

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

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff

**SC LA NO: SC/HCCA/LA/36/2021
HCCA COLOMBO NO: WP/HCCA/COL/31/2019 (F)
DC COLOMBO NO: DDV/155/2017**

Vs.

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at
1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant

AND BETWEEN

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at

1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.

Defendant-Petitioner

Vs.

Ruwa Anouka De Silva,
No. 79/14,
Dr. C.W.W. Kannangara
Mawatha,
Colombo 07.
Plaintiff-Respondent

Registrar General,
Registrar General's Department,
No. 234/A3,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
Respondent

AND BETWEEN

Saman Karl Jayasinghe,
No. 3, Park Avenue,
Borella, Colombo 08.
Presently at
1201, Canal Street Apt. 362,
New Orleans, LA 70112,
United States of America.
Defendant-Petitioner-Petitioner

Vs.

Ruwa Anouka De Silva,

No. 79/14,

Dr. C.W.W. Kannangara

Mawatha,

Colombo 07.

Plaintiff-Respondent-Respondent

AND NOW BETWEEN

Saman Karl Jayasinghe,

No. 3, Park Avenue,

Borella,

Colombo 08.

Presently at

1201, Canal Street Apt. 362,

New Orleans, LA 70112,

United States of America.

Defendant-Petitioner-Appellant-

Petitioner

Vs.

Ruwa Anouka De Silva,

No. 79/14,

Dr. C.W.W. Kannangara

Mawatha,

Colombo 07.

Plaintiff-Respondent-Respondent-

Respondent

Before: Buwaneka Aluwihare, P.C., J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.

Counsel: Anura Meddegoda, P.C., with Mihirini Perera and Nadeesha Kannangara for the Defendant-Petitioner-Appellant-Petitioner.
Palitha Kumarasinghe, P.C., with Sugath Caldera, Niran Anketell, Vasanthakumar Niles and Chathurika Gunasekara for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 06.08.2021

Written submissions:

by the Defendant-Petitioner-Appellant-Petitioner on 13.08.2021.

by the Plaintiff-Respondent-Respondent-Respondent on 11.08.2021.

Decided on: 15.10.2021

Mahinda Samayawardhena, J.

The respondent wife instituted this action against the petitioner husband in the District Court seeking a divorce, the custody of their child and financial support. Summons was reportedly served on the petitioner through the Ministry of Justice as he is resident in the United States of America. The case was taken up for *ex parte* trial and judgment entered for the respondent. The decree *nisi* was reportedly served on the petitioner and the decree absolute entered. The petitioner made an application

under section 86(2) of the Civil Procedure Code to vacate the *ex parte* judgment on the basis that neither summons nor decree *nisi* was served on him. After inquiry the District Court refused the application of the petitioner. On appeal the High Court affirmed it by judgment dated 25.11.2020. The petitioner filed this leave to appeal application on 07.01.2021 against the judgment of the High Court. By motion dated 07.01.2021, the Attorney-at-Law for the petitioner suggested 08.03.2021, 29.03.2021 and 31.03.2021 to list the application for support for leave and further moved court to issue notice on the respondent.

However in the said motion the Attorney-at-Law for the petitioner stated as follows:

I tender herewith the original petition, affidavit (scanned copy) and document annexed thereto marked B and the signed proxy (scanned copy) in proof of my appointment as registered Attorney-at-Law for the petitioner-petitioner-appellant-petitioner abovenamed and 5 copies of the above together with notices and stamped envelops and respectfully move that the same be accepted and filed of record.

I respectfully move that Your Lordships Court be pleased to grant permission to tender the original affidavit, proxy, documents marked A and B to be filed of record as soon as it is practicable to do so.

In this motion the Attorney-at-Law for the petitioner admits the petitioner did not tender:

- (a) the original proxy

- (b) the original affidavit in support of the petition
- (c) the document purportedly marked A, which is the appeal brief, and
- (d) a certified copy of the document marked B, which is the judgment appealed from.

Having admitted that the application is incomplete, can the petitioner sensibly move court to fix the matter for support for leave to appeal? How can the petitioner support for leave without the appeal brief when he seeks leave to appeal on the basis that he was not served with summons and decree *nisi*, which is a mixed question of fact and law if not a pure question of fact. There cannot be any dispute that the appeal brief purportedly marked A in the petition is a material document to support this application.

Rule 2 of the Supreme Court Rules 1990 *inter alia* states:

Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry together with affidavits and documents in support thereof as prescribed by Rule 6, and a certified copy or uncertified copy of the judgment or order in respect of which leave to appeal is sought.

What are the affidavits and documents prescribed by Rule 6?

Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant

document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal).

There was no valid affidavit nor a copy of the District Court or High Court case record when the petitioner lodged the application for leave to appeal at the Registry of the Supreme Court.

Rule 8(1) states:

Upon an application for special leave to appeal being lodged in the Registry of the Supreme Court, the Registrar shall forthwith give notice by registered post of such application to each of the respondents in the manner hereinafter set out. There shall be attached to the notice a copy of the petition, a copy of the judgment against which the application for special leave to appeal is preferred and copies of affidavits and annexures filed therewith.

It is not a bare notice that shall be served on the respondent but notice with a copy of the petition, and affidavits and annexures filed therewith.

The proper service of notice on the respondent through the Registrar of the Supreme Court is the duty of the petitioner. Once notice is issued by the Registrar, the duty is cast upon the petitioner by Rule 8(5) to attend at the Registry to verify whether notice has been returned undelivered and if so to take further steps to serve notice on the respondent.

As the original proxy, affidavit and annexures were undertaken to be produced as soon as it was practicable to do so, and since without those documents there was no point in issuing bare

notice on the respondent and fixing the application for support, the Judge made order in chambers on 05.02.2021 directing the petitioner to tender all marked documents and the memorandum and thereafter move for support.

Although the judgment of the High Court was delivered on 25.11.2020, the application for leave to appeal was filed on 07.01.2021, and this court on 05.02.2021 made order to tender all marked documents and then move to support for leave, the petitioner did not tender (a) the original proxy, (b) the original affidavit, (c) appeal brief purportedly marked A, (d) a certified copy the High Court judgment marked B and (e) complete notice to be served on the respondent. The matter was left in abeyance.

It is against this background that the respondent filed a motion dated 28.07.2021 with notice to the petitioner seeking to dismiss the petitioner's application for leave to appeal *in limine* on the basis that the petitioner who is resident in the United States of America is intentionally refusing to take steps to prosecute the leave to appeal application in order to delay the finality of the matrimonial action.

This motion was supported in open court by learned President's Counsel for the respondent and learned President's Counsel for the petitioner made reply submissions.

According to paragraph 34 of the petition, the reason for the inability to file documents with the petition was the COVID-19 pandemic, imposition of quarantine curfew and lockdown in the Keselwatta police area.

Rule 2 permits the petitioner to tender documents later, but he must show his *bona fides* and satisfy the court that he exercised

due diligence to secure the documents and any failure was beyond his control.

If the court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this Rule.

Was there quarantine curfew and lockdown from 25.11.2020 (the date of the High Court judgment) until 07.01.2021 (the date the petition was filed) preventing the petitioner from obtaining a certified copy of the appeal brief? Is there any proof that the petitioner at least applied for a certified copy of the appeal brief? Has the petitioner explained why he could not tender the original proxy and the original affidavit along with the petition? The answers are in the negative.

Let us assume the COVID-19 pandemic, imposition of quarantine curfew and lockdown in the Keselwatta police area prevented the petitioner from obtaining marked documents at the time of filing the application. Was there due diligence on the part of the petitioner to obtain those documents after the filing of this application on 07.01.2021?

When this motion was supported seeking dismissal of the petitioner's application nearly seven months after the filing of the application for leave to appeal, the petitioner had still not tendered the original proxy, original affidavit, memorandum and marked documents which he undertook to produce as soon as possible. The High Court and this court were not closed for

seven months. There was no quarantine curfew or lockdown for seven months. This is not the only leave to appeal application filed during this period. The contumacious conduct of the petitioner is conspicuous.

This court has in an array of decisions¹ repeatedly emphasised the importance of due compliance with the Supreme Court Rules and the consequences of non-compliance. Non-compliance with the Supreme Court Rules results in dismissal of the application *in limine* without going into the merits.

I acknowledge that cases should not be thrown away on technicalities without going into the merits unless they go to the root of the matter. Such an attitude will erode the confidence placed in the justice system by those who come to court seeking redress. But this is not a mere technicality.

I am also sensitive to the fact that the Rules setting out procedure have been made to facilitate the due administration of justice and not to thwart it. For the effective and efficient administration of justice, both substantive law and procedural law must co-exist. Substantive law aims at the ends which the administration of justice seeks to achieve while procedural law aims at the means by which those ends can be achieved. Without procedural law in place, substantive law will be illusory.

No acceptable reason has been adduced by the petitioner to satisfy the court that he exercised due diligence in attempting to

¹ Tissa Attanayake v. Commissioner General of Elections [2011] 1 Sri LR 220, Sudath Rohana v. Mohomad Zeena [2011] 2 Sri LR 134, Rohitha Peiris v. Doreen Peiris [2015] BLR 101, Nestle Lanka PLC v. Bodiyawatte (SC/HC/LA/54/2018 – SC Minutes of 30.09.2020), Aaron Senerath v. The Manager, Moray Estate, Maskeliya (SC/SPL/LA/231/2015 – SC Minutes of 19.01.2017), Colombo Business School Limited v. Sri Lanka Tea Board (SC/HC/LA/69/2018 – SC Minutes of 25.01.2021)

obtain marked documents and tender the original proxy, original affidavit and memorandum for nearly seven months. As I stated earlier, even at the time of the respondent supporting the motion for dismissal of the petitioner's application, there was no complete leave to appeal application before court.

The losing party shall not be allowed to abuse the process of court to prevent the winning party from enjoying the fruits of his or her victory.

In my view, the petitioner failed to exercise due diligence in prosecuting this application for leave to appeal and failed to comply with Rule 2 read with Rule 6, and Rule 8(1) read with Rule 8(3) of the Supreme Court Rules 1990. I dismiss the application *in limine*.

Judge of the Supreme Court

Buwaneka Aluwihare, P.C., J.

I agree.

Judge of the Supreme Court

Achala Wengappuli, J.

I agree.

Judge of the Supreme Court