

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

Kumarapatti Pathiranalage Freeda  
Doreen Peiris (After marriage)  
Gunathilaka,  
No. 117/4,  
Thalpathpitiya Road,  
Udahamulla,  
Nugegoda.  
Present Address:  
No. 06, Albert Place,  
Hopperskrossin, Victoria,  
Australia.

*Plaintiff*

S.C./H.C CA/L.A./137/12.

High Court Case No. WP/HCCA/MT/07/2011(L.A.)

D.C. Nugegoda Case No. 44/2008/L Vs.

1. Kumarapatti Pathrannehelage  
Namal Rohitha Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.
2. Kumarapatti Pathrannehelage Sunil  
Jackson Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.

*Defendants*

*AND*

1. Kumarapatti Pathrannehelage  
Namal Rohitha Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.

2 Kumarapatti Pathrannehelage Sunil  
Jackson Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.

*Defendants-Petitioners*

*Vs.*

*Kumarapatti Pathiranalage Freeda  
Doreen Peiris, (After marriage  
Gunathilaka),  
No. 117/4,  
Thalapathpitiya Road,  
Udahamulla,  
Nugegoda.*

Present Address:

*No. 06, Albert Place,  
Hopperskrosin, Victoria,  
Australia.*

*Plaintiff-Respondent*

**AND NOW BETWEEN**

In the matter of an application for Leave to Appeal under Section 5(c) of the High Court of Provinces (Special Provisions) (amendment) Act No. 54 of 2006 read with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. *Kumarapatti Pathrannehelage  
Namal Rohitha Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.*
  
2. Kumarapatti Pathrannehelage Sunil  
Jackson Peiris,  
No. 320, Thalawathugoda Road,  
Madiwela, Kotte.

*Defendants-Petitioners-Petitioners*

Vs.  
Kumarapatti Pathiranalage Freeda Doreen  
Peiris, (After marriage Gunathilaka),  
No. 117/4,  
Thalapathpitiya Road,  
Udahamulla,  
Nugegoda.  
Present Address:  
No. 06, Albert Place,  
Hopperskrosin, Victoria,  
*Australia.*

*Plaintiff-Respondent-Respondent*

**BEFORE** : Mohan Pieris P.C.,C.J.  
K. Sripavan, J.  
E.Wanasundera P.C., J.

**COUNSEL** : Dr. Sunil Coorey with Henmantha Boteju,  
H.A.M. Dayaratna for the 1<sup>st</sup> and 2<sup>nd</sup>  
Defendants- Petitioners- Petitioners.

Athula Bandara Herath With Shashika de Silva  
instructed by Sanath Wijewardene for the  
Plaintiff-Respondent-Respondent.

**ARGUED ON** : 28.04.2014

**WRITTEN SUBMISSIONS**

**FILED** : By the Defendants-Petitioners- Petitioners  
on 28.05.2014  
By the Plaintiff-Respondent-Respondents  
on 21.05.2014

**DECIDED ON** : 25.09. 2014

**K. SRIPAVAN, J.**

On 28.04.14 learned Counsel for the Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) took up a preliminary objection on the ground that the petition filed by the Defendants-Petitioners-Petitioners (hereinafter referred to as the "Petitioners") has not been filed in terms of 8(3) of the Supreme Court Rules 1990. Counsel submitted that the Petitioners have filed only the petition and affidavit without tendering with their application such number of notices as are required for service on the Respondent. Counsel further submitted that at the time of filing the petition the Petitioners have failed to prescribe a date for the support of the leave to appeal application.

It is not in dispute that the petition of appeal, affidavit and documents were filed on 09.04.2012. However, Counsel for the petitioners submitted that by an inadvertence, the notices and suitable dates for support of the application had not been tendered along with the petition. The notices were tendered to the Registry on 03.05.12 almost 24 days after filing the petition affidavit and documents.

Learned Counsel for the "Petitioners" sought to rely on the decision of this Court in the case of *Ediriwickrema Vs. Ratnasiri* (S.C. Appeal No. 85/2004 – S.C. Minute of 22.2.13) where Marsoof, J. stated as follows :-

*"Since no objections had been taken to said amended petition on 28<sup>th</sup> October 2003, or on any of the other dates this case had been heard, and in fact this preliminary*

*objection has been raised by learned Counsel for the Respondent only on 28<sup>th</sup> November 2012 when hearing was due to be resumed after several previous dates of hearing when learned Counsel had made submissions on the merits, it is my opinion that it is too late to raise an objection of this nature as a preliminary objection. Hence, the said preliminary objection is overruled”*

It could be seen that a preliminary objection was raised in *Ediriwickrema's* case after submissions had been made on merits and nine years after filing the amended petition. The Court having considered the question of undue delay and the failure to raise the preliminary objection at the earliest possible opportunity refused to entertain such objection.

As noted by Wijetunga, J. in the case of *Priyani E. Soysa Vs. Rienzie Arsecularatne* (1999) 2 S.L.R. 179 at 203, in dealing with the procedure applicable to applications – we are here concerned particularly with the requirements of the Rules at the stage when the Court decides whether or not leave should be granted. However, in the present application, the preliminary objection was raised before the matter was taken up for support. Hence, the decision in *Ediriwickrema's* case does not apply to the case in hand.

Learned Counsel for the Petitioners submitted in their written submissions that when determining whether an appeal can be dismissed

for failure to comply with a Rule, one must see the context of that Rule, the object of the Rule as well as the circumstances of the default. However, the Petitioners have failed to explain to the satisfaction of Court the reason why they did not tender the notices for service on the Respondent at the stage of filing the petition. Even if non compliance had not been explained, the Court has a discretion to make an order in an appropriate case considering the need to maintain the discipline of the law. The order complained of was made by the High Court of Mt. Lavinia exercising Civil Appellate jurisdiction on 28.02.12. Any party aggrieved by the said order has the right to invoke the jurisdiction of this Court within six weeks of the judgment. (Vide *Priyanthie Chandrika Jinadasa Vs. Pathma Hemamali & Others* (2011) 1 S L R 337). The six week period lapsed on 11.04.12.

The Petitioners only filed the petition of appeal, affidavit and documents on 09.04.12 and filed the required notice together with the stamp and the envelope to be served on the Defendant only on 03.05.12. Thus, the entire process of filing the petition of appeal, affidavit, documents and the notice to be served on the Respondent became complete only on 03.05.12 which is outside the appealable six weeks period. It is therefore abundantly clear that the defendant has failed to invoke the jurisdiction of this Court in the manner provided by Rule 8 of the Supreme Court Rules 1990 on or before 11.04.12.

It may be appropriate to consider the observation made by Shirani A. Bandaranayake, J. (as she then was) in the case of *Hon. A.H.M. Fowzie &*

*two Others Vs. Vehicles Lanka (Pvt.) Ltd. (2008) B.L.R. 127.*

*“An examination of Rule 8(3) clearly specifies the necessity to tender the relevant number of notices along with the application for service on the respondents. The said Rule, not only specifies the need to tender notices, but also describes the steps that have to be taken in tendering such notice. It is also to be borne In mind, that in terms of Rule 8(3), tendering of such number of notices for service has to be done, at the time the petitioner hands over his application and it appears that the said requirement is mandatory. The purpose of Rule 8(3) is to ensure that, the respondents are notified that a Special Leave to Appeal application is lodged in the Supreme Court. The Rule clearly stipulates that such notice should be given along with the filing of the application. The need for serving notice on the respondents, is further emphasized in Rule 8(5).*

*(emphasis added).*

As stated earlier, the Petitioners have not filed the requisite notice along with their petition, which was filed on 09.04.12. If the Petitioners were in need of further time to comply with Rule 8(3), they should have made an application in terms of Rule 40, immediately after filing the leave to appeal application. It is not disputed that the Petitioners had not taken any steps to issue notice on the respondent at the time of filing of this application for leave to appeal on 09.04.12. Moreover, they had not taken any steps to issue notice until 03.05.12. Therefore it is evident

that the Petitioners had failed to comply with Rule 8(3) of the Supreme Court Rules, 1990. The Supreme Court Rules made in terms of the provisions of the Constitution cannot be disregarded especially when an objection is raised with regard to its non-compliance.

Considering the totality of the circumstances, it is not possible for the Court to exercise its discretion in favour of the Petitioners. I uphold the preliminary objection raised and dismiss the Petitioners' application for leave to appeal.

**JUDGE OF THE SUPREME COURT.**

**MOHAN PIERIS, P.C., C.J**

I agree.

**CHIEF JUSTICE**

**E. WANASUNDERA, P.C., J**

I agree.

**JUDGE OF THE SUPREME COURT.**

