

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

***In the matter of an application under and in
terms of Articles 17 read with 126 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.***

**SC (F/R) Application No.
410/2019**

Budgama Mudalige Thamila Dinushi Perera
Attorney-at-Law
391/1/2, Dam Street,
Colombo 12.

PETITIONER

For and on behalf of

Devabandanage Ruwan Kumara of
216, Kakiriobada, Thalawilla, Suriyawewa,
who is presently held at an undisclosed
location.
(abductee)

-Vs-

1. Chandana Wickramaratne
Acting Inspector General of Police
Police Head Quarters,
Colombo 1.

1A. Priyantha Weerasooriya

Acting Inspector General of Police
Police Head Quarters,
Colombo 01.

2. Senior DIG
Organized Crimes Unit
Colombo 1.
3. Head Quarters Inspector
Mirihana Police Station
Mirihana.
4. Officer In Charge,
Mirihana Law Enforcement Unit,
Mirihana Police Station
Mirihana.
5. Officer In Charge,
Wellawa Police Station,
Wellawa.
6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE: **S. THURAIRAJA, PC, J.**
 ARJUNA OBEYESEKERE J. AND
 DR. SOBHITHA RAJAKARUNA, J

COUNSEL: Thishya Weragoda with Dilan Nalaka instructed by Ms. Niluka Dissanayake for the Petitioner.

Ms. Induni Punchihewa, SC, for the Respondents.

WRITTEN Petitioner on 17th March 2021 and 25th August 2025

SUBMISSIONS: Respondents on 04th August 2021 and 27th August 2025

ARGUED ON: 11th July 2024

DECIDED ON: 13th March 2026

THURAIRAJA, PC, J.

1. The Petitioner, namely, Attorney-at-Law Budgama Mudalige Thamila Dinushi Perera [hereinafter "Petitioner"], filed this application on 30th October 2019 against the 1st to 6th Respondents [hereinafter "Respondents"] seeking relief in respect of the alleged infringement of one Devabandanage Ruwan Kumara's fundamental rights guaranteed under Articles 11, 12(1), 13(1) and 13(2) of the Constitution.
2. This Court, observing no merit in the allegation on Article 11, granted leave to proceed on 8th November 2019 for the alleged infringement of Articles 12(1), 13(1) and 13(2) of the Constitution.

FACTUAL BACKGROUND

3. The instant application is instituted by the Petitioner, who is an Attorney-at-Law in terms of Rule 44(2) and 44(3) of the Supreme Court Rules 1990 on behalf of one Devabandanage Ruwan Kumara [hereinafter "Virtual Complainant" or "abductee"], who claims to have been abducted and kept in an undisclosed place at the time of institution of proceedings before the Court.

4. The Petitioner states that the Petitioner was made aware of the matters pleaded by the relatives of the abductee. According to the Petitioner, the series of events that form the basis of this application is as follows.
5. On 21st October 2019, individuals claiming to be CID officers, while attending a religious sermon in Kurunegala, had abducted and detained the Virtual Complainant without explanation, and denied prompt access to court and legal counsel. The family had lodged complaints with the police and the Human Rights Commission that he was arbitrarily detained at undisclosed locations, expressing concern that he could face false implication or custodial harm.
6. The instant Petition was filed seeking judicial intervention, including a declaration of fundamental rights violations, his immediate production before the Court, disclosure of detention details, disciplinary action against those responsible, and compensation. In response, the 4th Respondent has denied the allegations, asserting that Ruwan Kumara was lawfully arrested on 2nd November 2019 in connection with a murder investigation and for possession of heroin. The said Respondent claims that the Virtual Complainant was informed of the reasons for arrest, and duly produced before the Magistrate's Court of Gangodawila, with investigations ongoing. He contends this fundamental rights application to be unfounded and pleads its dismissal.
7. On 4th November 2019, the Petitioner filed the amended petition and affidavit as ordered by the Court, and on 8th November 2019, the parties were heard in support, where the Court granted leave to proceed under Articles 12(1), 13(1), and 13(2) of the Constitution. At this stage, learned Counsel for the Petitioner reserved his right to tender an affidavit from the Virtual Complainant, and he further moved that the 1st Respondent be directed to inquire into this application. On 23rd January 2020, the affidavit of the Virtual Complainant was filed by the Petitioner, where the said Virtual Complainant claims to

still be imprisoned. The Attorney-at-Law remained on record as the Petitioner of the fundamental rights application on behalf of the 'abductee' named in the caption.

8. Although the case was first fixed for argument on 24th September 2020, the hearing had to be postponed several times for various reasons. On 28th January 2025, when the case was taken up for argument, learned Counsel for the Petitioner informed Court that the Virtual Complainant, Devabandange Ruwan Kumara, had passed away as a result of a train accident, and the mother of said Ruwan Kumara tendered an affidavit to this Court expressing willingness to proceed with this matter in order to safeguard the rights and interests sought to be vindicated by the petition which relates to the abduction of her son. Matter was re-fixed for argument on 11th July 2025.

THE SUBMISSIONS OF THE PARTIES

9. On 11th July 2025, when the matter was taken up for argument, the learned State Counsel for the Respondents raised a preliminary objection that a memorandum as warranted under Rule 41C has not been filed, and that the petitioner cannot, for this reason, maintain this action by substituting the mother. Both parties were permitted to file written submissions on the maintainability of this application.
10. Primary argument of the learned State Counsel was that the application cannot continue because the right to sue does not accrue to the next of kin except in limited circumstances. Relying on Article 126(2), the State Counsel submitted that only in cases involving a violation of the right to life, particularly under Articles 11 and 13(4), has the Supreme Court permitted heirs or dependants to continue proceedings. Cases such as ***Sriyani Silva v. Iddamalgoda [2003]***,¹ ***Lama Hewage Lal v. Officer-In-Charge***

¹ [2003] 2 Sri L.R. 63

Seeduwa & 8 Others [2004],² and **Mohammed Rashid Fathima Sharmila v. K.W.G. Nishantha & 6 Others [2023]**,³ where next of kin were allowed to proceed because the deaths occurred due to executive action infringing the right to life, such as deaths in police custody. In contrast, the present death resulted from a train accident and not from any alleged violation of Articles 11 or 13(4), nor was leave granted under those provisions. Therefore, it was argued that the mother lacks *locus standi* to continue the case.

11. Secondly, the learned State Counsel contended that the Petitioner failed to comply with Rules 41C1, 41C3, and 41C5 of the Supreme Court Rules (as amended in 2018), which require nomination of legal representatives and their consent in the event of death. Since these rules were in force from October 2020 and the Petitioner failed to comply before the death of the abductee in December 2023, the Respondents submitted that the application is liable to be dismissed for non-compliance and laches. Additionally, the motion to substitute the mother was filed more than a year after the death, further demonstrating delay.
12. In conclusion, the Respondents submitted that there is neither a substantive basis nor procedural compliance to justify continuation of the application. As the right to sue has not devolved upon the mother and the relevant Supreme Court Rules were not followed, the Respondents pray that the application be dismissed.
13. The Petitioner argued that these objections were not raised in a timely or procedurally fair manner. Although the abductee's death was formally recorded on 28th January 2025 and the mother's affidavit was accepted without objection, the Attorney General only raised the maintainability objection later, on the date fixed for argument. The Petitioner

² SC (FR) Application No. 700/2002, S.C. Minutes of 26 July 2004

³ SC (FR) Application No. 398/2008, S.C. Minutes of 3 February 2023

submitted that raising such an objection without prior written notice is unfair and prejudicial in an adversarial system.

14. On maintainability, the Petitioner contended that the application survives the abductee's death because pleadings had already closed long before his demise in December 2023. Relying on the principle of *litis contestatio* and, particularly, the judgment in ***Malalage Chaminda Tissa Peiris v. Hettigedara Weerakoon & 11 Others* [2013]**,⁴ the Petitioner argued that once pleadings are complete, a fundamental rights application does not lapse upon the Petitioner's death and may be continued by next of kin. The Petitioner further submitted that Rule 38 of the Supreme Court Rules expressly provides for substitution where the record becomes defective due to death, and that the mother's affidavit satisfies this requirement. The exception discussed in ***Sriyani Silva v Iddamalgoda, Officer-In-Charge, Police Station Paiyagala and Others* [2003]**⁵ was distinguished by the Petitioner on the basis that it applies where the victim died before instituting proceedings, unlike the present case.
15. Regarding Rule 41C, the Petitioner argued that it does not apply retrospectively. Although introduced in 2018, it only came into operation on 15th October 2020, after this application was filed on 30th October 2019. There is no express provision requiring retrospective compliance. Even if Rule 41C were applicable, its wording, particularly the use of "may" instead of "shall", confers discretion on the Court rather than mandating dismissal for non-compliance. The Petitioner maintains that there has been no undue delay or prejudice to the Respondents and that the matter was diligently prosecuted throughout.

⁴ SC (FR) Application No. 278/2008, S.C. Minutes of 25 October 2013

⁵ [2003] 2 Sri L.R. 63

16. In conclusion, the Petitioner submitted that the Attorney General's objections are procedurally improper, legally misconceived, and unsupported by the facts. Moreover, as the application had reached the stage of *litis contestatio*, substitution is permissible under Rule 38, for Rule 41C, which came into effect after the date of the Petition, does not apply retrospectively.
17. Accordingly, the Petitioner pleaded the Court to overrule the preliminary objections and proceed to hear the case on its merits.

MAINTAINABILITY OF THE APPLICATION

Rule 38 and the Position Prior to the 2018 Amendment

18. Rule 38 of the Supreme Court Rules, 1990 stipulates that,

*"Where at any time after the lodging of an application for special leave, or appeal, or application under Article 126, or 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 material 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 herein before 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.”⁶

19. Thus, the vital issue that needs to be addressed in the instant matter is whether the right to seek redress in terms of Article 17 and 126 of the Constitution survives beyond the death of the Virtual Complainant of this Case.
20. The contention of the Petitioner is that the mother of the deceased Virtual Complainant should be substituted in place of the Virtual Complainant and permitted to continue the proceedings of this matter, since parties had already lodged their pleadings before the Virtual Complainant's death.
21. Article 126(2) of the Constitution stipulates that,

***“Where any person alleges** that any such fundamental right or language right **relating to such person** has been infringed or is about to be infringed by executive or administrative action, **he may himself or by an Attorney-at-Law on his behalf,** within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.”⁷*

22. In terms of the applicable legal position, an Attorney-at-Law may apply to the Supreme Court invoking its fundamental rights jurisdiction, only on behalf of the person who

⁶ Emphasis added

⁷ Emphasis added

alleges that a fundamental right pertaining to such person has been infringed or is imminently likely to be infringed by executive or administrative action.

23. A perusal of the decided cases establishes that the Supreme Court has permitted the continuation of proceedings by the next of kin only in the limited circumstances where a violation of Article 11 and/or Article 13(4) of the Constitution, recognising the right to life, has been established. In the present case, leave to proceed has been granted only in respect of Articles 12, 13(1), and 13(2) of the Constitution. In spite of this, as the Virtual Complainant was detained incommunicado at the time of making this application, the rationale of allowing the next of kin to move this Court may be extended to the instant case. However, as the learned State Counsel observed, it is not the next of kin that invoked the jurisdiction of this Court, but an Attorney-at-Law on behalf of the abductee/detainee. The said Attorney-at-Law continues on record as the Petitioner to date.
24. The Petitioner submitted that the application was instituted by Petition dated 30th October 2019, Affidavit of the abductee was tendered on 23rd January 2020 detailing how he had been tortured in police custody. The Respondents filed their Statement of Objections on 22nd September 2020, and the Petitioner filed the Counter Affidavit on or about 9th March 2021. Thereafter, the Petitioner filed the Written Submission on or about 17th March 2021, and the Respondents filed the Written Submissions on 4th August 2021, making 9th March 2021 the date on which the proceedings reached the stage of *litis contestatio*.

**Rule 41C of the Supreme Court Rules of 1990 as Amended by SC Rules 2090/16
Dated 26.09.2018**

25. It was submitted by the Learned State Counsel that the failure of the Petitioner to comply with Rules 41C (1), 41C (3) and 41C (5) of the Supreme Court Rules of 1990 as amended

by SC Rules 2090/16 dated 26th September 2018 disentitles the next of kin from continuing this Application. Since these rules were in force from October 2020 and the Petitioner failed to comply before the death of the abductee in December 2023, Rule 41C (6) further states that any Petitioner or Respondent who does not do so may face the consequences as set out in the immediately preceding provisions.

26. Rule 41C stipulates that,

- 1. "Every Petitioner who files any application and/or appeal inclusive of application under Article 126 of the Constitution, to the Supreme Court shall file together with such application, a memorandum as set out in the Schedule of these rules nominating at least one person and not more than three persons in order of preference to be his legal representative for the purpose of prosecuting his application in the event of the Applicant's death and/or change of status in cases where the application and/or appeal survives the death and/or change of status of the Petitioner.**
2. Every Respondent when tendering an appearance shall file a memorandum as set out in the schedule of these rules nominating at least one person and not more than three persons in order of preference to be his legal representative for the purpose of prosecuting his application in the event of the Respondent's death and/or change of status.
- 3. If the Petitioner does not file such a memorandum the Court may dismiss the application in the event of the death of the Petitioner or the change of status of the Petitioner.**
4. If the Respondent does not so file a memorandum, the Court may proceed to hear and determine the application without substituting a legal representative in the place of the Respondent.

5. **Every Petitioner and/or Respondent within three months from filling any application and/or appeal to the Supreme Court file a document which expresses written consent of the person and/or persons nominated to be the legal representative of the Petitioner or the Respondent in the event of the death or the change of status of the Petitioner or the Respondent.**
6. **Every Petitioner and/or Respondent who does not do so may face the consequences set out above.**
7. *The Petitioner/Applicant shall within one month of change to the caption being necessitated amend the caption.*
8. *If the Petitioner/Applicant fails to do so the Court may dismiss the application/Petition.*
9. *This rule does not apply to a public officer who files any application and/or appeal in his official capacity or cited as a Respondent in his official capacity.*⁸

27. Regarding Rule 41C, as noted above, the Petitioner argued that it does not apply retrospectively. Although introduced in 2018, it only came into operation on 15th October 2020, after this application was filed on 30th October 2019. There is no express provision requiring retrospective compliance. Petitioner further maintained that, even if Rule 41C were applicable, its wording, particularly the use of "may" instead of "shall", in Rule 41C (3) confers discretion on the Court rather than mandating dismissal for non-compliance.

28. The Petitioner, referring to Kulatunga, J. in **Jayawickrama Someswaram Manthri & Company v. Jinadasa [1994]**,⁹ states as follows:

"The appellant failed to file written submissions within 14 days as required by Rule

⁸ Emphasis added

⁹ [1994] 3 Sri L.R. 185, at p. 185 (Emphasis added)

35 of the Supreme Court Rules 1978 and was unable to tender an excuse for not so tendering the written submissions. The appeal has therefore to be dismissed for failure to show due diligence for the purpose of prosecuting the appeal. The corresponding provision relating to written submissions is found in Rule 30 and the provision for dismissal of the appeal for non-prosecution is found in Rule 34 of the Supreme Court Rules 1990 which are now in force. There is no change in the requirement for filing written submissions and in the provision for dismissal for non-prosecution. **As this appeal was pending on the date of the promulgation of the new Rules, the 1978 Rules would apply to this case.**"

29. However, in the said matter, Kulatunga J. proceeded to dismiss the appeal, holding as follows:

*"It is clear from the facts which I have narrated in an earlier part of this judgment that the **appellant had ample opportunity of becoming aware of the failure to file written submissions**. Counsel himself is unable to adduce any excuse for the default. Accordingly, I dismiss this appeal with costs."*¹⁰

30. The Petitioner also cited Abayakoon, J. in **Ceylon Electricity Board v. Poyry Switzerland Limited**,¹¹ who held therein as follows:

"I am in full agreement with the submissions of the learned President's Counsel for the petitioner that the Court should not rely on mere technical objections to decide on a matter that needs adjudication from the Court, if such technicality had not prejudiced the substantial rights of the parties. I am in full agreement with the observations made by this Court in previous decisions cited by the learned President's Counsel in this regard.

¹⁰ *ibid* at p. 189 (Emphasis added)

¹¹ SC/HC/LA/06/2020 with SC/HC/LA/07/2020, SC Minutes of 9th July 2025, at p. 16

However, it is my considered view that disregarding a preliminary objection of this nature should not allow a party who has shown no regard to the Rules of Procedure and is clearly guilty of laches and negligence, to benefit from such action of its own making. I am also of the view that each default has to be considered on a case-by-case basis in the context of the purpose of the Rule that has been violated."

31. The view taken by Kulatunga, J. appears to be that, if a matter was pending at the time of promulgating any new Supreme Court Rule, those pending matters, too, must be governed by such Rules thereafter. I am inclined to agree with this view. Supreme Court Rules are promulgated to streamline the procedure of this Court and avoid unnecessary and time-consuming complications, such as the one which is the subject of this order. When new Rules are promulgated and put in effect, all future steps taken in any pending proceedings must adhere to the new Rules.
32. However, I cannot close my mind to the fact that the application of new such Rules in old applications, in some limited instances, may end up causing prejudice to any one or more of the parties. For this very reason, it would only be prudent to not curtail the discretion of this Court when it comes to such matters.
33. As can be clearly seen from Rule 38 and Rule 41C (6), the provisions in the Supreme Court Rules prior to the 2018 amendment, as well as after the 2018 amendment, the discretion of this Court when it comes to procedural questions involving the death of a party is well preserved. For this reason, I am not inclined to dismiss this instant application solely based on the Petitioners' failure to comply with Rule 41C.
34. However, it has to be noted that the instant case is somewhat factually dissimilar to the cases that parties brought to the notice of this Court. It is not the Petitioner who has passed away in the instant case but the abductee on whose behalf the Petitioner, who is an Attorney-at-Law, maintained this application. When an Attorney-at-Law makes an

application on behalf of any person, such Attorney-at-Law must either be duly authorised by such person as prescribed by law, or such person must subsequently acquiesce and ratify the application made on his behalf. In the instant case, the latter was the case as the abductee was incommunicado when the petition was preferred.

35. The abductee passed away on 14th December 2023. However, the Petitioner, who is the Attorney-at-Law maintaining the application on his behalf, failed to bring the fact of such death to the attention of this Court until 28th January 2025. For well over a year, the said Attorney-at-Law has maintained an application on behalf of a person who did not exist.
36. It is my considered view that the Petitioner has failed to comply with the relevant Supreme Court Rules governing the filing of an application for substitution and has further failed to prosecute the said application with due diligence for a period of nearly one year and one month. Such conduct, in my view, amounts to laches on the part of the Petitioner.
37. No acceptable explanation has been adduced by the Petitioner to justify this serious delay in bringing to the notice of the Court the demise of the Virtual Complainant on whose behalf the Petitioner was maintaining this application. A party cannot sleep on procedural rules and requirements simply because a case reaches the stage of *litis contestatio*.
38. Having considered the facts and the circumstances relevant to the instant matter, I'm of the view that the default by the Petitioner would not fall under the category of a mere oversight or taking the relevant steps without undue delay. This is a clear situation where the Petitioner has failed to follow the relevant Supreme Court Rules with due diligence.
39. In this context, reference may be made to the well-known Latin maxim *vigilantibus non dormientibus jura subveniunt* [The law assists only those who are vigilant, and not those

who sleep over their rights].

40. In the case of ***Liyanage and Another v. Ratnasiri – Divisional Secretary, Gampaha and Others [2013]***,¹² the Supreme Court considered the above Latin maxim as relevant in a fundamental rights application filed before the Court, and held that negligence in following the direction given by the Court would disentitle an applicant to claim that Fundamental Rights were violated under the given circumstances.
41. For all the foregoing reasons, I hold that the Petitioner does not have *locus standi* to maintain this application. The preliminary objection is upheld. The application is dismissed without costs.

Application Dismissed.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J.

I agree.

JUDGE OF THE SUPREME COURT

DR. SOBHITHA RAJAKARUNA, J.

I agree.

JUDGE OF THE SUPREME COURT

¹² [2013] 1 Sri L.R. 6