

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

*In the matter of an application for Revision
under and in terms of Article 138 of the
Constitution.*

The Officer-in-Charge, Unit 5,
Criminal Investigations Department,
Colombo 01.

Court of Appeal Application
No: **CA/PHC/APN/159/19**
CPA/

4/

High Court of Colombo
No: **HC RA 37/2019**

Vs.

Complainant

Magistrate's Court of Colombo
Fort
No: **B/8438/2018**

Santhi Kanagasingma
No. 34, Anula Road, Wellawatte.

1st Suspect

And between

Mercantile Investments and Finance PLC, No.
236, Galle Road, Colombo 03.

Absolute owner-Claimant

Vs.

Shanthi Kanagasingam
No. 34, Anula Road, Wellawatte.

Registered owner-Suspect-Claimant

David Pradeepan Saundaranayagam,
75/5/5B, Crescat Residencies, Galle Road,
Colombo 03.

1st Complainant-Claimant

And between

Mercantile Investments and Finance
PLC, No. 236, Galle Road, Colombo 03.

Absolute owner-Claimant-Petitioner

Vs.

1. The Officer-in-Charge, Unit 5
Criminal Investigation Department,
Colombo 01.

Complainant-1st Respondent

2. Shanthi Kanagasingam
No. 34. Anula Road, Wellawatte.

Suspect-Claimant-2nd Respondent

3. David Pradeepan Saundaranayagam No.
75/5/5B, Crescat Residenciers, Galle
Road, Colombo 03.

Complainant-Claimant-3rd Respondent

4. Hon. Attorney General,
Attorney General's Department,
Colombo 12

4th Respondent

And now between

David Pradeepan Saundaranayagam
No. 75/5/5B, Crescat Residencies,
Galle road, Colombo 03.

**Complainant-Claimant-3rd Respondent-
Petitioner**

Vs.

1. The Officer-in-Charge, Unit 5
Criminal Investigation Department,
Colombo 03.

**Complainant-1st Respondent-
Respondent**

2. Shanthi Kanagasingam
No. 34. Anula Road, Wellawatte.

**1st Suspect-Claimant-2nd Respondent-
Respondent**

3. Mercantile Investments and Finance PLC,
No. 236, Galle Road, Colombo 03.

**Absolute owner-Claimant-Petitioner-
Respondent**

4. Hon. Attorney General,
Attorney General's Department,
Colombo 12

4th Respondent-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	M. M Zuhair P.C. with Anjana Rathnasiri with Rizwan Uwaiz for the Petitioner Harsha Amarasekara P.C. with Shehan Gunawardena with Sachindra Sanders for the Respondent
Argued on	:	25.07.2022
Written Submissions	:	10.08 2022
Decided on	:	06.09.2022

Iddawala – J

When this matter was taken up for argument on 25.07.2022, the President's Counsel for the complainant-claimant-3rd respondent-petitioner (hereinafter the petitioner) raised an objection against the preliminary objections sought to be raised by the absolute owner-claimant-petitioner-3rd respondent (hereinafter the absolute owner), on the basis that the respondent has violated the Court of Appeal (Appellate Procedure) Rules 1990. Hence, the petitioner raised his objection to hearing the absolute owner on the facts or on the facts and the law except on a pure question of law. This Court reserved its order and directed both parties to file written submissions on the said objection.

At the outset, it is pertinent to narrate the facts. The instant application for revision was supported on 20.12.2019 by the petitioner, and notices were issued to the respondents. On 13.01.2020, notices were re-issued. On 24.02.2020, the State Counsel for the 1st and 4th respondents appeared and moved for objections, and the Court directed objections to be filed on 01.04.2020. On 24.02.2020 the remaining respondents, namely the absolute owner and 2nd respondent, were unrepresented. On 01.04.2020 the matter was not taken up as the Court was not functioning due to the COVID pandemic. No matters were taken up before this Court for month of April 2020. Subsequently, Journal Entry dated 18.06.2020 notes that the Attorney-at-Law for the absolute owner filed a motion dated 12.05.2020 tendering his Statement of Objection.

On 22.06.2020, the case was relisted and mentioned in open Court. On the said date the Court ordered objections to be filed on or before 23.07.2020 and written submissions to be filed on or before 26.08.2020. It is safe to assume that the said direction by the Court was given as an opportunity for the remaining respondents, namely 1st, 2nd and 4th respondents, to file the respective objections and for all parties to file their written submissions in the interest of time. Further, on the said date the

case was fixed for inquiry on 25.11.2020. The next Journal Entry dated 27.08.2020 notes that the absolute owner filed the motion dated 26.08.2020 and tendered his written submissions. Thereafter the case was not mentioned/listed for inquiry due to the COVID pandemic and the closure of courts. The case was next mentioned on 25.02.2021 in open courts, and all parties, except the 2nd respondent were represented. On the said date, the State Counsel undertook to furnish a new address of the 2nd respondent with the assistance of police, and this Court directed to issue notice on the 2nd respondent. The case was set to be mentioned on 07.09.2021, but due to the pandemic, the Court ceased functioning on the said date. When the matter came before this Court on 09.12.2021, all parties except the 2nd respondent, were represented. The Court was informed that notice was served on the 2nd respondent by way of a courier, despite which the 2nd respondent was unrepresented. The Court fixed the matter for Argument on 15.03.2022.

Journal Entry dated 03.03.2022 notes the petitioner filing a counter affidavit and Entry dated 14.03.2022 records the tendering of written submissions of the petitioner. On 15.03.2022 the case was postponed to 26.05.2022 due to a resumed matter and the record notes that all parties, except the 2nd respondent, were represented. The Journal Entry further records that the President's Counsel for the absolute owner intimated that he would be filing a motion within a week, setting out certain preliminary objections for the maintainability of the application with notice to all parties. It is understood that the said preliminary objections were filed in addition to the Statement of objection filed by the absolute owner on 12.05.2020. The said preliminary objections are contained in the motion dated 17.06.2022 tendered by the absolute owner (Journal Entry dated 23.05.2022), which purports a violation of Rule 3(4) and Rule 4 of the Court of Appeal (Appellate Procedure) Rules of 1990 alleging that the petitioner has failed to comply with the order made by the Court on 22.06.2020 directing the parties to file their respective written submissions on or before 26.08.2020. The motion further claims that, despite the matter being fixed for argument as per Journal Entry dated

09.12.2021, the petitioner has, without seeking permission of the Court, filed a counter affidavit on 02.03.2022 and written submission on 11.03.2022. Based on the said contention, the absolute owner in his motion dated 17.05.2022 prays for the application of the petitioner to be dismissed *in limine*.

On 26.05.2022, the matter was not taken up for reasons beyond the control of the Court, and the case was re-fixed for argument on 25.07.2022. On 25.07.2022, the President's Counsel for the petitioner objected to the preliminary objections sought to be raised by the absolute owner vis-à-vis the motion dated 17.05.2022, and this Court reserved its order on the matter.

The President Counsel for the petitioner referred to preliminary objections sought to be raised by the absolute owner and the averments contained within the motion filed on 17.06.2022, stating that the absolute owner must be limited to only canvass pure questions of law on the basis that the absolute owner has violated Rule 3(4)(b) and Rule 3(5) of the Court of Appeal (Appellate Procedure) Rules 1990. He contended that the absolute owner has failed to file his Statement of Objections in due compliance with the Court of Appeal (Appellate Procedure) Rules 1990, as they were filed belatedly, and that the absolute owner has failed to appraise the Court of such belatedness. In concluding his submissions, the President's Counsel for the petitioner argued that given the violation of Rules, the absolute owner could only be heard on a pure question of law and nothing else when considering the preliminary objections sought to be raised vis-à-vis the motion dated 17.05.2022. In the Written Submission dated 10.08.2022, the petitioner cites several judgments in support of his contention that Rules 3(4)(b) and 3(5) of the Court of Appeal (Appellate Procedure) Rules 1990 are mandatory in nature. Hence, the petitioner averred that the Court of Appeal made an order on 24.02.2020 for the Objections of the respondent to be filed on 01.04.2022 but the absolute owner did not file objections on or before such date in violation of Rule 3(4)(b). The petitioner avers that the absolute owner "*did not tender any*

reason or excuse for not filing the Objections on the due date. The said respondent did not at least seek the indulgence of the hon. Court to grant further time from the said date to file Objections” (vide paragraph 10(c)). The written submission further notes the following at Paragraph 10(d) *“however, about one month and 12 days after the expiry on 01.04.2020 of the said date 01.04.2020, the 3rd respondent (absolute owner) had filed on 12.05.2020 the purported Objections, without seeking the approval of Court with reasons if any for the extraordinary delay”*. It is further contended that the absolute owner had violated the imperative Rule 3(5) by failing to *“forthwith serve a copy”* of the said Objections to the petitioner. The petitioner submitted that when the matter was called in open Court thereafter on 22.06.2020, the absolute owner did not appraise the Court that he had already filed his objections belatedly.

This Court was able to peruse the Written Submissions dated 10.08.2022 filed by the absolute owner on the canvassed objection. The absolute owner concedes that when the matter was called before Court on 24.02.2020 Court ordered that objection of the respondent be filed on 01.04.2022. However, the absolute owner avers that on the face of the record, he was not present nor represented before the Court and was therefore *“unaware of the Order made on the said date”* (Vide paragraph 6(a)). The absolute owner avers that subsequently, upon examining the record, he was made aware of the direction to file objections but was prevented from doing the same due to the outbreak of the COVID pandemic which resulted in an island wide lockdown. At paragraph 6(d), the absolute owner avers: *“it is pertinent to note that the Court of Appeal only resumed in operations in open Court from on or about 11.05.2020. The respondent (absolute owner), acting extremely expeditiously and diligently caused to file Objections the very next day on 12th May 2020”*. The absolute owner further asserts that due to an oversight on the part of the Registry of the Court of Appeal, the Motion dated 12.05.2020 was minuted only on 18.06.2020 (Vide Journal Entry dated 18.06.2020). The written submissions refer to the proceedings before this Court on 22.06.2020 and aver that the absolute owner has already complied with the directions of

the Court by filing their objections on 12.05.2020 and has filed the written submissions on or about 26.08.2020 by way of a motion. Furthermore, the absolute owner relies on Section 2(1) Corona Virus Disease 2019 (Covid – 19) (Temporary Provisions) Act, No. 17 of 2021, to submit that any purported delay is justified and/or of no adverse consequence.

Hence, the instant order pivots on the question of whether the absolute owner has violated Rules 3(4)(b) and 3(5) of the Court of Appeal (Appellate Procedure) Rules 1990.

At the outset, it must be noted that violation of Court of Appeal Rules can be canvassed by both parties to an action. In most instances where the respondent alleges a Rule violation on the part of the petitioner, if proven, will make such application liable for dismissal. In the event a petitioner alleges violation of Rules on the part of the respondent and such respondent is found guilty, the Courts will permit the respondent to make representations/submissions only on pure questions of law. The objection raised by the petitioner pertains to the latter category. The petitioner alleges that the respondent has violated Rules 3(4)(b) and 3(5) of the Court of Appeal (Appellate Procedure) Rules 1990 (hereinafter the CA Rules). Rule 3(4)(b) provides the following:

Where upon such application being supported, the Court orders the issue of notice –

(b) the Court shall fix dates for the filing of statements of objections by the respondents, for the filing of counter affidavits by the petitioner; and for the hearing of the application; if any of such dates is not fixed by the Court, the following provisions shall apply; -

(i) a statement of objections shall be filled by each respondent within four weeks of the date of service of notice: -

(ii) counter-affidavits if any, shall be filed by the petitioner within four weeks of the date of receipt of the statement of objections; and

(iii) *the date of hearing shall be fixed by the Registrar;*

Rule 3(5) provides that “*every respondent who lodges a statement of objections, and every petitioner who lodges a counter affidavit, shall forthwith serve a copy thereof, together with any supporting affidavit and exhibits on every other party (other than a party who waives the right to receive)*”

There is a long line of authorities decided by the Superior Courts that the noncompliance of the Rules is fatal to an application. For the purpose of this order, it is pertinent to note the rationale behind insisting on the compliance of Rules when assessing an application. In **Caroline Nona and others v Pedrick Singho and Others** 2005 3 SLR 176 it was held that “*The rules of procedure have been devised with the sole object of eliminating delay and facilitating due administration of justice. On an examination of the decisions made by the Appellate Courts, it appears that the Superior Courts have time and again emphasized the mandatory nature of the observance of the Appellate Court Rules. It seems to me that the observance of the Rules is necessary to understand the order sought to be revised and to place it in its proper context. In my view, if this Court is unable to understand the order sought to be revised in the absence of the relevant documents, it is only then the failure to observe the Rules and the failure to file the relevant documents will amount to a fatal irregularity which would result in the dismissal of the petition.*” Similarly in **R. A. Ranasinghe v A. G.** CA/PHC/185/2011 CA Minute dated 05.08.2015, the Court of Appeal examined a series of authorities on the issue of non-compliance of the Rules and held: “*...the weight of authorities mentioned above, thus favours the view, that non-compliance with the Rules is fatal to the application. Parties who invoke the jurisdiction of the Court cannot ignore the Rules and then ask to be heard. It is to the best interest of the administration of Justice that Judges shall not ignore or deviate from the procedural law and decide matters on equity and justice as Dr. Amarasinghe J. pointed out in the case of **Fernando vs. Sybil Fernando and Others** (1997) 3 SLR 12 - there is the substantive law and the*

procedural law. Procedural law is not secondary. The two branches are complementary. Halsbury points out it is by procedure that the law which puts life into substantive law, gives it remedy and effectiveness and brings it into being - Hence, in the interests of the administration of justice, there must be order, and therefore there must be compliance with the Rules of the Court of Appeal.”

Hence it is clear that the fatality of non-compliance with Rules is premised on the rationale of ensuring the due administration of justice. The crux of the petitioner’s objection is belatedness on the part of the absolute owner in filing his Statement of objections and the failure to appraise the Court of such belatedness in violation of Rules 3(4)(b) and 3(5) of the Court of Appeal (Appellate Procedure) Rules 1990. The petitioner relies on the Journal Entry dated 24.02.2022 in support of his contention and asserts that the Court has directed the objections to be filed by 01.04.2020, a direction the absolute owner failed to comply with. It can be inferred that the petitioner is canvassing the absolute owner’s failure to show due diligence as grounds to support the contention that the absolute owner has violated the Rules of the Court of Appeal. Therefore, it is incumbent upon this Court to examine whether the failure of the absolute owner to file the Statement of objections on or before 01.04.2020 has hindered the due administration of justice. This Court notes that the impugned date is covered by the Coronavirus Disease 2019 (COVID -19) (Temporary Provisions) Act, No. 17 of 2021, which came into operation from 01.03.2020 (Section 2(1)). Though the said piece of legislation was certified on 23.08.2021 and published on the Gazette on 27.08.2021, it has the retrospective effect of being in operation since 01.03.2020. Hence, when the Court fixed a date for the filling of objections on 24.02.2020, His Lordships did not have the benefit of relying on the Coronavirus Disease 2019 (COVID -19) (Temporary Provisions) Act, No. 17 of 2021, which has been legislated precisely for *inter alia*, providing relief for inability to comply with prescribed time periods because of the effects of the COVID pandemic. The Coronavirus Disease 2019 (COVID -19) (Temporary-

Provisions) Act, No. 17 of 2021, is an extraordinary measure taken by the legislature to facilitate the due administration of justice for a specified time (period of two years commencing from 01.03.2020) due to unprecedented circumstances, and as such will take precedence over the ordinary application of Court of Appeal (Appellate Procedure) Rules 1990. This Court further notes that the instant case does not fall under Section 2(2) of the Coronavirus Disease 2019 (COVID -19) (Temporary Provisions) Act, No. 17 of 2021. Hence it is the considered view of this Court that the absolute owner cannot be held liable for failing to file his Statement of objections before the expiration of 01.04.2020.

In any event, Journal Entry dated 22.06.2020 notes that when the case was relisted and mentioned in open courts, this Court directed the filing of objections on or before 23.07.2020 and written submissions on or before 26.08.2020. This Court notes that the absolute owner has complied with the said direction and has filed his Statement of Objection by motion dated 12.05.2020 and his Written Submissions by motion dated 26.08.2020.

Prior to concluding, this Court would like to refer to the judgement of **Ranaweera v Mahaweli Authority of Sri Lanka and Another** (2004) 2 SLR 346 where His Lordship Marsoof J (PC/A) commented on the failure of the petitioner's to invite the attention of the Court to the alleged non-compliance with Rule 3(4)(b)(i) of the Court of Appeal (Appellate Procedure) Rules 1990 by acting under Rule 3(14) - "*Where the parties fail to comply with the requirements set out in the preceding rules, the Registrar shall without any delay, list such application for an Order of Court*". Hence, His Lordship observed the following: "*The objective of this Rule appears to be to give an opportunity to a party in default to take steps to comply with the rules of Court. In my view of the petitioner should have objected to the alleged "Objections" filed by the respondents by way of motion and had the matter referred for an Order of Court. Instead, the petitioner has chosen to file counter affidavit wherein he taken up the question of non-compliance with Rules in the said counter affidavit. In terms of Rule 3 (4)(b)(i) counter affidavits have to be filed by the petitioner within 4 weeks of the date of*

receipt of the Statement of Objection, unless a different date is fixed by Court which was what happened in this case. By filing counter affidavits, the petitioner has waived the right to take objection to the non-compliance of the rules by the respondents.” (at Page 350). In the instant case, the petitioner has filed a counter affidavit dated 02.03.2022, an act which has seemingly acquiescence to the filing of the objections by the absolute owner (it is pertinent to note that none of the other respondents has filed their statements of objections by this time) and later made submissions on 25.07.2022 objecting to the statement of objections filed by the absolute owner. While Ranaweera v Mahaweli Authority (supra) primarily dealt with different facts than the instant case, this Court believes that the observations concerning ‘waiving’ the right to take objection to the non-compliance of the rules by the respondent must not be ignored.

For the foregoing reasons, this Court overrules the objection raised by the Complainant-claimant-3rd respondent-petitioner against the preliminary objections sought to be raised by the absolute owner-claimant-petitioner-respondent.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL