

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

Mohomed Rilvan Rizar Rafeek,
No. 24/10, Fedrica Road,
Wellawatta, Colombo 06.

Plaintiff

SC APPEAL NO: SC/APPEAL/162/2018

SC LA NO: SC/HCCA/LA/63/2017

HCCA NO: WP/HCCA/MTL/63/04(F)

DC MT. LAVINIA CASE NO: 966/1997/L

Vs.

Nimal Deshappriya
Wickramasingha,
No. 15, Church Road,
Keselwatta, Panadura.

Defendant

AND BETWEEN

Nimal Deshappriya
Wickramasingha,
No. 15, Church Road,
Keselwatta, Panadura.

Defendant-Appellant

Vs.

Mohomed Rilvan Rizar Rafeek,
No. 24/10, Fedrica Road,
Wellawatta, Colombo 06.

Plaintiff-Respondent

AND BETWEEN

Nimal Deshappriya
Wickramasingha,
No. 15, Church Road,
Keselwatta,
Panadura.
Defendant-Appellant-Appellant

Vs.

Mohomed Rilvan Rizar Rafeek,
No. 24/10,
Fedrica Road,
Wellawatta,
Colombo 06.
Plaintiff-Respondent-Respondent

AND NOW BETWEEN

Walgama Wilage Don Sanath
Nandana,
Winsant Lane,
Wellawatta.
Petitioner

Vs.

Mohomed Rilvan Rizar Rafeek,
No. 24/10,
Fedrica Road,
Wellawatta,
Colombo 06.
Plaintiff-Respondent-Respondent

Before: Hon. Justice S. Thuraiaraja, P.C.
Hon. Justice A.L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: J.M. Wijebandara with Dushmanthi Porogama for the
Petitioner.
Hussain Ahamed with Ayanthri De Silva for the Plaintiff-
Respondent-Respondent.

Argued on: 23.01.2024

Written Submissions:
By the Petitioner on 14.02.2024

Decided on: 03.04.2024

Samayawardhena, J.

The plaintiff filed this action in the District Court of Mt. Lavinia against the defendant, seeking specific performance of the agreement to sell the land described in the schedule to the plaint. The defendant sought dismissal of the action. After trial, the District Court entered judgment for the plaintiff. On appeal, the High Court of Civil Appeal affirmed that judgment. This Court granted leave to appeal to the defendant against the judgment of the High Court. Before the case was taken up for argument, the defendant died. The petitioner, namely W.W.D. Sanath Nandana, made an application by way of petition and affidavit supported by documents marked X, X1-X4 seeking him to be substituted in place of the deceased defendant “to proceed with this appeal” on the basis that the defendant by Deed of Gift marked X4 gifted the land in suit to him subject to the outcome of the pending cases. The petitioner further stated that the defendant’s wife predeceased the defendant and they do not have children or legal heirs. The plaintiff objects to this application for

substitution on the basis that (a) the deed X4 is a forgery and (b) the defendant did not have right to the land at the time of the execution of the deed. This order is regarding substitution pending appeal.

Substitution in the District Court is mainly governed by Chapter XXV of the Civil Procedure Code (sections 392-404). The Civil Procedure Code (Amendment) Act, No. 8 of 2017 simplified the complicated procedure regarding substitution by repealing sections 393 to 398 of the principal enactment and substituting them with new provisions, as well as amending section 27. The special feature of this amendment is to make it compulsory for each party to file a memorandum nominating at least one person and not more than three persons to be his legal representatives for the purpose of proceeding with the action in the event of his death pending final determination of the action. If the memorandum has not been filed, the steps stipulated in the said Chapter must be followed for substitution. The legislature introduced special provisions to simplify the substitution procedure in partition actions too by repealing and replacing section 81 of the Partition Law by the Partition (Amendment) Act, No. 17 of 1997. Strict adherence to these provisions by all District Judges could help save judicial time spent on substitutions.

Substitution in the Court of Appeal is governed by section 760A of the Civil Procedure Code.

760A. Where at any time after the lodging of an appeal in any civil action, proceeding or matter, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court of Appeal may in the manner provided in the rules made by the Supreme Court for that purpose, determine who, in the opinion of the court, is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a

change of status, and the name of such person shall thereupon be deemed to be substituted or entered of record as aforesaid.

Unlike in the proceedings before the District Court, where substitution is governed by several sections of the Civil Procedure Code applicable at different stages, section 760A of the Civil Procedure Code confers the Court of Appeal wide discretion to determine, who in the opinion of the Court is the proper person to be substituted. Section 760A does not specify even the mode of filing an application. In the event of the death of a party, substitution would be solely for the purpose of representing the deceased for the limited purpose of prosecuting the appeal and no more. The inquiry into determining the “proper person” under section 760A aims to ensure the continuation of the appeal despite the death or change in status of a party and not to adjudicate upon the substantive rights of the parties involved. (*Careem v. Sivasubramaniam* [2003] 2 Sri LR 197, *Chandana Hewavitharane v. Urban Development Authority* [2005] 2 Sri LR 107, *Kusumawathie v. Kanthi* [2004] 1 Sri LR 350)

Substitution in the Supreme Court is governed by Rule 38 of the Supreme Court Rules 1990.

38. Where at any time after the lodging of an application for special leave to appeal, or an application under Article 126, or a notice of appeal, or the grant of special leave to appeal, or the grant of leave to appeal by the Court of Appeal, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on application in that behalf made by any person interested, or ex mero motu, require such applicant or the petitioner or appellant, as the case may be, to place before the court sufficient materials to establish who is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status;

Provided that where the party who has died or undergone a change of status is the petitioner or appellant, as the case may be the court may require such applicant or any party to place such material before the court.

The court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted or added, and entered on the record as aforesaid. Nothing hereinbefore contained shall prevent the Supreme Court itself ex mero motu, where it thinks necessary, from directing the substitution or addition of the person who appears to the court to be the proper person therefor.

The application for substitution can be made “by any person interested”, not necessarily a legal representative or the next of kin who has adiated the inheritance of the deceased. Upon “sufficient materials” being placed before the Court, the Court shall decide who is the “proper person” to be substituted. The Court can also *ex mero motu* direct the substitution of a “person who appears to the court to be the proper person therefor”.

When it comes to substitution in appellate proceedings, the Court is not trammled by technicalities. Substitution will not confer the party substituted the status of legal heir of the deceased party. Therefore, it is not necessary to include all heirs as substituted parties. Substitution is solely for the purpose of prosecuting the appeal. Spending excessive judicial time on substitution is unnecessary unless the Court thinks that the application is *mala fide*. (*Seelawathie v. Sumanawathie* (SC/APPEAL/199/2014, SC Minutes of 22.06.2017), *Edandukitha Gnanasiri Thero v. Dellawa Suneetha Thero* (SC/HCCA/LA/378/2017, SC Minutes of 08.03.2022), *Ven. Aludeniye Subodhi Thero v. Ven. Kotapola Amarakiththi Thero* (SC/APPEAL/144/2019, SC Minutes of 31.10.2023))

As previously stated, the plaintiff objects to the application for substitution on the grounds that the deed produced by the petitioner is a fraudulent document, and in any event, the defendant did not have any rights to the land at the time of the execution of the deed. Those matters are beyond the scope not only of this inquiry but also of the main appeal. X4 is a deed which appears to have been notarially executed and registered at the Land Registry over 11 years prior to the defendant's death.

Taking all the facts and circumstances into account, I overrule the objection of the plaintiff and hold that the petitioner is a proper person to be substituted in place of the deceased defendant for the purpose of prosecuting this appeal. The costs of this inquiry will abide the final outcome of the appeal.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

A.L. Shiran Gooneratne, J.

I agree.

Judge of the Supreme Court