

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

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

Officer in Charge,
Unit 5,
Criminal Investigation Department,
Colombo 01

Complainant

Vs.

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

Shanthi Kanagasingam,
No.34, Anula Road, Wellawatta

High Court of Colombo
Revision Application No:
HC/RA/37/2019

1st Suspect

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

AND IN BETWEEN

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

Absolute Owner-Claimant

Vs.

Shanthi Kanagasingam,
No.34, Anula Road, Wellawatta

Registered-Owner-Suspect-Claimant

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

1st Complainant-Claimant

AND NOW IN BETWEEN

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

**Absolute-Owner-Claimant-
Petitioner**

Vs.

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

Complainant- 1st Respondent

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

Suspect-Claimant- 2nd Respondent

3. David Pradeepan
Sasundaranayagam
75/5/5B, Crescat Residencies,

3

Galle Road, Colombo 03

Complainant-Claimant-3rd Respondent

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

4th Respondent

And Now Between

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

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

Vs.

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

**Complainant-1st Respondent-
Respondent**

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

**1st Complainant-Claimant-
Respondent-Respondent**

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

Colombo 03.

**Absolute Owner-Claimant-
Petitioner-Respondent**

4. Hon. Attorney General,
Honorable 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 and Rizwan Uraiz for the Complainant 3 rd Respondent Petitioner. Harsha Amarasekare P.C. with Sehan Gunawardena and S. Sendeera for the absolute owner- claimant-petitioner- respondent.
Written Submissions of the Petitioner	:	15.12.2022
Written Submissions of the Respondent	:	15.01.2023
Decided on	:	07.02.2023

Iddawala – J

The instant revision application is filed on 13.12.2019 against a judgment of the High Court of Colombo. At the argument stage on the 15.03.2022, the President's Counsel for the absolute owner-claimant-petitioner-3rd respondent (hereinafter the absolute owner), raised a preliminary objection on the basis that the complainant-claimant-3rd respondent-petitioner (hereinafter the petitioner) has violated Rule 3(4) and Rule 4 of the Court of Appeal (Appellate Procedure) Rules 1990 (hereinafter, Court of Appeal Rules) by not filing counter-affidavit and written submissions on time. It is the learned President's Counsel's assertion that as such, as the petitioner has shown to be negligent, this Court should dismiss this application *in limine*. (Initially, the absolute owner mentioned this preliminary objection on 15.03. 2022 and sought to file a motion setting out the said objections with notice to all parties. Accordingly, a motion dated 17 .05 2022 was filed).

Subsequently, matter came up for arguments on 22.11.2022. The President's Counsel appearing for the absolute owner reiterated the said objections based on the motion dated 17.05.2022. This Court reserved its order and directed both parties to file written submissions on the said objection.

This matter must be traced back to the year 2020 in order to make a determination on the question at hand. As per the Journal Entries, this Court has ordered both parties to file written submissions by the 26th August 2020 and the matter has been fixed for inquiry on the 25th of November 2020. The absolute owner – Mercantile Investments and Finance PLC has duly filed written submissions on the given date. The petitioner has filed his counter-affidavit on 2nd March 2022 and written submissions on 11th March 2022, after a significant lapse.

Given the above context wherein the petitioner failed to submit the written submissions and the respective counter affidavits on the date fixed by the court, in short, this Court is concerned with the following two questions:

(1) whether the Petitioner is in violation of the Court of Appeal (Appellate Procedure) Rules 1990

(2) whether a violation warrants a dismissal of the case *in limine*?

In answering the first question as to whether the Petitioner is in violation of the Court of Appeal Rules, a closer look should be taken at them. The relevant Rules 3(4) and 4 are as follows:

Rule 3(4)

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

(a) the Court shall fix the date for the tendering by the petitioner of the requisite notices, together with such number of copies of his application as there are respondents, and stamped addressed envelopes for dispatch of such notices by registered post to the respondents, it being the duty of the petitioner to ensure the accuracy of such notices, copies and addresses; if no date is fixed by the Court, the petitioner shall tender such notices, copies, and envelopes within two weeks;

(b) the Court shall fix the 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 filed by each respondent within four weeks of the date of service of notice;

*(ii). Counter affidavit **if any**, shall be filed by the petitioner within four weeks of of the date of receipt of the statements of objections; and*

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

Rule 4

Part III – Written submissions in the Court of Appeal

4(2) No party to an appeal shall be entitled to be heard unless he has previously lodged three copies of his written submissions, complying with the provisions of this rule...

4(5) The submissions of the respondent shall contain as concisely as possible

(a) Statement in reply to the appellant's or petitioner's statement of facts, confirming whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of other relevant facts, referring to the evidence, both oral and documentary, (and whenever possible the pages of the brief or record at which such evidence appears), indicating which of such facts, according to the respondent, have been established or are otherwise no longer in dispute, and which facts are disputed;

4(6) Where a party fails to lodge submissions, or lodges submissions which are not in substantial compliance with the foregoing provisions, the Court may restrict the duration of the oral submissions of such party at the hearing of the appeal or application to 45 minutes.

4(7) The appellant shall within six weeks of the filing of the petition of appeal, and the petitioner within six weeks of the filing of the respondent's statement of objections, (as the case may be) lodge his submissions at the Registry, and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions.

4(8) The respondent shall within six weeks of the receipt of notice of the lodging of the appellant's or petitioner's submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions. Where the appellant or petitioner has failed to lodge his submissions as required by sub-rule (7), the respondent shall lodge his submissions within twelve weeks of the filing of the petition of appeal, or the respondents statement of objections (as the case may be), giving notice in like manner.

4(9) Every party shall tender to the Registrar, not less than one week before the date first fixed for the hearing of an appeal or application, a complete list of the

authorities which he proposes to refer to or rely on at the hearing of an appeal or application, a complete list of the authorities which he proposes to refer to or rely on at the hearing so as to ensure that there is full disclosure and to preclude surprise...

4(10) A party shall not be obliged to file submissions in conformity with the provisions of the preceding sub-rules, if

- a) the duration of the oral submissions on behalf of such party at the hearing of the appeal or application will be confined to a period of 45 minutes; ...

In addition to the above, Rule 3(1) is also of use in this matter.

Rule 3(1)

3(1)(a) 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 such document, he shall state the reason for such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application. (Emphasis added)

Accordingly, if one examines Rule 3(4) in light of Rule 3(1), it is clear that while Rule 3(1) envisages that the petitioner not submitting the petition, affidavit, and any original documents cited in them are grounds for dismissal of application preliminarily, Rule 3(4) does not envisage a dismissal of the application for violation of it.

Furthermore, Rule 4(6) is indicative of the Court's discretion of restricting oral submissions to 45 minutes, in a situation where a party fails to lodge submissions or submits not in compliance with Rule 4. The Rule does not envisage the application being dismissed on such ground of absence of submissions.

However, the compliance to CA Rules is of imperative importance for the sustenance of the application. There is a plethora of authorities decided by superior courts on the matter of adherence to CA rules. In **R. A. Ranasinghe v A. G.** CA/PHC/185/2011 CA Minute dated 05.08.2015, the matter of non-compliance of the rules was discussed with a line of authorities to hold 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 Dr. Amarasinghe J. as 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.*”

It is clear by the above authority that in order to duly conduct the administration of justice, the compliance to CA rules is of paramount importance. Hence as the rationale behind such mandatory compliance is the interest of justice, the parties to an application shall first and foremost respect such procedural law to maintain order and justice duly.

Furthermore, in the case of **Koralage vs. Marikkar Mohamed and others** (1988) 2 SLR 299, it was held, “*compliance of the Rules is a mandatory requirement and non-compliance is a material defect in the application and cannot maintain the application*”, therefore accordingly in the instant application as the petitioner has not adhered to the CA Rules 3 (4) (b), and 4 there appears a material defect in the application, however read with Rule 4 (6), the question remains whether a delay in submitting the counter affidavits and the submissions warrants a preliminary dismissal.

In furtherance, the authority laid out by the case **Ranaweera v Mahaweli Authority of Sri Lanka and Another** (2004) 2 SLR 346, can be quoted which

has analogous facts to the instant application. Here, His Lordship Marsoof J (PC/A) observed that *“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.”*

In the instant application the Court fixed a date for the filing of the objections of the parties on or before 23.07.2020 and to file the respective written submissions on or before 26.08.2020. However, without adherence to such fixed dates, the petitioner filed his counter affidavits on the 02.03.2022 and filed the written submissions on 11.03.2022 by way of motion.

Nonetheless, as per Rule 4 and the Rule 4 (6) of CA rules, there is a requirement of submitting the written submissions duly before this court and in the instance of failure to do so, warrants the discretion of this court in restricting the oral submissions of the party to 45 minutes and does not warrant a dismissal of the application on account of such absence of the submissions.

Therefore, there arises a question as to whether the petitioner’s failure to submit the written submissions and the respective counter-affidavits on the date fixed by the court, warrants a dismissal of the application as opposed to not submitting the submissions and the affidavits altogether. The answer is in the negative. While the Petition and affidavit with material documents are vital to the progress of the case, and without them the matter can be dismissed as per the Rule 3(1), counter-affidavit is a document that is supplementary or optional rather than mandatory document for the progress of the case.

Furthermore, it is apparent that Rules 3(4) and 4 do not specify a dismissal of the action for delays in submitting written submissions/counter-affidavit. But as per Rule 4(6), violation of it by not submitting written submissions in compliance with, it will entitle the petitioner's oral submissions at the hearing being restricted to 45 minutes.

Hence, it is determined by this Court that the Preliminary objection, to dismiss the petitioner's application in limine, raised by the learned President's Counsel appearing for the respondent absolute owner is over-ruled; and the matter is fixed for argument without accepting the delayed submissions (counter-affidavit filed on 2nd March 2022 and written submissions filed on 11th March 2022) as part of the petitioner's pleadings.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL