

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

**CA LTA Application No:
0006/21**

**Wakfs Tribunal case No.
WT/273/2020**

In the matter of an application for Leave to Appeal under and in terms of section 754(2) read with section 757 of the Civil Procedure Code and section 55A of the Muslim Mosques and Charitable Trusts or Wakfs Act. No.51 of 1956 as amended against the Order of the Wakfs Tribunal dated 04.12.2021.

1. Mohamed Alavi Navaz Caffoor,
No.57, Green Path,
Colombo 03.
2. Abdul Majid Mohamed Abdul Cader,
No.85, Barnes Place,
Colombo 07.
3. Mohamed Riyaz Mohamed Hamza,
No.11, Ruhunukala, Mawatha,
Colombo 08.

And presently of-
Puisne Judge-High Court of Fiji.
Registrar of the High Court of Fiji,
Fiji.

By his Attomey-
Mohamed Uvais Mohamed Hamza,
No 26/9, Sir Marcus Fernando
Mawatha,
Colombo 07.

4. Ahmed Jazeem Mohamed Ariff,
No. 171/7A, Baudhaloka Mawatha,
Colombo 04.
5. Mohamed Iqbal Faiz Abdul Caffoor,
No.31, W.A.D. Ramanayake Mawatha,
Colombo 02.
6. Farzard Hussein Caffoor,
No. 5, Flower Road,
Colombo. 07.
7. Mohamed Azmeth Hussain Caffoor
No.1148, Horton Place,
Colombo 07.
8. Mohamed Thalib Hassan Caffoor
No.81. Horton Place,
Colombo 07.
9. Mohamed Uvais Mohamed Hamza,
No.26/9, Sir Marcus Fernando
Mawatha.
Colombo 07.
- 10.Sithy Shihara Caffoor
No.114B, Horton Place,
Colombo 07.
- 11.Mohamed Hejazi Thahir
No, 117, Hampden Lane,
Wellawatte,
Colombo 06.

Persons in Charge
NDH Abdul Ghaffoor Trust & Arabic
College Maharagama
No. 57. Greenpath
Colombo 07.

Respondent-Petitioners

-Vs-

1. M.R.M Malik
The Director,
Mosques and Muslim Charitable,
Trusts or Wakfs,
No. 180, TB. Jayah Mawatha,
Colombo 10.

1A.Ibrahim Ansar,
The Director,
Mosques and Muslim Charitable,
Trusts or Wakfs,
No. 180, T.B. Jayah Mawatha,
Colombo 10.

Applicant-Respondents

2. M. Zuhair Caffoor
No. 10/16A Lake Drive Enclave,
Lake Drive
Colombo 08.

Respondent-Respondent

3. Mohamed Hanifa Mohamed Azhar
Ghaffooriya Arabic College,
Pamunuwa Road,
Maharagama.

4. Mohamed Saly Mohamed Arshad
Ghaffooriya Arabic College,
Pamunuwa Road,
Maharagama.
5. Mohamed Farook Mohamed Hasan
Faris
Ghaffooriya Arabic College,
Pamunuwa Road,
Maharagama.
6. Abdul Cader Rishad Ahmed
Ghaffooriya Arabic College,
Pamunuwa Road
Maharagama.
7. Nahoor Gani Mohamed Hannan
Ghaffooriya Arabic College,
Pamunuwa Road,
Maharagama.

The Members of the purported
Management Committee
Ghaffooriya Arabic College.
Pamunuwa Road,
Maharagama.

Intervenient Petitioner-
Respondents

8. Mohamed Mohamed Ashraff
Ghaffooriya Arabic College
Pamunuwa Road,
Maharagama.

9. Mohamed Ibrahim Mohamed
Mafaz
Ghaffooriya Arabic College
Pamunuwa Road,
Maharagama.

10. Pakeerdeen Sahib
Ghaffooriya Arabic College
Pamunuwa Road,
Maharagama.

11. Mohamed Kabir Mohammed
Maznavi
Ghaffooriya Arabic College
Pamunuwa Road,
Maharagama.

12. Abdul Raseedu Muhammadu
Manas
Ghaffooriya Arabic College
Pamunuwa Road,
Maharagama.

Respondent-Respondents

Before: C.P. Kirtisinghe – J.
Sampath K. B. Wijeratne – J.

Counsel: Suren Gnanaraj with Shamalie De Silva instructed by Sanath Wijewardena for the Respondent-Petitioners.
N. M. Shaheid with M. A. Zaid for the 3rd to 7th Respondent-Respondents.
Hejaaz Hizbullah with Shifaan Maharooof and Piyumi Senevirathne instructed by Prabuddika Tissera for the 9th to 12th Respondent-Respondents.

Argued on: 29.09.2022

Decided On: 06.12.2022

C. P. Kirtisinghe – J.

The Respondent-Petitioners have filed this Leave to Appeal application seeking leave to appeal against the interim order made by the Wakfs tribunal dated 04.12.2021 to set aside same and for a dismissal of the case No. WT 273/2020 which is pending before the Wakfs tribunal. The Counsel for the Petitioners was heard in support of this application on 10.02.2022 and on the same day the court has issued a limited stay order in terms of paragraph G of the prayer to the petition staying the proceedings of the Wakfs tribunal operative till 07.03.2022. After hearing the parties, the Court, on 08.06.2022, had issued notice on all the Respondents named in the petition and also issued stay orders as prayed for in paragraphs F, G, I, J, K, and L of the prayer to the petition until the final determination of this application. After the notice returnable date the court had fixed the matter for inquiry regarding the granting of leave. While the inquiry was pending the 9th to 12th Respondent-Respondents had tendered a motion dated 30th August 2022 along with an affidavit and moved court to set aside the Order dated 8th June 2022 and direct the Respondent-Petitioners to amend the caption by inserting the correct addresses of the 9th to 12th Respondent-Respondents and to suspend the Order dated 8th June 2022 until the hearing of this application. The 9th to 12th Respondent- Respondents in their affidavit had stated that, although the addresses of the 9th to 12th Respondent-Respondents as indicated in the petition of this leave to appeal application was Ghaffooriya Arabic College, Pamunuwa Road, Maharagama it is neither their official address nor the residential address. They state that the addresses of the 9th to 12th Respondent-Respondents are known to the Respondent-Petitioners as both are parties in the case No. WT 268/2019 pending before the Wakfs tribunal. A copy of the answer filed in that case by the Respondent-Petitioners in this case had been produced and marked X1. The 9th to 12th Respondent-Respondents had stated that the Order dated 8th June 2022 had been obtained by the Respondent-Petitioners without notice to them and without hearing them.

Thereafter, the Respondent-Petitioners had filed a motion dated 28th September 2022 along with an affidavit and prayed for a dismissal of the application by the 9th to 12th Respondent- Respondents. In the affidavit filed on

behalf of the Respondent-Petitioners it is stated that the Respondent-Petitioners had served notices on the 9th to 12th Respondent-Respondents by courier service at the addresses set out in the petition dated 18th December 2021 and the same had been duly accepted and had not been returned. The proxy filed by the 9th to 12th Respondent-Respondents in the case No. WT 273/2020 did not contain their addresses. The registered attorney of the 9th to 12th Respondent-Respondents in case No. WT 273/2020, Ms. Shafeena was aware of this leave to appeal application as she had appeared in this case as the instructing attorney for the 3rd to 7th intervenient Respondents. It is further stated that the 9th to 12th Respondent-Respondents were well aware that there was a limited stay order issued by this Court which prevented the Wakfs tribunal from proceeding with the said case in which they were represented by Ms. Shafeena. The applicant Respondent had addressed correspondence to the 9th to 12th Respondent-Respondents to the address in the caption to these proceedings, which the 9th to 12th Respondent-Respondents had relied on in the proceedings before the Wakfs tribunal. The 11th and 12th Respondent-Respondents had represented themselves to be members of the Board of Management of the Ghaffooriya Arabic College.

The 9th to 12th Respondent-Respondents have moved court to set aside the order dated 8th June 2022. On that day the court has ordered to issue notice on the Respondents. In addition, the court has issued stay orders as prayed for in paragraphs F, G, I, J, K and L of the prayer to the petition. It is not necessary to set aside the order issuing notice on the Respondents. Court can issue notice of an application of this nature ex-parte. The 9th to 12th Respondent-Respondents are before court now and if they wishes to object to the granting of leave, they can do so after participating at the inquiry. The only question that has to be taken into consideration is whether this court should vacate the stay orders that had been issued until the final determination of this case.

The case of the 9th to 12th Respondent-Respondents is that, the Respondent-Petitioners had obtained those stay orders without notice to them and without hearing them. The case of the Respondent-Petitioners is that they had given notice of this application to the 9th to 12th Respondent-Respondents by courier service. Rule 2 of **The Court of Appeal (Appellate Procedure) Rules of 1990** is applicable to the granting of the interim relief by the Court of Appeal.

Rule 2 reads as follows,

2. (1) Every application for a stay order, interim injunction or other interim relief (hereinafter referred to as 'interim relief') shall be made with notice to the adverse parties or respondents (hereinafter in this rule referred to as 'the respondents') that the applicant intends to apply for such interim relief; such notice shall set out the date on which the applicant intends to support such application, and shall be accompanied by a copy of the application and the documents annexed thereto:

Provided that -

(a) interim relief may be granted although such notice has not been given to some or all of the respondents if the Court is satisfied that there has been no unreasonable delay on the part of the applicant and that the matter is of such urgency that the applicant could not reasonably have given such notice; and

(b) in such event the order for interim relief shall be for a limited period not exceeding two weeks sufficient to enable such respondents to be given notice of the application and to be heard in opposition thereto on a date to be then fixed.

Rule 2(4) reads as follows,

2 (4) The provision of the preceding sub-rules shall apply too every application for the extension of an order for interim relief.

Issuing notices to the parties to an appeal or an application is the function of court. The court cannot delegate that power to a party to an application. Unless the court issues notice to a party following the proper procedure it cannot assume jurisdiction over that party. The proper procedure to issue notice in this court is by registered post.

According to the provisions of Rule 2(1) every application for a stay order, interim injunction or other interim relief shall be made with notice to the adverse parties or the Respondents. Rule 2(1)(a) provides that interim relief may be granted although such notice has not been given to some or all the Respondents if the court is satisfied that there has been no unreasonable delay on the part of the applicant but the interim relief shall be limited for a period not exceeding 2 weeks (Rule 2(1)(b)). When an application for a stay order or other interim relief is supported, for practical purposes and for expediency the court permits the Petitioner to issue notice on the opposing party instead of the

court registry issuing the notice. But it cannot be treated for all purposes as a notice issued by court. In a situation where the Petitioner himself had issued a notice on the opposing party before supporting the application for interim relief and if the opposing party appears in court in response to that notice, then the matter ends there and the opposing party can object to the application. If the opposing party does not appear in court in response to that notice, then the court has to issue notice through the registry. Otherwise, the court cannot assume jurisdiction over that party. The notice issued by the Petitioner cannot be treated as an official communication and it cannot be treated as a formal notice issued by court. That is why this court issued a limited stay order for 2 weeks against the Respondents when the matter was supported for interim relief, instead of issuing a stay order until the final determination of this application. Thereafter, on several occasions the Petitioner had made applications for the extension of the stay orders. Rule 2(4) states that the proceeding sub-rule shall apply to every application for an extension of an interim relief but the Petitioner had never noticed the opposing party in respect of those applications and the court had extended the stay orders from time to time but only for a period not exceeding 2 weeks. The Petitioners have never taken steps to notice the 9th to 12th Respondent-Respondents through court. When this case was supported for notice and extension of the stay orders on 25.05.2022, the Petitioners had not taken steps to notice the 9th to 12th Respondent-Respondents through the court registry. Therefore, the application against the 9th to 12th Respondent-Respondents on that day has to be treated as an ex-parte application without formal notice to the 9th to 12th Respondent-Respondents and the proceedings have to be treated as ex-parte as against the 9th to 12th Respondent-Respondents. The court by an oversight had issued interim orders against 9th to 12th Respondent-Respondents until the final determination on the footing that the 9th to 12th Respondent-Respondents had formal notice of the application. Therefore, that order is clearly a per incuriam order made on the footing that the 9th to 12th Respondent-Respondents had notice of the application. This court has the power to vacate an order made in per incuriam.

The court possess inherent power to rectify such an error on the principal *actus neminem gravabit* (an act of court shall prejudice no person). This principal has been stated by Lord Cairns in **Rodge v. Comptoir D'Escompte de Paris** to be:

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression 'the act

of the Court' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is a duty of the aggregate of those tribunals, if I may use the expression to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court."

The Respondent-Petitioners state that they had dispatched the notices to the 9th to 12th Respondent-Respondents by courier service and those notices had been accepted. 9th to 12th Respondent-Respondents state that the address to which notices were dispatched are neither their private address nor the official address. Notices had been handed over to the Arabic College and some officer there must have accepted the same. There is no assurance that, same would have been communicated to the 9th to 12th Respondent-Respondents. Respondent-Petitioners state that the registered attorney-at-law for the 9th to 12th Respondent-Respondents at the Wakfs tribunal was aware of this case. They state that the 9th to 12th Respondent-Respondents were also aware of this case. Even assuming that they were aware of the case, the court cannot assume jurisdiction over them without serving notice on them. Therefore, it will only be an academic exercise to go into those matters. Black defines 'jurisdiction' as follows,

"Jurisdiction naturally divides itself into three heads. In order to the validity of a judgment, the Court must have jurisdiction of the persons, of the subject matter and of the particular question which it assumes to decide. It cannot act upon persons who are not legally before it, upon one who is not a party to the suit...., upon a defendant who has never been notified of the proceedings. If the Court has no jurisdiction, it is of no consequence that the proceedings had been formally conducted, for they are coram non iudice. A judgment entered by such Court is void and a mere nullity." (Black on Judgments-P.261)

In the case of **Ittepana Vs. Hemawathie (1981) 1 SLR 476** Sharvananda J. (as he then was) had observed as follows,

"Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise

notified of the proceedings against him, judgment entered against him in those circumstances is a nullity.”

The learned Counsel for the 9th to 12th Respondent-Respondents cited the judgement of **Craig Vs Kanseen 1946 A.E.R. (Volume 1) 108**. In that case Lopes LJ. had observed as follows, “The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper ex parte proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained.”

For the aforementioned reasons we vary the Order dated 08.06.2022 and vacate the stay orders issued against 9th to 12th Respondent-Respondents.

Judge of Court of Appeal

Sampath K. B. Wijeratne – J.

I Agree

Judge of Court of Appeal