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

In the matter of an application for Restitution, in the nature of *Restitutio-In-Integrum* under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal
Case No: RII/0053/2025

DC Minuwangoda
Case No: 24/Land

Sriyani Mangalika Weththasinghe,
No. 136, Wegovva East, Minuwangoda

Plaintiff

VS

1. Kuruwita Arachchige Sunil Appuhamy,
   No. 23, Kopiwatta, Minuwangoda.

2. Dinayadura Vijitharathne
   No. 124/125, Gonamaditha Settlement,
   Heenatiyana, Minuwangoda.

3. Imiya Pathirannahalage Susila Nilmini,
   No. 125/3, Kopiwatta, Minuwangoda

Defendants

AND NOW BETWEEN

Imiya Pathirannahalage Susila Nilmini
No. 125/3, Kopiwatta, Minuwangoda.

Presently at:
No. 82/4, Sirivimanawatta,
Yatiyana, Minuwangoda

3rd Defendant-Petitioner

Vs.

Sriyani Mangalika Weththasinghe,
No. 136, Wegovva East, Minuwangoda

Plaintiff-Respondent

1. Kuruwita Arachchige Sunil Appuhamy,
   No. 23, Kopiwatta, Minuwangoda

2. DinayaduraVijitharathne,
   No. 124/125, Gonamadiththa Settlement,
   Heenatiyana, Minuwangoda.

Defendants-Respondents

Before : R. Gurusinghe, J. (Acting/PCA)
&
Dr. S. Premachandra, J.

Counsel : Palitha Ranatunga instructed by Sudharshani Ratnayake
for the 3rd Defendant-Petitioner

Chandrika Manamendra instructed by Udeni Gallage
for the Plaintiff-Respondent

Arguedon : 25-02-2026

Decided on: 13-05-2026

JUDGMENT

R. Gurusinghe, J.

The petitioner instituted the present Revision/Restitutio-in-Integrum application seeking to revise, reverse or vary the *ex parte* judgment dated 24-03-2022 of the District Court of Minuwangoda, to restore possession of the subject matter to the 3rd defendant-petitioner, together with other consequential reliefs.

The plaintiff-respondent instituted an action against the original defendant, who is the husband of the plaintiff, seeking a declaration that the defendant- respondent holds the land more fully described in the schedule to the plaint on a constructive trust for the plaintiff, and that the plaintiff has the beneficial interest. During the pendency of the said action before the District Court, the plaintiff added another party as the 2nd defendant.

Thereafter, the plaintiff moved to Court seeking to add a further party as the 3rd defendant to the action. Accordingly, the Court issued notice to the petitioner, who sought to be added as the 3rd defendant. Upon receipt of such notice, the petitioner appeared before Court. However, the petitioner had not filed objections to the plaintiff's application seeking to add the petitioner as the 3rd defendant.

Subsequently, the plaintiff-respondent filed an amended plaint, adding the petitioner as the 3rd defendant. At the time the amended plaint was filed, the action was already fixed for *ex parte* trial as against the 1st and 2nd defendants. Following the filing of the amended plaint adding the 3rd defendant to the action, Court had not issued summons to the added 3rd defendant. Nevertheless, the matter was thereafter fixed for *ex parte* trial against all three defendants.

Section 21 of the Civil Procedure Code is as follows:

21. Where a defendant is added, the plaint shall, unless the court directs otherwise, be amended in such manner as may be necessary, and a copy of the amended plaint shall be served on the new defendant and on the original defendants.

The said provision is mandatory in nature. It is not in dispute that, subsequent to the filing of the amended plaint, no summons has been issued to any of the defendants. Journal entry no. 34, dated 03.08.2018, records that the matter was fixed for *ex parte* trial against the 1st and 2nd defendants and that the amended plaint was due on that date. Accordingly, the Court fixed 26-10-2018 as the final date for filing of the amended plaint.

According to Journal No. 35 dated 26-10-2018, even though the plaintiff was given a final date to file an amended plaint, the plaintiff has failed to comply therewith. Instead, the plaintiff sought leave to file the amended plaint way of a motion. Thereafter, the matter was fixed for 01-03-2019.

Journal entry No. 36 dated 01-03-2019 records that the plaintiff "tenders an amended Plaint". Thereafter, without issuing summons on the defendants, the case matter was fixed for ex *parte* Trial on 06-06-2019. This constitutes a grave procedural error. In the absence of due service of summons on the defendants, the Court will not acquire jurisdiction over such defendants.

The plaintiff-respondent (plaintiff) filed objections to the petitioner's application and sought the dismissal of the petition. In support thereof, the plaintiff took up four preliminary objections.

1. Petitioner has failed to place exceptional circumstances which warrant intervention by way of Revision and/or Restitutio-in-Integrum.

2. The petitioner has not exhausted all available remedies in law prior to preferring the instant application.

3. The petitioner has been negligent in litigation and therefore, this is entitled to remedies by way of Revision and Restitutio-in-Integrum.

4. The petitioner has failed to come before Court with clean hands and is guilty of laches.

The case record reflects that, subsequent to the plaintiff being amended, no summons has been issued on any of the defendants, including the 3rd defendant. The plaintiff contended that, prior to the addition of the 3rd defendant to the action, the 3rd defendant was notified and therefore, the 3rd defendant cannot take the position that she was unaware of the pendency of the action.

The provisions contained in section 21 of the Civil Procedure Code are mandatory in nature. The 3rd defendant was not a party to the action prior to the filing of the final amended plaint. Subsequent to the filing of the said amended plaint, the matter was fixed for *ex parte* trial without taking any steps to issue summons on the defendants.

Upon service of the *ex parte* decree on the 3rd defendant-petitioner, she made an application before the District Court in terms of Section 86 of the Civil Procedure Code. However, the said application was dismissed and *ex parte* decree was executed and the petitioner was evicted from possession of the subject property.

Ex parte judgment against the petitioner is a nullity.

In the case of Ittepana v. Hemawathie(1981) 1 Sri L. R 476, the Supreme Court held as follows:

> Principles of natural justice are the basis of our laws of procedure. The requirement that the defendant should have notice of the action either by personal service or substituted service of summons is a condition precedent to the assumption of jurisdiction against the defendant.
>
> Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity.

In the above case, the Supreme Court held that the failure to serve summons goes to the root of the Court's jurisdiction. Further, a judgment entered against a party without service of summons is a nullity in law. The plaintiff respondent contended that the petitioner's application under petition 86 of the Civil Procedure Code was dismissed, and that the proper remedy for the petitioner was to prefer an appeal against the said order. It was further argued that, in that application, the petitioner failed to take up the position of raising the objection that the Court had no jurisdiction over the petitioner, as the summons was not duly served. However, the mere failure of the petitioner to raise the objection that the Court had no jurisdiction does not preclude the petitioner from raising the said jurisdictional objection at this stage.

In the case of Sirinivasa Thero vs. Sudassi Thero (1960) 63 NLR, the Court held as follows:

> Since the decree was one in respect of which, under the Code, the judgment-creditor could not ask for, and the Court had no power to issue, a writ of possession, it seems to me that the Court was acting without jurisdiction in issuing such a writ. The foundation of a writ of possession is a decree for possession, and a writ of possession which is not founded on such a decree is a nullity, because in issuing it the

> Court acts in excess of its jurisdiction. Where a Court makes an order without jurisdiction, as in this case, it has inherent power to set it aside; and the person affected by the order is entitled ex debito justitiae to have it set aside. It is not necessary to appeal from such an order, which is a nullity: see the judgment of the Privy Council in Kofi Forfie v. Seifah [2(1958) A. C. 59].
>
> The failure of the present plaintiff to take the objection that the Court had no jurisdiction, which he could have taken at an earlier stage of this action, does not prevent him from taking it now, for an objection to the jurisdiction of the Court is one which we must entertain when our attention is called to it, since we are dealing with an absence of jurisdiction which is apparent when one looks at the decree. Mr Jonklaas referred us to the case of Jayalath v. Abdul Razak [3 (1954) 56 N. L. R. 145], but the Court was not there dealing with a case of absence of jurisdiction, but with a case of a wrong or irregular exercise of jurisdiction.

In the case of Mohammadu Cassim vs. Perianan Chetty (1911) 14 NLR 385, the Supreme Court held that "a judgment is null and void and cannot be executed against the person who is not served with summons."

In the case of Jemis vs Dochchihamy (43 NLR 527), the Supreme Court held that the Court had acted without jurisdiction in entering judgment against a person on whom summons was not served.

The aforementioned legal literature clearly establishes that a judgment entered without serving summons on the defendants is a nullity in law. Therefore, none of the preliminary objections raised by the plaintiff respondent can be maintained.

This position was clearly laid down by Lord Denning in *Benjamin Leonard MacFoy vs United Africa Company Limited*[1961] 3 All ER 1169, as follows:

> The defendant here sought to say, therefore, that the delivery of the statement of claim in the long vacation was a nullity and not a mere irregularity. This is the same as saying that it was void and not merely voidable. The distinction between the two has been repeatedly drawn. If an act is void, then it is, in law, a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is

> sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity.

Accordingly, this Court rejects all the preliminary objections raised by the plaintiff-respondent. The impugned *ex parte* judgment is a nullity in law, and, as Lord Denning observed, cannot place something upon nothing and expect it to stand.

In the above circumstances, we set aside the *ex parte* judgment dated 24-03-2022, together with all consequential orders based on that judgment, including the Order dated 07-06-2024, of the Learned District Judge of Minuwangoda.

The application of the petitioner is allowed. The Learned District Judge of Minuwangoda is directed to restore the position of the 3rd defendant petitioner, in relation to the subject matter of the action.

Judge of the Court of Appeal.
(Acting)/PCA)

Dr. S. Premachandra J.
I agree.

Judge of the Court of Appeal.