowered to perform any other act. In these circumstances, I am of the opinion that the High Court becomes functus after performing the only task it has been directed to do, namely forwarding the petition of appeal together with all the papers and proceedings as speedily as possible to the Court of Appeal.

The question then is whether the Court of Appeal has been granted the jurisdiction to permit the withdrawal of a petition of appeal and filing of a new petition of appeal. I will discuss this aspect with question (b) referred to above.

#### ***New Petition of Appeal***

Rule 13 of the Rules requires the Registrar of the Court of Appeal to forthwith number the petition received from the High Court.

Rule 15(1) of the Rules states that **if the petition of appeal is not drawn up in the manner in the last preceding rule prescribed it may be rejected or be returned to the appellant for the purpose of being amended within a time to be fixed by the court or be amended then and there.** When the court rejects under this rule any Petition of Appeal, it shall record the reasons for such rejection. And when any Petition of Appeal is amended under this rule the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.

In some of the other rules formulated to regulate the procedure in the Supreme Court and the Court of Appeal, there is specific provision regulating withdrawal of applications such as Rules 15 and 32 of the Supreme Court Rules 1990 while Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules 1990 only refers to amendment of pleadings or filing additional pleadings. However, Rule 15 of the Rules is the only Rule in the Rules that refer to rejection or amendment of the petition of appeal.

The word "court" in this Rule is clearly a reference to the Court of Appeal. Therefore, where the petition of appeal is not drawn up according to Rule 14, the Court of Appeal has the power to either reject the petition of appeal or to return it to the appellant for the purpose of being amended within a time to be fixed by the court or be amended then and there.

However, Rule 15 of the Rules is conditional upon the petition of appeal not been drawn according to Rule 14 of the Rules. It is only then that the Court of Appeal has been given the power to either reject the petition of appeal or to return it to the appellant for the purpose of being amended. The motion dated 10.03.2014 filed by the Appellant does not urge this ground as the basis for the application made to file a new petition of appeal.

Instead, it states that "there have been some inadvertent typographical errors/omissions in the said Petition of Appeal filed on 05/03/2014". Furthermore, it seeks permission to file a new petition of appeal rather than amending the petition of appeal already filed. Even if the principle greater power includes the lesser power is considered, and without making a determination that authorizing an amendment of a petition of appeal includes authorizing the withdrawal of the petition of appeal already filed and filing a new petition of appeal, yet the application contained in motion dated 10.03.2014 filed by the Appellant does not fall within Rule 15 for the reasons set out above. The fact that the new petition of appeal was filed within the 60-day time period does not in my view make a change to the analysis.

In *Fernando vs. Sybil Fernando and Others* [(1997) 3 Sri. L. R. 1 at 13] Dr. Amarasinghe J. stated:

"There is the substantive law and there is the procedural law. Procedural law is not secondary: The two branches are complementary. The maxim *ubi ius, ibi remedium* reflects the complementary character of civil procedure law. The two branches are also interdependent. Halsbury (*ibid.*) points out that the interplay between the two branches often conceals what is substantive and what is procedural. It is by procedure that the law is put into motion, and it is procedural law which puts life into substantive law, gives its remedy and effectiveness and brings it into being."

In *Abdul Raul v. Urban Development Authority and others* [(CA(PHC) 158/2005; C.A.M. 20.10.2014] Chitrasiri J. stated:

“Article 154 P (6) gives the right to file an appeal. Such right cannot be undermined at any cost. However, it does not in any way refer to the procedure of filing an appeal. Therefore, when the word "law" found in Article 154 P (6) is to be defined, necessarily it has to be interpreted in conjunction with the rules that are applicable in filing and proceeding with appeals. Those Rules are meant to describe the procedure whilst the Article 154 P (6) of the Constitution refers, as to a right of a party aggrieved by a decision in a writ application filed in the High Court. In the circumstances, this Court is not in a position to disregard the procedure laid down in the Rules applicable when filing an appeal though the right referred to in Article 154 P (6) is a right that cannot be undermined.”

For the foregoing reasons, I am of the view that the application made by the Appellant by motion dated 10.03.2014 does not fall within Rule 15 and as such must be rejected.

The learned President's Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Appellant has by motion dated 10.03.2014 sought to withdraw the petition of appeal dated 05.03.2014 which is not permitted in law and in the same breath it is claimed that as the petition of appeal dated 05.03.2014 was withdrawn there is no valid appeal before this Court. To my mind, these two submissions are contradictory.

As I pointed out earlier, the High Court is functus after forwarding the petition of appeal together with all the papers and proceedings to this Court. It cannot and did not grant permission to withdraw the petition of appeal dated 05.03.2014. More so, because the motion dated 10.03.2014 was addressed to the Court of Appeal. A party cannot unilaterally withdraw a petition of appeal addressed to this Court. Once a petition of appeal has been filed addressed to this Court, the jurisdiction of this Court is invoked and any withdrawal of the said petition of appeal must be with permission of Court.

Hence, presently what is before this Court is the motion and petition of appeal dated 05.03.2014 and a motion dated 10.03.2014 moving Court to withdraw the petition of appeal dated 05.03.2014 and to have the petition of appeal dated 10.03.2014 filed with the motion to be the petition of appeal of the Appellant.

For the reasons set out above, the application made by motion dated 10.03.2014 has been rejected by this Court. This leaves the petition of appeal dated 05.03.2014 filed by the Appellant and we direct that this appeal be determined on the basis of matters pleaded in the said petition of appeal dated 05.03.2014.

Preliminary objection is partly upheld to the extent set out above.

The main matter will be fixed for argument in due course.

Judge of the Court of Appeal

**K.K. Wickremasinghe J.**

I agree.

Judge of the Court of Appeal