

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

In the matter of an application for revision in terms of Article 154P (3) of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with Section 5 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 and the Primary Courts Procedure Act, No. 44 of 1979.

Officer-in-Charge,
Police Station,
Teldeniya.

Complainant

Vs

CA Case No.: CA/ PHC/ 0153/ 19
Provincial HC of Central Province
Holden in Kandy Case No. HCRA 90/15
MC Teldeniya Case No.: 29168

Samarakoon Mudiyanseelage Jayathilaka
Banda Samarakoon,
No.13/3, Bebilathenna Giddawa,
Putuhapuwa.

First Party

Gamini Bandara Bebilatenna,
No.26/02,
Bebilathenna Giddawa,
Putuhapuvwa.

Second Party

And Between

Samarakoon Mudiyanseelage Jayathilaka
Banda Samarakoon,
No.13/3, Bebilathenna Giddawa,
Putuhapuwa.

First Party-Petitioner

Vs

Gamini Bandara Bebilatenna,
No.26/02,
Bebilathenna Giddawa,
Putuhapuwa.

Second Party-Respondent

And Now Between

Gamini Bandara Bebilatenna,
No.26/02,
Bebilathenna Giddawa,
Putuhapuwa.

Second Party-Respondent-Appellant

Vs

Samarakoon Mudiyanseelage Jayathilaka
Banda Samarakoon,
No.13/3, Bebilathenna Giddawa,
Putuhapuwa.

First Party -Petitioner-Respondent

Officer-in-Charge,
Police Station,
Teldeniya.

Complainant-Respondent

The Attorney General
Attorney General's Department
Colombo 12

Respondent

Before: Damith Thotawatte, J.
 K.M.S. Dissanayake, J.

Counsels:	Chamara Wannisekara with Isuri Cooray for the 2 nd Party Respondent-Respondent-Appellant. Rasika Dissanayaka with Shabdeen Huzzair for the 1 st Party Respondent-Petitioner-Respondent.
Written submissions tendered on:	28-07-2025, 09-05-2023 by the 2 nd Party Respondent- Respondent-Appellant 21-07-2023 by the 1 st Party Respondent-Petitioner-Respondent
Order Delivered:	11-09-2025

D. Thotawatte, J.

On the 24th of January 2015, the 1st Party-Petitioner-Respondent (Hereinafter sometimes referred to as the “Respondent”) lodged a complaint at the Teldeniya Police Station alleging that the 2nd Party-Respondent-Appellant (Hereinafter sometimes referred to as the “Appellant”) had unlawfully obstructed a pathway which the Respondent claimed to have been using. The Officer-in-Charge of the Teldeniya Police Station, acting under Section 66 of the Primary Courts’ Procedure Act No. 44 of 1979 (Hereinafter sometimes referred to as the “PCPA”), submitted information dated 2nd February 2015 regarding the dispute to the Magistrate’s Court of Teldeniya.

In the affidavits filed in the Magistrate Court of Teldeniya, the Respondent and the Appellant have been respectively referred to as the 1st Party and the 2nd Party. In the caption to the petition of appeal, parties are described respectively as the 1st Party-Petitioner-Respondent and 2nd Party-Respondent-Appellant. However, it is observed that in the caption of the written submissions filed by the Appellant, the parties are described respectively as 1st Party Respondent-Petitioner-Respondent and 2nd Party Respondent-Respondent-Appellant.

Upon the issuance of notices by the learned Magistrate of Teldeniya, both parties had filed affidavits and supporting documents. After the conclusion of the inquiry, the learned Magistrate delivered the Order on 21st October 2015, holding in favour of the Appellant on the grounds that the Respondent had failed to satisfy the Court that he used the disputed pathway as of right and therefore he was not entitled to the pathway claimed.

Aggrieved by the aforesaid order, the Respondent invoked the Revisionary Jurisdiction of the High Court of Kandy by filing Revision Application No. HCRA 90/15, seeking to revise or set aside the order of the learned Magistrate.

Upon consideration of the submissions of both parties, the learned High Court Judge, by order dated 2nd October 2019, set aside the order of the learned Magistrate, and further held that the Respondent was entitled to exercise a right of use over the disputed pathway. The present appeal arises from the said order of the High Court of Kandy dated 2nd October 2019.

During the pendency of the Revision Application before the High Court of Kandy, the original 2nd Party Respondent, namely **Gamini Bandara Bebilatenna**, had passed away. According to the journal entries of the High Court case record and the proceedings, the death of the said party was formally communicated to the Court on 31-03-2017. Further, the proceedings of 29-06-2017 reflect that a formal application was made on behalf of the wife of the deceased, **Rajapakshage Jeewani Manoja Rajapakshe**, for her to be named as the substituted 2nd Party Respondent (Hereinafter sometimes referred to as the “Substituted Respondent”) in place of the deceased, and that the application has been granted. On 07-09-2017, an Attorney-at-Law, **S.B. Madugalle**, has filed a proxy on behalf of the substituted Respondent, and the court has issued formal notices on the substituted Respondent.

However, notwithstanding such substitution, it appears that an amended caption had not been filed by the Respondent (the Petitioner of the Revision application). Although the written submissions dated 06th December 2017 filed by the substituted Respondent, contained a caption that had been amended adding the name of the substituted Respondent, the caption of the written submission filed by the Respondent (the Petitioner in the revision application) on 12th November 2018 did not contain the amendment to the caption.

As both parties had agreed to the matter being disposed of by way of written submissions, the learned High Court Judge of Kandy had delivered the order dated 2nd October 2019 based on the written submission filed by the parties. It appears that by some oversight, the caption of the High Court order also did not carry the amendment made to the caption and only had the name of the deceased **Gamini Bandara Bebilatenna** as the 2nd Party Respondent.

It appears that for some reason that had not been explained the substituted Respondent nor her Attorney had taken any attempt to rectify this error at the High Court and had instead filed an appeal against the order of the learned High Court Judge of Kandy under the same incorrect caption carrying only the name of the deceased **Gamini Bandara Bebilatenna** as the **Appellant** as though he were still alive.

Moreover, the Petition of Appeal has been signed by an Attorney-at-Law named **Lakshan Abeywardhana**, who was not the Attorney who had previously filed the proxy in the High Court on behalf of the substituted Respondent. It is also observed that there had not been a revocation of the proxy filed by the Attorney-at-Law **S.B. Madugalle**.

This procedural anomaly has given rise to a serious question as to the validity and maintainability of the instant appeal before this Court. The substituted Respondent (who can be considered to be the virtual Appellant) has tendered written submissions urging this court to dismiss the objections taken by the Respondent regarding the maintainability of this appeal and allow the present appeal to proceed, to be determined on its merits in the interest of justice.

The Respondent accept the fact that the widow of **Gamini Bandara Bebilatenna, Mrs. Rajapakshage Jeewani Manoja Rajapakshe**, was duly substituted on 31st March 2017 and acted in that capacity from that point onwards. The Respondent's objections are based on the grounds that;

- a) The appeal cannot be filed on behalf of a person who no longer exists in law.
- b) An attorney at law who is not the registered attorney of the Appellant cannot file a petition of appeal.
- c) These defects are fatal and cannot be cured at this stage.

However, the Respondent is not completely free from blame, as it is the Respondent (the Petitioner of the HC Revision) who had moved the High Court to accept the widow of the deceased **Gamini Bandara Bebilatenna** as the substituted 2nd Party Respondent (in the High Court) so that it would be possible to proceed with the application. As such, it would have been Respondent's duty to formally file an amended caption after permission of the court was obtained for the substitution. The Respondent had continued to use the previous caption instead of an amended caption, adding to the confusion.

The order of the Provincial High Court dated 2nd October 2019 itself referred only to the deceased party by name, and not to the substituted Appellant. That is the very order against the instant appeal that has been preferred. The Petition of Appeal is drafted in conformity with the caption of the High Court's impugned order. The fact that the deceased's name appears in the caption does not make any difference to the substance of the order, only to its form.

The following is observed regarding the filing of the instant appeal:

- The proxy filed in the High Court by the Attorney-at-Law **S.B. Madugalle** on behalf of the Appellant (the 2nd Party Substituted Respondent in the High Court) in the High Court has not been revoked.
- The Attorney-at-Law, **Lakshan Abeywardhana**, who had signed the petition of appeal, had not filed a proxy either in the High Court or the Court of Appeal.
- No proxy had been filed in the Court of Appeal by any Attorney with regard to the appellant named in the petition of appeal (the deceased 2nd Party Respondent) or the substituted Respondent.

Rule 4(1) of the Court of Appeal (procedure for appeals from the High Courts established by Article 154 P of the Constitution) Rules of 1988, states as follows:

“Every petition of appeal shall state shortly the grounds of appeal and shall be signed by the appellant or his attorney at law”

Although the word, registered Attorney is not mentioned, His Lordship Justice Janak De Silva in *S. Manivannan and others v. Bernard Kurukuladhithya*,¹ making a distinction between an attorney-at-law and his attorney-at-law has stated:

“Rule 4(1) of the 1988 Rules allows the petition of appeal to be signed by "the appellant or **his** Attorney-at-Law". The Supreme Court when making the 1988 Rules appears to have made a clear distinction between **an** attorney -at-law and **his** attorney-at-law for Rule 4(2) of the 1988 Rules refers to **an** attorney-at-law.

When does an attorney-at-law become, in relation to an appellant, **his** Attorney-at-Law? It is only when an appellant authorizes him to act on behalf

¹CA(PHC) 54/2003 C.A.M 12.02.2019

of the appellant. That is done through the filing of a proxy. The inveterate practice is to file a proxy with the petition filed in the High Court when a party files an application in revision against an order made by a Magistrate. Unless revoked, that proxy is valid when a notice of appeal is filed against the judgment of the High Court acting in revision.”

From the above explanation, it is apparent that although the word "registered attorney-at-law" does not appear in Rule 4(1) of the 1988 Rules, His Lordship Janak De Silva is of the view that if a petition of appeal is signed by an attorney, that attorney should necessarily be a registered attorney-at-law or in other words an attorney who had filed a proxy on behalf of the Appellant.

Although the instant appeal has been signed by an attorney, no proxy has been filed on behalf of the Appellant (the fact that the Appellant named is deceased may have been the reason). Applying the reasoning adopted by His Lordship Justice Janak De Silva in *Manivannan*, it is evident that the appeal presently before this Court is incurably defective, as it does not comply with Rule 4(1) of the Court of Appeal Rules, and accordingly, it is liable to be dismissed in limine.

Section 24 of the Civil Procedure Code (Hereinafter sometimes referred to as the “CPC”), as amended by Act No. 8 of 2017, is the overarching provision governing representation and appearances in court of a registered attorney. Section 27 regulates the formalities of appointing a registered attorney and the period of validity.

The Respondent has contended that as the proxy filed in the High Court by the Attorney-at-Law, **S.B. Madugalle** has not been revoked, as such, no other attorney could have signed the petition of appeal.

Section 27(3) of the CPC, as amended, reads as follows:

- 27 (3)** When an appointment under subsection (1) is filed, an appointment of a registered attorney shall be in force until –
- (a) revoked by the client in writing with the leave of the court and after notice to the registered attorney in writing signed by the client and filed in court;
 - (b) revoked by the registered attorney-
 - (i) in writing signed by the client and filed in Court;

- (ii) with leave of the court having given thirty days' notice to the client;
- (c) the client dies;
- (d) the death or incapacity of registered attorney; or
- (e) all proceedings in the action are ended and judgment satisfied so far as regards the client.

As the proxy of **S.B. Madugalle** has been filed regarding the High Court revision matter, it could be argued that even though the Petition of Appeal to the Court of Appeal is physically filed in the High Court that made the impugned order, the High Court's role at this stage is primarily administrative (it receives the appeal documents and transmits them to the Court of Appeal). It should not be considered part of the proceedings of the High Court for which the proxy has been filed, and as such, the previous proxy has ceased to be operative. Even if such an argument is made, that would mean that a fresh proxy needs to be filed by the attorney signing the Petition of appeal. In the instant appeal, no fresh proxy has been filed.

The attorney for substituted Respondent relies on Section 759 (2) of the CPC, which empowers the appellate court to grant relief where there has been a mistake or omission, provided that no prejudice is caused to the opposing party. And it is further submitted that in *Vellupillai v. Chairman, Urban District Council*,² Chief Justice Abrahams had held that a litigant should not be deprived of justice because of procedural shortcomings. The Supreme Court, in *Albert v. Veeriahpillai*³ has likewise emphasised that once appellate jurisdiction is properly invoked, the Court is seized of the matter and may correct both errors of fact and law. It is argued that, since substitution was affected in the High Court itself, there is no conceivable prejudice to the Respondent.

The attorney for the Substituted Respondent also relied upon *Nelundeniyalage Godwin Samarasinghe v. Soma Weerasinghe and Others*.⁴ In this case, His Lordship Justice Surasena (as he was then) observed:

² (1936)39 NLR 464

³[1981] 1 SLR 110

⁴ SC/HCCA/LA No. 351-2022 S.C.M 30.01.2024

“We also observe that Section 759 (2) of the Civil Procedure Code has empowered the Appellate Court to grant relief to the party in such situation where the Respondent has not been materially prejudiced.”

In the instant matter, an application invoking Section 759(2) of the CPC has been purportedly made by an Attorney-at-Law on behalf of a person who, it is admitted, was deceased even at the time the impugned order came to be made. It is a fundamental principle that no proceedings may be maintained in the name of a non-existent party. Accordingly, the Court is precluded from entertaining an application instituted by an attorney who, in the absence of a living client, lacks the requisite *locus standi*.

In view of the above facts and circumstances, I hold that the appellant party is not entitled to relief. The objection raised by the Respondents regarding the maintainability of this action is therefore upheld, and as such, I dismiss this appeal subject to costs.

Judge of the Court of Appeal

K.M.S. Dissanayake, J.

I agree

Judge of the Court of Appeal