

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

In the matter of an application for re-listing and/or to exercise inherent jurisdiction to set aside the order dated 11.1.2012 made without any notice to the Defendants-Respondents.

1. Mohamed Sameem Noorul Asma
alias Asmi.
2. Mohamed Hanifa Marikar
Mohamed Faiz
Both of No. 163, Hill Street,
Kalutara.

Plaintiffs

**CA No. 484/98 (F)
D.C. Kalutara No. 4665P**

VS

1. Mohamed Zaki Sithy Munawwara
Saki of 148, Hill Street, Kalutara.
2. Mohamed Mohideen Haleemathu
Sahiriya of 86/4, Moor Street,
Kalutara.
3. Abdul Cader Yafath Umma
(deceased)
- 3A. Abdul Wahid Sumthiya Hanim,
No. 154, Hill Street, Kalutara.

4. Mohamadu Lebbe Mohamed
Jamaldeen (deceased)
- 4A. Abdul Cader Yafath Umma
No. 154, Hill Street, Kalutara.
5. Abdul Latheef Mohamed
Bahawudeen
Of 154, Hill Street, Kalutara.
6. Mohamed Yoonus Marikar
Mohamed Saleem (deceased)
- 6A. Mohamed Haleemathul Jazseela
of Kuda Heenatiyangala,
Kalutara.
7. Mohamed Saleem Haleemathul
Jaseera of Kuda Heenatiyangala,
Kalutara.
8. Mohamed Saleem Sithy Fathumma
of Kuda Heenatiyangala, Kalutara.
9. Hameed Ali Mohamed Basheer
(Deceased)
- 9A.
10. Abdul Jaleel Mohamed Zaki
(deceased)
11. Ummu Kulazoom (deceased)
- 11A

12. Abdul Azeez Mohamed Yoosuf
(deceased)

12A. Mohamed Zain Mohamed
Jowfer,
No. 193, Hill Street,
Kalutara South.

13. Abdul Azeez Mohamed
Jamaldeen (deceased)

13A. Mohamed Jamaldeen
Mohamed Sinan, 623/2,
Galle Road,
Kalutara South.

14. Abdul Azeez Sharufa Umma of
122, Marikar Street, Kalutara.

15. Mohamed Zain Mohamed Jowfer
of 193, Hill Street,
Kalutara South.

16. Abdul Azeez Mohamed
Rafaideen of 151, Hill Street,
Kalutara South.

17. Abdul Azeez Mohamed Yoosuf
(Deceased)

17A.

18. Abdul Wahab Cassim of
12, Main Street, Kalutara South.

19. Abdul Latheef Marikar
Mohamed,
Hill Street, Kalutara South.

20. Mohamed Sadikeen Mohamed
Unais,

21. Abdul Wahid Mohamed Unais
Both of 154, Hill Street,
Kalutara South.

Defendants.

BETWEEN

1. Mohamed Sameen Noorul Asma
alias Asmi,

2. Mohamed Hanifa Marikar
Mohamed Faiz both of No.163,
Hill Street, Kalutara.

Plaintiffs-Appellants

VS.

1. Mohamed Zaki Sithy Munawwara
Saki of 148, Hill Street, Kalutara.

2. Mohamed Mohideen Haleemathu
Sahiriya of 86/4, Moor Street,
Kalutara.

3. Abdul Cader Yafath Umma
(deceased)
- 3A. Abdul Wahid Sumthiya Hanim of
154, Hill Street, Kalutara.
4. Mohamadu Lebbe Mohamed
Jamaldeen (deceased)
- 4A. Abdul Cader Yafath Umma of
154, Hill Street, Kalutara.
5. Abdul Latheef Mohamed
Bahawudeen of 154, Hill Street,
Kalutara.
6. Mohamed Yoonus Marikar
Mohamed Saleem (deceased)
- 6A. Mohamed Haleemathul Jazseela
of Kuda Heenatiyangala,
Kalutara.
7. Mohamed Saleem Haleemathul
Jaseera of Kuda Heenatiyangala,
Kalutara.
8. Mohamed Saleem Sithy Fathumma
of Kuda Heenatiyangala, Kalutara.
9. Hameed Ali Mohamed Basheer
(deceased)
- 9A.

10. Abdul Jaleel Mohamed Zaki
(deceased)

11. Umma Kulazoom (deceased)

11A.

12. Abdul Azeez Mohamed Yoosuf
(deceased)

12A. Mohamed Zain Mohamed
Jowfer of 193, Hill Street,
Kalutara South.

13. Abdul Azeez, Mohamed
Jamaldeen (deceased)

13A. Mohamed Jamaldeen
Mohamed Sinan.,
623, Galle Road,
Kalutara South.

14. Abdul Azeez Sharufa Umma of
122, Marikar Street, Kalutara.

15. Mohamed Zain Mohamed Jowfer
of 193 Hill Street, Kalutara South.

16. Abdul Azeez Mohamed Rifaideen
of 151, Hill Street, Kalutara South.

17. Abdul Azeez Mohamed Yoosuf
(deceased)

17A

18. Abdul Wahab Cassim of
12, Main Street,
Kalutara South.
19. Abdul Latheef Marikar Mohamed,
Hill Street, Kalutara South.
20. Mohamed Sadikeen Mohamed
Unais
21. Abdul Wahid Mohamed Unais
both of 154, Hill Street, Kalutara
South.

Defendants – Respondents.

In the matter of an application in terms of Section 771 of the Civil Procedure Code to vacate the order dated 11.1.2012 and rehear the appeal.

1. Mohamed Sadikeen Mohamed
Unais
2. Abdul Wahid Mohamed Unais
both of 154, Hill Street, Kalutara
South.

**20th & 21st Defendants –
Respondents - Petitioners.**

VS.

1. Mohamed Sameem Noorul Asma
alias Asmi.
2. Mohamed Hanifa Marikar
Mohamed Faiz both of No. 163,
Hill Street, Kalutara.

**Plaintiffs-Appellants-
Respondents**

1. Mohamed Zaki Sithy Munawwara
Saki of 148, Hill Street, Kalutara.
2. Mohamed Mohideen Haleemathu
Sahiriya of 86/4, Moor Street,
Kalutara.
3. Abdul Cader Yafath Umma
(deceased)
- 3A. Abdul Wahid Sumthiya Hanim
of 154, Hill Street, Kalutara.
4. Mohamadu Lebbe Mohamed
Jamaldeen (deceased)
- 4A. Abdul Cader Yafath Umma of
154, Hill Street, Kalutara.
5. Abdul Latheef Mohamed
Bahawudeen of 154, Hill Street,
Kalutara.

6. Mohamed Yoonus Marikar
Mohamed Saleem (deceased)
- 6A. Mohamed Haleemathul Jazseela
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Kalutara.
8. Mohamed Saleem Sithy Fathumma
of Kuda Heenatiyangala, Kalutara.
9. Hameed Ali Mohamed Basheer
(deceased)
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10. Abdul Jaleel Mohamed Zaid
(deceased)
11. Ummu Kulazoom (deceased)
- 11A.
12. Abdul Azeer Mohamed Yoosuf
(deceased)
- 12A. Mohamed Zain Mohamed
Jowfer of 193, Hill Street,
Kalutara South.
13. Abdul Azeez Mohamed
Jamaldeen (deceased)
- 13A. Mohamed Jamaldeen Mohamed
Sinan 623/2, Galle Road,
Kalutara South.

14. Abdul Azeez Sharufa Umma of 122, Marikar Street, Kalutara.
15. Mohamed Zain Mohamed Jowfer of 193, Hill Street, Kalutara.
16. Abdul Azeez Mohamed Rafaideen of 151, Hill Street, Kalutara South.
17. Abdul Azeez Mohamed Yoosuf (deceased)
- 17A.
18. Abdul Wahab Cassim of 12, Main Street, Kalutara South.
19. Abdul Latheef Marikar Mohamed, Hill Street, Kalutara South.

Defendants – Respondents – Respondents.

BEFORE : **W.M.M. Malinie Gunaratne, J. and P.R. Walgama, J.**

COUNSEL : M. Nizam Kariapper with M.I.M. Iynullah for the Petitioners.

Iftthikar Hassim with Ashiq Hassim for the Respondents

Argued on : 13.10.2015

Written submissions

filed on : 09.12.2015

Decided on : 02.02.2016

Malinie Gunaratne, J.

The Plaintiffs – Appellants (hereinafter referred to as the Appellants) instituted the Partition Action bearing No. 4665/P in the District Court of Kalutara, seeking to partition the land described in the schedule thereto.

The learned District Judge of Kalutara dismissed the said Partition Action by his Judgment dated 05.06.1998. The Appellants being aggrieved by the said judgment filed this Appeal and it was taken up for argument on 28.09.2011. On that day Appellants were absent and unrepresented. However the 1st Defendant – Respondent and the 2nd Defendant – Respondent (hereinafter referred to as the 1st and 2nd Respondents) had been represented by a Counsel. The Court had only heard submissions of the 1st and 2nd Respondents and dismissed the Appeal. While dismissing the Appeal this Court had made an order excluding Lot No.2 and Lot No. 2A from the Corpus.

The 20th and 21st Defendants – Respondents – Petitioners (hereinafter referred to as the Petitioners) filed a Petition and Affidavit on 15th of November 2012 seeking to set aside the Order of this Court dated 11.01.2012 and to re-hear this Appeal. They have stated in the Petition and Affidavit that the said Order was made by this Court without any hearing being given to them; and also without notice of appeal being given to them.

The 1st and 2nd Respondents objected to the application; as such the matter was fixed for inquiry.

When the matter was taken up for inquiry on 13.10.2015 Counsel for both parties made oral submissions and subsequently tendered written submissions.

The learned Counsel for the Petitioners, at the commencement of the argument made submissions to the effect that the Petitioners and other Defendants – Respondents were neither noticed to appear in Court nor given a hearing, before the Court dismissed the Appeal.

The contention of the learned Counsel for the Respondents is, that the Petitioners have failed to substantiate their claim as stipulated in the Provisions of Section 771 of the Civil Procedure Code in the context of the presumption in Section 114 illustration (d) of the Evidence Ordinance in regard to the proper performance of Official Acts and therefore the Registrar of the Court of Appeal is presumed to have dispatched the relevant notices to the Petitioners.

However, it is significant to note, that the Respondents have not denied the contents of Paragraph 5 of the Petition in their objections.

Paragraph 5 of the Petition states as follows:

(5) “These two 20th and 21st Defendants – Respondents - Petitioners state that the said Order was made without any hearing being given to them; and no notice of this Appeal being taken up was given to these Defendants – Respondents – Petitioners”.

When filing objections, if there is no specific denial of the facts mentioned in the Petition, it should be considered as an acceptance of the facts.

Accordingly, the first question arising for decision in this application is whether the Order dated 11.01.2012 was made without duly serving the Notice of Appeal on the Petitioners.

What is due notice? It was held in *Jinadasa and Another Vs. Sam Silva and Others* (1994) 1 S.L.R. 233, “Due notice for the purpose of the sort of matter under consideration, is making information available in the usual way, that is to say, in accordance with the prevailing law, rules, practices and usages of the Court. Where information of the appointed date for hearing is usually set out in a list prepared and published by the Court’s registry, and information of the hearing has been given in that way, that is **due notice** to the parties and their Counsel”.

It is to be noted that the case in hand had not been listed in the usual way. The way in which cases were fixed for hearing in this Court is that notice should have been personally served on the parties.

The stance of the Counsel for the Petitioners is that the Petitioners were not noticed of the Appeal; only the Appellants and the 1st and 2nd Defendants – Respondents were noticed.

On perusal of the journal entries of this case dated 26.10.2009, 30.10.2009, 09.12.2011 and 28.09.2011 it is quite evident that only the Appellants and the 1st and 2nd Respondents were noticed. If, upon the un rebutted oath of the absent party, the lack of due notice had been alleged, the view of the Court is ordering reinstatement of the hearing is justified.

The next question is under what authority the Court could have ordered the re-listing of an application. I am of the view the Court has the power to restore the application to the list in the exercise of its inherent jurisdiction.

The application before this Court is made in terms of Section 771 of the Civil Procedure Code.

The Section 771 reads as follows:

“When an appeal is heard ex-parte in the absence of the respondents and judgment is given against him, he may apply to the Court of Appeal to rehear the appeal; and if he satisfies the Court that he was prevented by sufficient cause from attending when the appeal was called on for hearing, the Court may re-hear the appeal on such terms as to Court or otherwise as the Court thinks fit to impose upon him”.

I am of the view that the Petitioners have established sufficient cause for absence, when the appeal was called for hearing. Obviously, the party had no due notice from the Court when the matter was to be heard, and as such, the matter ought to be reinstated.

The right to be heard has little or no value unless the party has been given a reasonable opportunity of being heard. It was held in *State Graphite Corporation vs. Fernando* (1982) 2 S.L.R. 590, where a party wishes to be heard or the issues involved are such, that the Court ought not to make an order without hearing a party affected.

Having taken the above circumstances into consideration this Court is of the view that the Order made on 11.01.2012 should be set aside, and the application of relisting is allowed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Application is allowed.