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

Court of Appeal Case No.
CA/PHC/230/2001

Provincial High Court of Central Province (Kandy) Case No. HC (REV) 301/2000

Primary Court of Kandy Case No. 666000

In the matter of an Appeal against the Judgment dated 09-10-2001 of the Provincial High Court of the Central Province (holden in Kandy) in Case No. PHC Kandy Revision 301/2000.

Thilak Kumara Ududgama
No. 45, Poornawaththa Road,
Kandy.

Petitioner

Vs.

1. D.P. Rathanayaka,
Contractor,
Trinity College,
Kandy.

2. Morris Ernest Weregoda,
Trinity College,
Kandy.

3. W.R. Breckenridge,
Trinity College,
Kandy.

4. Gunathilake,
Trinity College,
Kandy.

Respondents

AND BETWEEN

Thilak Kumara Ududgama
No. 45, Poornawaththa Road,
Kandy.

Petitioner- Petitioner

Vs.

1. D.P. Rathanayaka,
Contractor,
Trinity College,
Kandy.

2. Morris Ernest Weregoda,
Trinity College,
Kandy.

3. W.R. Breckenridge,
Trinity College,
Kandy.

4. Gunathilake,
Trinity College,
Kandy.

Respondent- Respondents

AND THEN BETWEEN

Thilak Kumara Ududgama
No. 45, Poornawaththa Road,
Kandy.

Petitioner- Petitioner- Appellant

Vs.

1. D.P. Rathanayaka,
Contractor,
Trinity College,
Kandy.

2. Morris Ernest Weregoda,
Trinity College,
Kandy.

3. W.R. Breckenridge,
Trinity College,
Kandy.

4. Gunathilake,
Trinity College,
Kandy.

Respondent- Respondent- Respondents

AND NOW BETWEEN

Rev. Father Araliya Jayasundera,
Principal,

Trinity College,
Kandy.

Petitioner seeking to be substituted

Vs.

Thilak Kumara Ududgama
No. 45, Poornawaththa Road,
Kandy.

Petitioner- Petitioner – Appellant-Respondent

Before:	Damith Thotawatte, J. K.M.S. Dissanayake, J.
Counsels:	Faisz Musthapha P.C. with Shehan Gunawardena, Isuru Balapatabendi, Charaka Jayaratne and Bishrah Iqbal instructed by Sanjeewa Kaluarachchi for the Party Seeking to be Substituted. Upul Jayasuriya, PC with P. Radhakrishnan fir the Petirtioner-Petitioner- Appellant- Respondent.
Supported:	11.02.2026
Written submissions tendered on:	26.03.2026 by Petitioner seeking to be substituted. 10.04.2026 by Petitioner – Petitioner – Appellant – Respondent.
Order Delivered:	18.05.2026

Thotawatte, J.

The proceedings in CA (PHC) 230/2001 had arisen from proceedings instituted before the learned Primary Court Judge of Kandy under Section 66(1)(b) of the Primary Courts' Procedure Act, No. 44 of 1979, wherein the Petitioner before the Primary Court, Thilak Kumara Udugama, had asserted possessory rights over the land in dispute as against

the 1st to 4th Respondents connected to Trinity College, Kandy. Upon the learned Primary Court Judge, by order dated 27.06.2000, determining that the Petitioner was not entitled to possession of the disputed land, the Petitioner had preferred a revision application before the Provincial High Court of the Central Province holden in Kandy in HC (REV) 301/2000. Following the dismissal of the said revision application by order dated 09.10.2001, the Petitioner had thereafter instituted the present appeal before the Court of Appeal in CA (PHC) 230/2001.

By June 2011 brief fees had been paid and notices issued on the Respondents had been returned unserved despite re-issuance. The matter has been fixed for argument in the absence of the Respondents on 02.08. 2011. However, the argument had not proceeded due to several postponements.

On 11.01.2012, one of the Justices constituting the bench had recused himself upon it being observed that he had delivered the impugned High Court judgment, thereby necessitating the constitution of a fresh bench by the President of the Court of Appeal. Thereafter, it appears that the matter had not progressed further after December 2012 until administrative steps were resumed in 2016.

On 05.10.2016 when the matter had been relisted and notices had again been directed to be issued on both parties and their Attorneys-at-Law returnable for 07.11.2016. Further notices had been issued on 15.11.2016 to all Respondents. On 10.01.2017 the Court in the absence of the Respondents had fixed the matter for argument on 24.03.2017.

The matter had eventually been taken up for argument on 13.06.2017 in the absence of the Respondents. Following submissions made on behalf of the Appellant, this Court had delivered judgment on 09.10.2017 *ex parte* allowing the appeal.

Subsequently, on 29.03.2018 Ravi Amarasekara, the then Manager Administration of Trinity College, Kandy, and Andrew Fowler-Watt, the then Principal of Trinity College, Kandy, had filed motions together with supporting affidavits seeking, *inter alia*, to be substituted in place of the original 1st to 4th Respondent-Respondents and to intervene in the appeal proceedings. When the matter had been taken up on 22.05.2018, the substitution applicants had contended that 3rd and 4th Respondents had died prior to the hearing of the appeal, that the appeal had proceeded without notice to them, and that the judgment dated 09.10.2017 ought therefore to be set aside.

Having considered those submissions, the Court on 12.07.2018 had held that the appeal had proceeded against deceased Respondents without proper substitution and that the

interests of justice required the affected parties to be heard. Consequently, the judgment dated 09.10.2017 had been set aside, the appeal had been restored with allowing the substitution in place of 3rd and 4th Respondents, and the matter had thereafter been fixed for argument on 19.10.2018.

Thereafter, on 19.10.2018, the learned Counsel for the Petitioner had informed Court that a Special Leave to Appeal application had been filed in the Supreme Court challenging the order dated 12.07.2018. Thereafter, the matter had repeatedly been postponed as the Special Leave application had remained pending before the Supreme Court.

Thereafter, by order dated 04.03.2024 made in SC (Spl) L.A. No. 278/2018, the Supreme Court had set aside the order of the Court of Appeal dated 12.07.2018 and held the said order to be legally unsustainable, following which the original record had been remitted to the Court of Appeal.

In SC (Spl) L.A. No. 278/2018, the Supreme Court had considered the legality of the order of the Court of Appeal dated 12.07.2018 by which the earlier judgment dated 09.10.2017 in CA (PHC) 230/2001 had been set aside and the matter restored for inquiry. Upon examining the original Court of Appeal record, journal entries, and certified copies issued by the Registry, the Supreme Court had identified several procedural irregularities and inconsistencies relating, *inter alia*, to the dates appearing on the record and the circumstances under which the impugned order had been made. The Supreme Court had further observed that the original judgment dated 09.10.2017 had been delivered by a differently constituted bench.

Accordingly, the Supreme Court had held that the purported order dated 12.07.2018 could not be accepted as a legal order and answered the formulated question of law in the negative, thereby allowing the appeal and setting aside the said order.

The effect of the Supreme Court order in SC (Spl) L.A. No. 278/2018 was that the Court of Appeal order dated 12.07.2018, which had set aside the earlier judgment dated 09.10.2017 and restored CA (PHC) 230/2001 for inquiry, ceased to have legal effect. Consequently, the original judgment of the Court of Appeal dated 09.10.2017 stood revived and remained operative.

In practical terms, the Supreme Court's decision restored the legal position that existed prior to the order dated 12.07.2018. Thus, unless and until further lawful proceedings were instituted, the appeal in CA (PHC) 230/2001 stood concluded in terms of the judgment delivered on 09.10.2017.

In these circumstances, the parties who had initiated the proceedings culminating in the order dated 12.07.2018, by seeking to intervene in CA (PHC) 230/2001, has once again by the motions dated 18.02.2025 and 09.05.2025 (with filing petition, affidavit and annexures) renewed the same application made in 2018, has moving this Court to set aside judgment dated 09.10.2017.

Upon consideration of the material presently placed before Court, it appears that the threshold issue is whether there exists any lawful basis to reopen and set aside the judgment dated 09.10.2017 in CA (PHC) 230/2001, which presently stands revived and operative consequent to the order of the Supreme Court dated 04.03.2024 in SC (Spl) L.A. No. 278/2018.

Although the Supreme Court had already held that the order dated 12.07.2018 was not a legal order and had accordingly set it aside, the Petitioner seeking substitution nevertheless contended that the Supreme Court had done so solely on the basis of technical or clerical irregularities, without considering the substantive reasons upon which the said order had purportedly been made.

The contention advanced by the Petitioner seeking substitution appeared, in effect, to invite this Court to evaluate the correctness of the reasoning contained in the order dated 12.07.2018, on the footing that the illegality had been determined on purely ancillary grounds.

His lordship Thurairaja J in SC (Spl) L.A. No. 278/2018 has stated the following:

> "*I find the information provided to the Petitioner by the Court of Appeal Registry to be incorrect, especially the dates. Further, it will not be appreciated that the Court of Appeal, being a Court of record, issuing copies unchecked. Even though they say checked, we find there are a lot of mistakes with the originals and the issued certified copies*"

Although the Court referred to "technicalities/irregularities in the journal entries, the order and copies issued," the final reasoning demonstrates that the defects were considered substantive rather than merely clerical.

The Court ultimately held:

> "*Considering the alleged order per se and the original judgment, I find that the alleged order delivered on 12.07.2018 cannot be accepted as a legal order*."

The wording:

"Considering the alleged order per se and the original judgment…"

suggests that both documents were examined together before arriving at the conclusion, that the alleged order could not be accepted as a legal order and as such it cannot be contended that the illegality had been determined on purely on technicalities and irregularities.

In view of the aforesaid, it is apparent that the order dated 12.07.2018 has been been regarded as a nullity in law, thereby leaving no remaining reasoning capable of subsequent judicial reliance. As such, the present relisting application can only be considered on the basis of the grounds now advanced, independent of any reasoning attributable to the order dated 12.07.2018.

To succeed in restoration of the appeal for hearing, the applicant must first establish exceptional and legally sustainable grounds warranting the reopening of a concluded appeal and the setting aside of a final judgment (judgment dated 09.10.2017) of this Court. On the material presently tendered, the grounds relied upon in support of the present applications are, in substance, identical to those advanced in the applications filed in 2018, which may be summarized as follows:

- that notices had not been duly served on the original 1st to 4th Respondents;
- that the 3rd and 4th Respondents had died prior to the judgment dated 09.10.2017;
- that substitution had not been effected prior to judgment; and
- that the judgment was therefore a nullity.

Further, it would appear that the present application is met with several additional difficulties, as identified in the written submissions tendered on behalf of the Petitioner-Petitioner-Appellant-Respondent, including:

- that the appeal proceedings stood terminated by the Open Court order dated 17.03.2025;
- that the present applicant was neither a party to the original proceedings nor shown to have obtained proper corporate authorization to maintain the application on behalf of Trinity College; and
- that substantial delay had occurred after the Supreme Court judgment of 04.03.2024 before the present application dated 09.05.2025 was instituted.

The appeal bearing No. CA (PHC) 230/2001 has been filed in 2001 and thereafter appeared to have remained dormant till 01.04.2011 when the first journal entries

appear on the docket and the parties had been noticed to appear in court. According to the journal entries dated 01.06.2011 the notices sent on the original Respondents (as appearing in the caption of the Petition of Appeal) had been returned undelivered. Fresh notices had thereafter been issued on 07.06.2011; however, those notices too had been returned undelivered. Subsequently, on 02.08.2011, the Court, having recorded that the Respondents were absent and unrepresented, had proceeded to fix the matter for argument.

Thereafter, owing to various intervening circumstances, the argument did not proceed for a considerable period, during which time further notices appear to have been issued on the Respondents. The subsequent notices had likewise been returned to Court with endorsements to the effect that no persons by the relevant names were residing at the addresses to which such notices had been directed.

There is no indication on the record that, at any time prior to the delivery of the judgment dated 09.10.2017, the Court had been informed that any one or more of the named Respondents were no longer in the service of Trinity College, Kandy, or that any one or more of them had deceased. It would stand to reason that, before an Appellant could be expected to take steps for substitution, he must first have been made aware that one or more of the Respondents had deceased.

In his judgment dated 09.10.2017 His Lordship Justice P. Padman Surasena (as His Lordship then was) had expressly recorded and proceeded on the basis that the Respondents were "absent and unrepresented."

At the commencement of the judgment itself, immediately after the appearance section, the judgment specifically states:

> "*Respondents - Respondents - Respondents are absent and unrepresented*."

Further, in the body of the judgment, His Lordship again expressly considered the absence of the Respondents and drew conclusions from it. The judgment states:

> "*The Respondents have failed to appear despite the notices repeatedly sent to them by this Court. Thus, this Court has to conclude that the Respondents are not interested in this matter*."

The judgment also proceeds on the footing that notices had been repeatedly sent by Court and that the Respondents had failed to appear thereafter. In fact, the conclusion that the Respondents had "lost interest in this matter" formed part of the reasoning adopted by the Court when declining to make a positive order regarding possession.

Accordingly, the judgment demonstrates that His Lordship Justice P. Padman Surasena (as His Lordship then was) did consciously advert to and rely upon the circumstance that the Respondents were absent and unrepresented.

In the aforesaid circumstances, it is incumbent upon the party seeking substitution, as a prerequisite to the reinstatement of this appeal, to furnish cogent and satisfactory reasons explaining the failure of the original Respondents to respond to the notices issued by the Court. Although the Petition and written submissions filed on behalf of the party seeking substitution do contain certain matters indirectly relied upon to explain the absence of participation in the proceedings, such matters are not advanced as a direct or comprehensive explanation for the prolonged inaction continuing from 2011 onwards.

The identification and addresses of the Respondents set out in the caption of the Petition of Appeal in CA (PHC) 230/2001 were identical to those reflected in the captions of Kandy Primary Court Case No. 66600 and Provincial High Court of the Central Province holden in Kandy Case No. HC (REV) 301/2000. The record further discloses that the Respondents had actively participated in the proceedings before both the learned Primary Court Judge and the learned Provincial High Court Judge. Nevertheless, it appears that repeated notices issued thereafter from the Court of Appeal, being the second highest court within the judicial hierarchy, and dispatched to the very same addresses, had not elicited any response from the parties concerned. Although the 01st to 04th original Respondents appear to have been associated with Trinity College Kandy and had participated in the proceedings before the Primary Court and the Provincial High Court in connection with the interests of the said institution, no meaningful steps appear to have been taken to apprise this Court of the status or whereabouts of the Respondents upon receipt of such notices.

If it is the position of the party seeking substitution that the retirement, departure from service, or demise of certain Respondents had occasioned the non-receipt or non-acceptance of the notices issued by Court, it was incumbent upon such party to specifically and chronologically place before Court the circumstances under which each notice had been returned unserved. A general assertion that the proceedings had continued without proper notice, substitution, or representation, without a corresponding factual explanation addressing the repeated return of notices, cannot by itself suffice.

Accordingly, upon the material presently before Court, it cannot be held that sufficient grounds have been demonstrated to warrant the reopening of CA (PHC) 230/2001 and the setting aside of the judgment dated 09.10.2017. In the absence of such reopening,

the question of substitution would not presently arise for determination, since substitution can only be considered within subsisting proceedings properly pending before Court.

In addition, it is observed that the party seeking substitution cannot be said to have suffered prejudice by reason of the judgment dated 09.10.2017, as it is apparent from the reasoning adopted therein by His Lordship Justice Surasena (as His Lordship then was) that, having regard to the lapse of time and the changed factual and possessory circumstances, it would have been unsafe and inappropriate to make a fresh possessory order in proceedings arising under Section 66 of the Primary Courts' Procedure Act nearly two decades after the original dispute. Accordingly, whilst vacating the orders of both the learned Primary Court Judge and the learned High Court Judge, the Court deliberately refrained from making any substituted declaration as to possession, thereby neutralizing the earlier findings in favor of the Respondents without granting corresponding relief to the Appellant, and leaving the parties to seek final adjudication of their substantive rights before the competent civil court, consistent with the provisional and preventive nature of the jurisdiction exercised under Section 66.

For the foregoing reasons, this Court is unable to hold that sufficient or legally sustainable grounds have been established to warrant the reopening of CA (PHC) 230/2001 or the setting aside of the judgment dated 09.10.2017, which presently remains operative and binding consequent to the determination of the Supreme Court in SC (Spl) L.A. No. 278/2018. Accordingly, the applications by motions dated 18.02.2025 and 09.05.2025 seeking substitution, intervention, and consequential relief are hereby refused and dismissed with costs.

Judge of the Court of Appeal

K.M.S. Dissanayake, J.

I agree

Judge of the Court of Appeal