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

In the matter of Appeal under Article 138 read with Article 154P(5) of the Constitution of Democratic Republic of Sri Lanka.

Mohomed Subair Mohamed Naufan,
No. 14/01, Mosque Road,
Beruwala.

Party of the 1st Party

Vs.

Mohomed Naufan Ahamed Karis,
No. 184, Old Road,
Beruwala.

Party of the 2nd Party

AND

Mohomed Naufan Ahamed Karis,
No. 184, Old Road,
Beruwala.

Party of the 2nd Party-Petitioner

Vs.

Mohomed Subair Mohamed Naufan,
No. 14/01, Mosque Road,
Beruwala

Party of the 1st Party-Respondent

AND NOW BETWEEN

Mohomed Naufan Ahamed Karis,
No. 184, Old Road,
Beruwala.

Party of the 2nd Party-Petitioner-Petitioner

Court of Appeal Case No:
CA (PHC) 212/2019

PHC of Western Province holden
at Kalutara: Rev 10/2018

MC Kalutara
12/2017

Vs.

Mohomed Subair Mohomed Naufan,
No. 14/01, Mosque Road,
Beruwala

**Party of the 1st Party-Respondent-
Respondent**

Before: **Prasantha De Silva, J.**
K.K.A.V. Swarnadhipathi, J.

Counsel: Chamara Nanayakkarawasam AAL with Dimuthu Fernando AAL for
the Party of the 2nd Party-Petitioner-Petitioner
Widura Ranawaka AAL with Menaka Warnapura AAL instructed by
Saman Abeywickrama AAL for the Party of the 1st Party-Respondent-
Respondent

Written Submissions: Written submissions filed on 08/06/2023 by 1st Party-Respondent-
filed on Respondent-Respondent
2nd Party-Petitioner-Petitioner has failed to file written submissions

Delivered on: 04.07.2023

Prasantha De Silva J.

Judgement

This is an appeal emanating from the proceedings instituted in the Magistrates Court of Kalutara based on an information filed under section 66 of Primary Court Procedure Act No 44 of 1979.

The learned magistrate, who was acting as a primary court judge having inquired into the matter had held against the Party of the 2nd party- Petitioner.

Being aggrieved by the order of the learned magistrate, Party of the 2nd party-Petitioner had invoked the revisionary jurisdiction of the High Court of the Western Province holden in Kalutara.

Following which, the learned High Court Judge of Kalutara had pronounced the order on 19.09.2019 by dismissing the said revision application.

Aggrieved by the decision of the learned High Court dated 19.07.2019 dismissing the said revision application, the Party of the 2nd Party-Petitioner-Appellant [hereinafter sometimes referred to as the ‘Appellant’] had filed the instant appeal before the Court of Appeal.

Subsequent to filing of this appeal, a preliminary objection was raised by the counsel for the Party of the 1st Party-Respondent-Respondent [hereinafter referred to as the ‘Respondent’] against the maintainability of this appeal based on the validity of the Petition of Appeal.

It appears that the petition of appeal dated 02.10.2019 addressed to Court of appeal was filed in the Provincial High Court of Kalutara by Mr. Charith Thuduwege AAL on behalf of the 2nd Party Petitioner-Petitioner-Appellant.

It appears that the Revision application bearing no 10/2018 has been filed in the Provincial High Court of Kalutara by one Mr. Vajira Luxman Asarappuli AAL and he was appointed as the proxy holder for the Appellant as evident from the journal entry dated 02.05.2018. From the journal entries included in the record it is evident that the proxy of Mr. Vajira Luxman Asarappuli AAL has not been revoked by the Appellant. However, the Petition of Appeal has been filed in the Provincial High Court by Mr. Charith Thuduwege AAL on 2nd October 2019. Therefore, this court has to decide whether the procedural objection raised by the Respondent would bar the Appellant from proceeding with this appeal.

It should also be noted that after the said preliminary objection was raised, Mr. Charith Thuduwege has revoked his proxy filed in this appeal with the permission of court. Furthermore, the proxy given to Mr. Charith Thuduwege AAL has also been revoked by the Appellant and M Dimuth Upeksha Fernando AAL has been appointed as the new proxy holder on 31 March 2023.

In any event, validity of such revocation and appointment depends on whether it is possible for the instant appeal to be filed by an Attorney-at-law who is not the proxy holder for the Appellant at the time of filing the Petitioner of Appeal in the Provincial High Court. In this case it is evident from the facts that at the time of filing of the impugned Appeal Mr. Vajira Luxman Asurappuli AAL remained the proxy holder of the Appellant and yet the Petition of Appeal was filed by Mr. Charith Thuduwege AAL.

General principle of law is such that, until a proxy is revoked it will be in force. *[Ran-naide v. Wimalasooriya (CA. No. 1015/93(F), CAM of 29.04.2014)]*. The Counsel for the Respondent has reiterated on this principle referring to a plethora of case law such as *Guniyan Godage Chandrasiri v Dinuka Nilruwan Edirisuriya [CA PHC 47/2015 – decided on 27/06/2019]*; *Silva V Cumarathunga 40 NLR 139*.

The Appellant in the instant case has argued that the general principle does not apply to this case since it is not necessary to file a proxy at the Magistrate Court in an action instituted under section 66 of the Primary Court Procedure Act. Thus, it was the contention of the Appellant that general concept of continuation of case from under the same Attorney-at-law does not apply in actions under the Primary Courts Procedure Act.

In this respect, it is worthy to note the *cursus ommissus* clause stipulated in Part VIII, section 75 (reproduced below) of the Primary Court Procedure Act.

Section 75: If any matter should arise for which no provision is made in this Act, the provisions in the Code of Criminal Procedure Act governing a like matter where the case or proceeding is a criminal prosecution or proceeding and the provisions of the Civil Procedure Code governing a like matter where the case is a civil action or proceeding shall with such suitable adaptations as the justice of the case may require be adopted and applied.

Accordingly, since the matters pertaining to section 66 of the Primary Court Procedure Act are quasi-criminal and quasi civil, Civil Procedure Code can be applied with suitable adaptations in the interest of justice.

Furthermore, in the case of *Jeevani Investments (Pvt) Ltd. V Wijesena Perera [2008] 1 Sri L.R 207* it was held that,

“In applications commenced in the Court of Appeal such as Relisting applications, applications for Leave to appeal notwithstanding lapse of time, Leave to appeal applications, Revision applications, a party is entitled to appoint a registered attorney other than the registered attorney in the original court - on record.”

However, in the instant action revisionary jurisdiction of the Court of Appeal was not invoked it is an appeal emanating from the order of Provincial High Court of Kalutara exercising its revisionary jurisdiction. As the revision applications referred to in the above case refers to revision applications commenced at Court of Appeal and not an appeal emanating from an order of a revision application filled in the Provincial High Court.

It was further held in *Jeevani Investments (Pvt) Ltd. V Wijesena Perera [2008] 1 Sri L.R 207* that,

A final appeal commences with the filing of a notice of appeal and the petition of appeal in the original court by the registered attorney on record, appeal proceedings

in the Court of Appeal are a continuation of the proceeding commenced in the original court.

As such, the present appeal is a continuation of the proceedings commenced at Provincial High Court of Kalutara. Therefore, it is imperative to note that at the time of filing of Petition of Appeal by the Appellant in the Provincial High Court of Kalutara, the proxy holder for the Appellant was Mr. Vajira Luxman Assarappuli. As such, at the time of filing of the said Petition of Appeal Mr. Vajira Luxman Assarappuli was the Attorney on record and his proxy remained valid since it was not revoked.

Thus, it is seen that the Petition of Appeal is filed in the Provincial High Court is not signed by the registered attorney for the Appellant.

However, it was the contention of the Appellant that according to Rule 4 of the **Court of Appeal (Procedure for Appeals from High Courts) Rules**, Petition of Appeal lodged against a judgment or an order of the provincial high Court, which exercised appellate or revisionary jurisdiction shall be signed by the **appellant or his Attorney-at-law**.

According to Rule 4 of the said Rules,

“(1) Every petition of appeal shall state shortly the grounds of appeal and shall be signed by the appellant or his Attorney-at-law

(2) Where the appeal is on the matter of law the petition shall contain a statement of the matter of law to be argued and shall bear a certificate by an attorney-at-law that such matter is a fit question for adjudication by the Court of Appeal.”

As such, it was contended by the Appellant that Rule 4(1) does not require that such Petition of Appeal shall be signed by the registered attorney- at-law. The attention of court was drawn to Part 2 of the Court of Appeal (Procedure for Appeals from High courts established by article 154 of the constitution) Rules 1988 for the purpose of comparison.

It appears that Part 2 of the said rules applies to an instance where an appeal is lodged before Court of Appeal from an order/ judgment of the high court exercising writ jurisdiction under article 154P (4) of the constitution.

In a situation where the order/ judgment made by the provincial High Court exercising writ jurisdiction, aggrieved party is empowered to prefer an appeal to the Court of Appeal. In this instance a Notice of Appeal has to be filed before the high Court within 14 days and a Petition of Appeal has to be filed within 60 days.

According to Rule 12(1) and 12(2) both the Notice of Appeal and the Petition of Appeal shall be signed either by the Appellant or his registered attorney - at-law.

As such it was the contention of the Appellant that the Court of Appeal rules have made a distinction in respect of preferring appeals in the instances where the Provincial high court exercises the appellate or revisionary jurisdiction under article 154P(3)(b) of the constitution and where the provincial high court exercises the writ jurisdiction under article 154P(4).

It was Appellant's submission that in a situation where a Notice of Appeal and the Petition of Appeal is lodged in the Court of Appeal against an order/judgement made by the Provincial High Court exercising writ jurisdiction, it is mandatory that the Petition of Appeal is signed by the Registered Attorney-at-law.

Appellant has further stated that, contrary to above however, in the instance where the Appeal is emanating from the Provincial High Court exercising revisionary or Appellate jurisdiction, it is permitted for an Attorney-at-law who acts on the instructions of the Appellant to sign the Petition of Appeal according to Rule 2 of the Court of Appeal Rules 1988.

Furthermore, the Appellant is of the view that Rule 4(1) of purposefully omitted any reference to a Registered Attorney-at-law as an appeal to the Provincial High Court may be filed by an Attorney-at-law without filing a proxy when the Magistrate court has convicted and sentenced an Accused.

Hence, the Appellant asserted that there is no irregularity in the Petition of Appeal filed by the Appellant in this Appeal.

It should be noted that after delivering the order/judgment by the Provincial High Court until the appeal is preferred to Court of Appeal, such Provincial High Court is not *functus*. The Provincial High Court becomes *functus* only after the Appeal is filed and the case record has been sent to the Court of Appeal.

After the pronouncement of the order/judgement, there may be instances where the Provincial High Court has to make orders, such as applications for writ of execution, to comply with the terms of settlement entered before court, granting of an interim order to preserve the status quo, and/or to enforce any decree etc. For this purpose, there may be an Attorney-at-law on record to represent the Parties concerns. As such the proxy of the Attorney-at-law on record is valid until it has been revoked according to the procedure set out in the Civil Procedure Code.

Therefore, it is clear that, in the instant case, the proxy filed by Mr. Vajira Luxman Asarappuli AAL is valid until such time it is revoked by the Appellant. As such, without revoking the proxy of Mr. Vajira Luxaman Asarappuli AAL, the Appellant is precluded from filing the Petition of Appeal under the signature of another Attorney-at-Law.

It appears that in the instant case, the Appellant without revoking the proxy of the said Attorney-at-law, Mr. Vajira Luxaman Asarappuli, allowed another Attorney-at-law, Mr. Charith Thuduwege to file the Petition of Appeal in the Provincial High Court of Kalutara.

This clearly shows that there are two registered Attorneys-at-law for the Appellant, which is contrary to our law as established time and time again by our judicial precedents.

In the case of *Silva v Cumarathunga* 40 NLR 139, the court of Appeal held that,

“A petition of appeal must be signed by the proctor, whose proxy is on the record at the date on which the petition is filed.”

It is trite law that the party in a litigation can only act through his registered attorney-at-law after a proxy has been given to such an attorney-at-law. In order to revoke such proxy, the procedure prescribed in law must be followed.

In *Fernando v. Sybil Fernando* [1997] 3 Sri LR 1 (SC) the court held that,

“If a party is dissatisfied with his registered attorney, he is at liberty to revoke the proxy filed in court and either appoint some other attorney or act for himself. If the registered attorney dies, or is removed or suspended or otherwise becomes incapable, he may either appoint some other attorney or act for himself. However, that must be done in the manner prescribed by sections 27 and 28 of the Civil Procedure Code, for justice, in my view, requires that the work of a court must be conformable to laws, including civil procedure laws.”

Therefore, if the registered attorney is to be removed procedure set out in section 27 and 28 of Civil Procedure Code must be followed. In the instant case, proxy given to Mr. Vajira Luxaman Asarappuli AAL was only revoked on 09.05.2023, which is well after the Petition of Appeal was filed in 2019.

In the case of *National Insurance Corporation Ltd. v Violet* (2002) 3 SLR 337, Somwansa J. held that:

“when there is an attorney-at-law on record it is such attorney-at-law who could lodge an appeal.”

Furthermore, in *Wauwage Nishantha v Wauwage Kamala* CA/PHC/29/2015 [CAM 14.06.2019] Samayawardhena, J. (at page 2) stated that,

“If a proxy has been filed, “his Attorney-at-Law” refers to the Attorney-at-Law on record. Until the proxy is revoked, neither the Appellant nor any other Attorney can sign the Petition of Appeal.”

In view of the afore cited authorities, it is clear that the Court cannot recognise two Registered Attorneys-at-Law for the same party in the same case. Thus, I hold that the Petition of Appeal should have been signed by the Attorney on record in the Provincial High Court, who was Mr. Vajira Lakshman Assurappuli.

Therefore, the Petition of Appeal filed by Mr. Charith Thuduwege in the Provincial high Court of Kalutara is contrary to the procedure set out under the law. It is bad in law. Hence, the preliminary objection raised on behalf of the 1st Party-Respondent-Respondent is deemed to be upheld. Consequently, the Appeal stands dismissed without costs.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL