

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

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

W.A. Gunawardana
Municipal Commissioner,
Dehiwala Mount Lavinia Municipal Council,
Anagarika Darmapala Mawatha, Dehiwala.

Applicant-Petitioner

Court of Appeal Case

No.CA/PHC/190/2012

High Court Revision

Application No.HC/RA/157/2009

Magistrate's Court of

Mount Lavinia Case No.1532/S/08

Vs.

Clara Lilamani Fernando

No.14D, Sri Gunarathna Mawatha, Mount Lavinia.

Respondent-Respondent

And (in the matter of an application for revision under and
in terms of Article 154P and 138 of the constitution of the
Democratic Socialist Republic of Sri Lanka read with
Section 5 of Act No.19 of 1990) between

Clara Lilamani Fernando

No.14D, Sri Gunarathna Mawatha, Mount Lavinia.

Respondent-Petitioner

Vs.

1. W.A.Gunawardana

Municipal Commissioner,

Dehiwala Mount Lavinia Municipal Council,

Anagarika Darmapala Mawatha, Dehiwala.

Applicant-Petitioner-Respondent

2. K.B.V.D.N. Muthugala

Municipal Commissioner,

Dehiwala Mount Lavinia Municipal Council,

Anagarika Darmapala Mawatha, Dehiwala.

2nd Respondent

3. Compangnage Devindasiri Fonseka

No.12/3, Sri Gunarathna Mawatha, Mount Lavinia.

Intervenient Petitioner-Respondent.

AND NOW BETWEEN

Clara Lilamani Fernando

No.14D, Sri Gunarathna Mawatha, Mount Lavinia.

Respondent-Petitioner-Appellant

Vs.

1. W.A. Gunawardana

Municipal Commissioner,

Dehiwala Mount Lavinia Municipal Council,
Anagarika Darmapala Mawatha, Dehiwala.

Applicant-Petitioner-Respondent-Respondent

2. K.B.V.D.N. Muthugala
Municipal Commissioner,
Dehiwala Mount Lavinia Municipal Council
Anagarika Darmapala Mawatha, Dehiwala.

3. Compagnage Devindasiri Fonseka
No.12/3, Sri Gunarathna Mawatha, Mount Lavinia.

Intervenient Petitioner-Respondent-Respondent.

Before: **PRESHANTHA DE SILVA J.**
K.K.A.V. SWARNADHIPATHI J.

Counsel: N.M. Reyaz
for the Respondent-Petitioner-Appellant.

W. Dayarathna (P.C.) with Hirantha Namal Perera
for the 2nd A Respondent-Respondent.

Charith Galhena
for the Intervenient Petitioner-Respondent-Respondent.

Date of argument: 13.10.2022

K.K.A.V. SWARNADHIPATHI J.

JUDGMENT

The Respondent-Petitioner-Appellant [hereinafter referred to as "**Appellant**"] filed this Appeal seeking to set aside orders dated 16.9.2012 and 30.10.2012 of the learned High Court Judge of Ratnapura in case No. H.C.R.A./157/2009 and the order dated 24.07.2009 by the learned Magistrate of Mount Lavinia in Case No.3532/S/08.

The Applicant-Petitioner-Respondent-Respondent, 2nd Respondent-Respondent and the Interventient Petitioner-Respondent-Respondents appeared before this Court. In this judgment, Applicant Petitioner Respondent "**Respondent**" will be referred to as the respondent 2nd Respondent-Respondent as the "**2nd Respondent**", and the Interventient-Petitioner-Respondent-Respondent as the "**Interventient- Respondent**".

After written submission, the matter was argued. In this judgment, I have considered all parties' oral and written submissions at the Court of Appeal and documents produced at the High Court and the Magistrate's Court by the parties.

The Appellant owner of premises No.14D, Sri Gunarathna Mawatha, Mount Lavinia had sought permission to build and permission was granted by the 1st and the 2nd Respondents. When applying for permission, there was an old building at the back of the premises. Therefore, the Appellant kept the rear space from the East of the land. Later as the old building collapsed, she decided to have the rear area from the West. For this purpose, Plan No.MB/32/2006 was produced and approved by the Municipality. Approval was granted subject to a provision that she submit an amended plan for endorsement to be filed of record as an amended, approved plan. However, the Appellant had spent eight million rupees to construct a three-storied building on the Plan, which was approved before shifting the rear space.

After the completion of the house, the 1st Respondent informed her that the building was not in conformity with the approved Plan.

The action was filed in the Magistrate Court of Mount Lavinia Case, No. 1532/S/08, under Section 28A(3) of the Urban Development Authority Act No.41 of 1978. According to the journal Entry of 17.03.2008, the learned Magistrate had ordered to issue summons to the Appellant. Until 27.02.2009, nearly a year summons was not served on the Appellant. One endorsement gives the reason as "Defendant cannot be found."

On 27.02.2009, an order was made to serve the summons by substituted service. The Appellant appeared before the Court and was given a date to fulfil the requirements indicated by the Respondent. On the second date given, which was the final date for her to comply, she was absent from Court, and a warrant was issued for her arrest. Once the warrant was recalled, she was given time to file her objections. As she did not appear before Court to file objections, an order was made as prayed for by the Respondents.

She then appeared in Court on a subsequent date and pleaded to set aside the demolition order, which the learned Magistrate refused on 07.08.2009. On 31.08.2009, the Appellant lodged papers in the High Court of Mount Lavinia seeking to revise the order of the learned Magistrate. The High Court order was passed, staying the Magistrate's order dated 24.07.2009.

On 09.03.2010, an application for intervention was filed by the intervenient Respondent. Objections were called regarding the intervention, and parties were heard. On 16.09.2011, the learned High Court Judge of Colombo granted permission for the party to intervene. On the same day, the matter was fixed for argument.

The Intervenient Respondent then objected that the Appellant had not filed vital documents in the Magistrate's Court. She had violated Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990.

On perusal of the case record, the learned High Court Judge concluded that the Appellant had failed to show cause by filing documents or submissions. Therefore, the learned High Court Judge had found no reason to disturb the learned Magistrate's order dated 24.07.2009. He had emphasised that it was the duty of the Appellant to file all original documents or certified copies when applying for the revisionary jurisdiction.

The learned High Court Judge had considered that the Magistrate's order was pronounced on 24.07.2009 when the Appellant moved in revision to the High Court court filing papers to set aside the order made in her absence, which was rejected on 07.08.2009. The second order, which confirms the demolition order on 24.07.2009, was not canvassed at the High Court.

According to the learned High Court Judge, even in the petition for revision, the Appellant had mentioned an Affidavit which is not part and parcel of the papers petitioners filed at the High Court, which is non-compliance within the meaning of Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules 1990. Dissatisfied by the judgment delivered on 30.10.2012, the Appellant lodged Appeal papers at the Court of Appeal.

The main question in this Court is to consider the judgment of the learned High Court Judge. The Appellant must satisfy this Court that the reasoning of the learned High Court Judge is wrong or that she had filed all necessary papers, which the learned Judge overlooked.

However, having that to the last Appellant took up the position that summons was not served on her by the learned Magistrate. According to the Magistrate's Court case record, the summons was issued over eleven months. Then, by substituted service. She should have urged this matter at the Magistrate's Court.

A position not taken up at the Magistrate's Court or the High Court cannot now be taken up even though a high emphasis was made that the learned Magistrate had to follow Section 3(a) of Act No.44 of 1984. An application that should have been taken before the Magistrate at the first Instance available if not taken is estopped by making the application now.

Section 28A(3) of the Urban Development Authority Act No.44 of 1984 can only be considered by the learned High Court Judge if papers were filed according to the stipulated appellate procedure.

It was the duty of the Appellant to be vigilant regarding his case. There are many lapses on the part of the Appellant. When she knew she had a final date to file objections, she had not even taken care to get the service of a lawyer, which made the learned Magistrate come to a conclusion on 07.08.2009. She had not paid due diligence when filling the revision papers at the High Court.

Now in this Court, she points out the illegality of the Interventient parties' intervention. An objection should have been made on the day intervention was allowed. Time has now passed to make that application. She fails to show how the judgment of the learned High Court Judge of Ratnapura dated 30.10.2012 is not according to Rule 3(1) of the Court of Appeal (Appellate Procedure) Rules of 1990.

It is accepted that our courts will not help those who sleep upon their rights.

I see no reasons to disturb the judgment delivered on 30.10.2012. The Appeal is dismissed. No order for costs is made.

Judge of the Court of Appeal

PRESANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal