

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

In the matter of an Appeal under
Article 154 P (6) of the Constitution
of the Democratic Socialist of Sri
Lanka.

Diyogu Hennadige Kusumawathi,
Yalawatta,
Rajagedara,
Tissamaharama.

Petitioner

**C.A. (PHC) Appeal 197/2007
H.C. Hambantota 32/2004**

VS.

1. The Secretary,
Provincial Ministry of Education,
Lower Dickson Road,
Galle.
2. The Secretary,
Public Services Commission,
Galle.
3. Director of Education for
Southern Province,
Tangalle.

Respondents

AND NOW BETWEEN

The Secretary,
Provincial Ministry of Education,
Lower Dickson Road,
Galle.

1st Respondent-Appellant

VS.

Diyogu Hennadige Kusumawathie,
Yalawatta,
Rajagedara,
Tissamaharama.

Petitioner - Respondent

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

COUNSEL : **W. Dayaratne, P.C. with Yajish Tennakoon**
for the Appellant
Shymal A. Collure with A.P. Jayasena
for the Respondent

Argued on : **08.05.2015.**

Written submissions

filed on : **12.08.2015**

Decided on : **02.02.2016**

Malinie Gunaratne, J.

This is an Appeal filed by the 1st Respondent – Appellant (hereinafter referred to as the Appellant) against the Judgment of the learned High Court Judge of Hambantota, dated 06.06.2007.

When the Appeal came up for hearing on 08.05.2015, the learned Counsel for the Respondent raised the following two preliminary objections with regard to the maintainability of the instant Appeal.

- i. The Petition of Appeal has not been filed by the 1st Respondent - Appellant himself or by his registered Attorney in terms of the Court of Appeal Rules, 1988.
- ii. There is no valid appeal before this Court as the necessary parties are not before this Court which is a violation of Court of Appeal Rules, 1988.

After conclusion of oral submissions by Counsel, parties have tendered their written submissions which have been filed.

The first question which arises for decision is as to whether the Petition of Appeal contravened Rule 14 of the Court of Appeal Rules 1988 as it has not been signed by the Appellant or his registered Attorney-at-Law.

The facts with regard to the issue are as follows:-

The Notice of Appeal has been filed in the original Court (High Court) by Mr. H.A. Amarasena the Appellant's Attorney-at-Law. Subsequently, the Petition of Appeal had been lodged on 03.08.2007. Together with the Petition of Appeal, revocation of proxy given in the name

of the said Mr. H.A. Amarasena and a fresh proxy had been tendered along with a motion. The Motion was received by the learned High Court Judge on 07.08.2007, according to the date stamp on it. The Petition of Appeal had been signed by Mr. Chaminda Sooriyapatabendi Attorney-at-Law. The learned High Court Judge, on 07.08.2007 had ordered that the Petition of Appeal and the said fresh proxy be filed of record; and the case record be sent to the Court of Appeal.

The learned Counsel for the Respondent contends, the issue that arises here is to determine who the Appellant's registered attorney was on the day the present appeal was filed (on 03.08.2007). The learned Counsel for the Respondent elaborating on the objection raised, contends that the appeal is fatally defective as the Petition of Appeal has not been signed by the Appellant's registered Attorney on record on 03.08.2007 in terms of Rule 12(2) and therefore, the same is liable to be rejected *in limine*.

It is the stance of the learned President's Counsel for the Appellant that the Counsel for the Respondent is trying to rely on technicalities. The gist of the submissions of the learned President's Counsel was that the Petition of Appeal in this case has been signed by the Attorney on record and therefore, it is pertinent to look into the merits of the case rather than confining oneself to rigid rules that would clearly disturb the process of this Court in reaching justice. Learned President's Counsel further contends, that according to Rule 14 of the Court of Appeal Rules of 1998, there is no requirement to obtain the permission of Court to file a fresh proxy when the proxy of the previous registered Attorney is revoked.

However, it is relevant to consider the manner in which a proxy can be duly revoked is stipulated in Section 27 (2) of the Civil Procedure Code. Though the present Appeal stems from a judgment delivered by the Provincial High Court, the position with regard to filing and revocation of proxies should follow Section 27 (2) of the Civil Procedure Code.

The instrument of appointment of a registered attorney is substantially in terms of Form No.7 of the First Schedule to the Civil Procedure Code and is commonly referred to as a “Proxy”. In *Mohideen Ali vs, Cassim* 62 N.L.R. 457, Basnayake C.J. held, the proxy is required to be filed in Court (Section 27 (1) CPC) and “when so filed, it shall be in force until revoked with **leave** of the Court and after notice to the registered attorney by a writing signed by the client and filed in Court, or until the client dies, or until the registered attorney dies, is removed or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.....” (Section 27 (2) Civil Procedure Code).

It was not in dispute that the proxy filed in this matter was in force when the notice of appeal was filed and that the Petition of Appeal was signed by the new Attorney Mr. Chaminda Sooriyapatabendi and not by the Attorney Mr. H.A. Amarasena who was on the record on 03.08.2007. The question which arises for decision is now who was the Appellant’s registered Attorney on the day the present Appeal was filed.

It was not in dispute that the Petition of Appeal had been filed on 03.08.2007 and along with it, revocation of proxy given in the name of the said Mr. H.S. Amarasena and a fresh proxy of Mr. Chaminda

Sooriyapatabendi had been tendered along with a motion. The Petition of Appeal was signed by the new Attorney-at-Law Mr. Chaminda Sooriyapatabendi.

The contention of the learned Counsel for the Respondent is that the Petition of Appeal has not been signed by the Appellant's Attorney on record on 03.08.2007 in terms of Rule 12(2). As such, the appeal is fatally defective and liable to be rejected *in limine*.

The learned Counsel in support of the above submissions relied on the decision of *Silva vs. Kumaratunga* 40 N.L.R. 139. It is relevant to note, the facts of that case are similar to the issue at hand. The Plaintiff – Appellant's proctor, Mr. M.A. Van Rooyen, by a motion dated November 11, 1937, moved to revoke the proxy granted to him by the Plaintiff. The motion was according to the date stamped on it, received by District Court on November 13, 1937. It was brought on the roll and allowed by the Court on November 15, 1937. The Petition of Appeal was filed on November 12, 1937. It was not signed by the proctor who was on the record on November 12, 1937. A preliminary objection was taken on the ground that the Petition of Appeal is not signed by the proctor who was proctor on the record on the day the appeal was filed, November 12, 1937.

It was held in that case, 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. In the cases of *Wace Vs. Angage Helana Hami* (1881) 4 S.C.C.48 and *Romanis Bass vs. Raveena Kader Mohideen and Another* (1881) 4. S.C.C.6) also, it was held that the petition of appeal must be signed by the proctor on the record.

In the said cases, the objection was upheld and the appeal was dismissed. Eunis J., in *Reginahamy vs. Jayasundara* (1917) 4 C.W.R. 390, rejected an appeal which was not signed by the proctor on the record.

It is important to note, in the case at hand, the Petition of Appeal was not signed by the Attorney-at-Law who was Attorney –at-Law on the record on the date the appeal was filed. Even though the new Attorney-at-Law had filed a motion along with the Petition of Appeal he has not moved to support it or to revoke the earlier proxy. He has only moved to file the papers in the record. On a perusal of the Journal Entry dated 07.08.2007, the learned High Court Judge also has not made any order giving permission / leave to revoke the earlier proxy and accepting the new proxy. He had only made an order to file the fresh proxy and the petition of appeal and send the case record to the Court of Appeal.

Accordingly, I am of the view that as the Petition of Appeal has not been signed by the Appellant's Attorney on the record on 03.08.2007, the Appeal is fatally defective and liable to be rejected.

An appeal is a crucial step in the proceedings. The view of the Court is that the defect is not of a purely formal or technical nature as submitted by the learned President's Counsel for the Appellant.

For the reasons stated above, I uphold the First Preliminary Objection raised by the Counsel for the Respondent. This Appeal is dismissed accordingly.

Since this Court has dismissed the Appeal for the above stated reasons, this Court is of the view that it is not necessary to go into the Second Preliminary Objection.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal is dismissed.