

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

Ratgamage Rohana De Silva of
"Mudhita", Chullapaduma Mawatha,
Bategama, Dickwella.

By his Attorney,
Ratgamage Dharmasena De Silva
Wellaboda, Madampe,
Ambalangoda.

PLAINTIFF

C.A. No. 961/97(F)

DC Balapitiya Case No. 2094/P

Vs

1. Ponnahandi Algin Nona
"Lakshman Villa"
Madampe, Kuleegoda,
Ambalangoda.
2. Ratgamage Dotty Wotmy De Silva
C/o, 65/B, E.H. De Soysa Abeysekera
Bandaragama Road,
Waskaduwa.
3. Ratgamage Luxman De Silva
39/4, Kottegewatte road
Udumulla, Battaramulla.
4. Ratgamage Molly De Silva
383, Galle Road,
Kalutara North.

5. Ratgamage Dudley De Silva
“Lakshman Villa”, Madampe,
Kuleegoda, Ambalangoda.

DEFENDANTS

AND

1. Ponnahandi Algin Nona (dead)
“Lakshman Villa”, Madampe
Kuleegoda, Ambalangoda.
- 1a Ratgamage Luxman De Silva
39/4, Kottegewatte road
Udumulla, Battaramulla.
**(1a Substituted Defendant-
Appellant)**
2. Ratgamage Dotty Wotmy De Silva
C/o, 65/B, E.H. De Soysa Abeysekera
Bandaragama Road,
Waskaduwa.
3. Ratgamage Luxman De Silva
39/4, Kottegewatte road
Udumulla, Battaramulla.
4. Ratgamage Molly De Silva
383, Galle Road,
Kalutara North.
5. Ratgamage Dudley De Silva
“Lakshman Villa”, Madampe,
Kuleegoda, Ambalangoda.

1a-5th DEFENDANTS-APPELLANTS

Vs

Ratgamage Rohana De Silva of
"Mudhita", Chullapaduma Mawatha,
Bategama, Dickwella.
By his Attorney,
Ratgamage Dharmasena De Silva
Wellaboda, Madampe,
Ambalangoda.

PLAINTIFF-RESPONDENT

BEFORE

: Deepali Wijesundera J.

: M.M.A. Gaffoor J.

COUNSEL

: M.C. Jayaratne with T.C. Weerasinghe

And M.D.J. Bandara for the

Defendant-Appellants

Nagitha Wijesekara with

G. Rubasinghe for the

Plaintiff-Respondent.

ARGUED ON

: 30th March, 2015

DECIDED ON

: 29th January, 2016

Deepali Wijesundera J.

The plaintiff respondent had instituted a partition action in the District Court of Balapitiya to partition the land described in the schedule to the plaint. After trial the learned District Judge has delivered the judgment on 21/08/1997 and being aggrieved by the said judgment the defendant appellants have filed the instant application.

The learned counsel for the plaintiff respondent raised a preliminary objection stating that there is no valid notice of appeal or petition of appeal filed by the appellant before this court. The respondent stated that throughout the partition case the attorney on record for the appellants had been Mr. Kamal Jayasekera. After the judgment was delivered one Mr. Neil Fernando had filed a notice of appeal along with a new proxy on behalf of the appellants. The respondent submitted that the appellants did not take steps to revoke the first proxy filed on their behalf before filing the new proxy. The respondent stated that the learned District Judge made a minute at the end of the relevant journal entry that the registered attorney of the appellants did not express his consent to revoke his proxy. The respondent submitted that under Sec. 27 (1) and (2) of the Civil Procedure Code the earlier proxy was not revoked before filing the new proxy.

The respondent citing the judgment in **Raninkumar vs Union Assurance Ltd. 2003 2 SLR 92-98** said the laps by the appellants to present the notice of appeal by his registered attorney goes to the basic validity of the notice and that it is not curable in terms of *Sec. 759 (2) of the Civil Procedure Code*.

The respondent also stated that the earlier attorney had given an affidavit which was filed in the District Court stating that he requested the appellants to meet him to sign the revocation papers but that they never came to see him.

The learned counsel for the defendant appellants argued that the appellants have taken every possible step to revoke the first proxy held by Mr. Jayasekera sending a notice to him by registered post informing him about the revocation of proxy given to him. He further stated that due to the undue delay in filing the notice of appeal against the said judgment by Mr. Jayasekera the new proxy was filed along with the petition and notice of appeal. He submitted that the District Judge who held the inquiry on the objection taken by the respondent in the District Court did not give a ruling since the case was in appeal.

The appellants stated that the District Judge has made a minute to say that Mr. Jayasekera had informed court that he was willing to revoke the proxy given to him therefore an implied consent was given by him to revoke the proxy.

Citing the judgment in **Wanigaratne vs Dissanayake 2002 2 SLR 331** said that the appellants have given due notice to the attorney-at-law about the revocation of proxy.

In the above case it has been decided that a party who is dissatisfied with his registered attorney can revoke his proxy and appoint a new attorney by following the procedure described in *Sec. 27 (2) of the Civil Procedure Code* and it must be affected with leave of court and after notice to the registered attorney. The appellants by merely sending a letter to the registered attorney by registered post stating that they are revoking the proxy given to him have not complied the procedure stated in *Sec. 27 (2) of the Civil Procedure Code*. They have not taken leave of court. District Judge has mentioned that the attorney has not refused to revoke the said proxy but the appellants have not gone to get the said documents signed by the attorney. Therefore the notice of appeal and the petition of appeal have been filed by an attorney at law who had no legal authority given by the appellants to do so. The first proxy which

was not revoked stands valid. Therefore the attorney on record is the attorney who filed the first proxy. The petition of appeal has not been signed by the attorney on record therefore the appellants have no *locus standi*.

In Raninkumar vs Union Assurance Ltd it was stated thus;

“The lapse by the appellant’s failure to present the notice of appeal by his registered attorney goes to the basic validity of the notice and as such is not curable in terms of the provisions of Sec. 759 (2) of the Code..”

For the afore stated reasons the preliminary objection raised by the respondent is allowed. The application of the appellants are dismissed with costs fixed at Rs. 50,000/=.

JUDGE OF THE COURT OF APPEAL

M.M.A. Gaffoor J.

I agree

JUDGE OF THE COURT OF APPEAL