# DIAS
## v.
# KARAWITA

COURT OF APPEAL
DE SILVA, J.,
WEERASURIYA, J.
C.A. NO. 653/98
D.C. HOMAGAMA NO. 833
SEPTEMBER 29, 1998.

*Appeal notwithstanding lapse of time – Cap. LX Civil Procedure Code S. 27, S. 765, S. 759 (1) – Court of Appeal (Appellate Procedure Rules 1990) – Validity of Proxy.*

In an Application under S. 765 Cap. LX CPC the plaintiff-respondent, took up the following legal objections:

(i) Acceptability of the proxy filed on behalf of the petitioner.
(ii) Acceptability of the amended petition.
(iii) Whether a different attorney could file proxy.
(iv) Whether there is a petition of Appeal filed to be admitted.

**Held:**

1. An act done for another person though without any precedent authority whatever, becomes the act of the principal if subsequently ratified by him, is the known and established rule of law. The irregularity occasioned by the absence of a proper proxy in favour of an Attorney-at-law is curable. However a complete omission to file the act of appointment/proxy cannot subsequently be supplied.

2. The Court of Appeal (Appellate Procedure Rules 1990 – Rule 8) permits a party with prior permission to amend his pleadings, or file additional pleadings or other documents within 2 weeks of the grant of such permission unless the court otherwise directs. The above rules empower the Court of Appeal to permit amendments.

3. Application to the Court of Appeal is a totally different application. It does not stem from the Notice of Appeal and it has nothing to do with the Notice of Appeal in the original court. An application for leave notwithstanding lapse of time originates in the Court of Appeal. Therefore a fresh proxy could be tendered by the Attorney-at-law on record or by a different attorney.

4. Under S. 766 – on the petition of Appeal submitted to the Court of Appeal necessary directions could be given to the original court to comply with.

**APPEAL** notwithstanding lapse of time.

**Cases referred to:**

1. *Attorney-General v. Silva* – 61 NLR 500.
2. *Tillekeratne v. Wijesinghe* – 11 NLR 270.
3. *De Silva v. Casinathan* – 55 NLR 121.
4. *Kadiragamadas v. Suppaiah* – 56 NLR 172.
5. *Lorna Maritime Corporation v. Mohamed Saleh Bawasir and another* – 1986 3 CALR at 133.
6. *Wilson v. Tumman and Fretson* – GMLG 236 at 242.
7. *Saravanapavan v. Kandasamydurai* – 1984 I SLR 268.

*R. C. Gunaratne* for defendant-petitioner.

*Harsha Soza* for plaintiff-respondent.

*Cur. adv. vult.*

January 21, 1999.

DE SILVA, J.

This is an application for an appeal notwithstanding lapse of time in terms of chapter LX of the Civil Procedure Code. When the matter was taken up for argument certain preliminary objections were taken and on that oral submissions were made. Thereafter both counsel agreed to file written submissions on the following questions:

(1) The acceptability of the proxy filed on behalf of the petitioner.
(2) Acceptability of the amended petition of the petitioner.
(3) Whether a different Attorney could file this application in the Court of Appeal without revocation of the proxy filed in the original court.
(4) Whether there is a petition of appeal to be admitted and entertained by the Court of Appeal.

On the first question counsel for the respondent submitted that the proxy given by the petitioner is invalid for the reason that :

(*a*) The attorney's name does not appear after the word nominate, constitute and appoint but at the very end of the document.

(*b*) The petitioner has not signed the proxy form.

Mr. Harsha Soza, counsel for the respondent contended that the defects in the purported proxy of Mr. K. Hettiarachchi are incurable and that the said purported proxy is no proxy at all in law. He relied on the decision in the case of *Attorney-General v. Silva*[1].

Mr. Ranjan Guneratne counsel for the petitioner submitted that the filing of a defective proxy would not be fatal to an action and was curable and sought permission of court to rectify the defects. In support of this contention, counsel cited the case of *Thilekaratne v. Wijesinghe*[2] where a plaintiff granted a proxy to a proctor which, by an oversight was not signed by the plaintiff.

The Proctor acted on the proxy without being objected to in the lower court. When the case was taken up in the appeal, the defendant's counsel objected to the status of the Proctor in the case. The Supreme Court held that the mistake in the proxy could be rectified at this stage by plaintiff signing it and the signature would be a ratification of all acts done by the Proctor in the action. The following decision too support the above view. *De Silva v. Casinathan*[3], *Kadiragamadas v. Suppaiah*[4].

Mr. Gunaratne further submitted that the provisions of section 27 of the Civil Procedure Code are not mandatory but only directory. In support of this view he relied on the judgment in *Thillekaratne v. Wijesinghe* referred to earlier where Hutchinson, CJ. in rejecting the, contention that an unsigned proxy was void made the following observations:

"Section 27 enacts that the appointment of a Proctor to make any appearance or application or do any act as aforesaid shall be in writing signed by the client and shall be filed in court; is in my opinion that is only directory." This case has been cited with approval by Gunasekara, J. in *Kadiragamadas v. Suppaiah* (*supra*) at 173.

Support for this view is also found in the judgment of Justice Perera in *Lorna Maritime Corporation v. Mohomed Saleh Bawazir and Others*[5] at 133 where the above decisions were considered fully. At page 139 Perera, J. observed as follows: "We are in agreement with the submission made by the learned counsel for the petitioner that if the omission in the proxy is not because the registered Attorney-at-law has not in fact any authority and if the client afterwards ratifies what has been done in his name by signing the authority, that would satisfy the requirements of the relevant provisions of the Civil Procedure Code". This would however be subject to the exception that a complete omission to file the act of appoinment or proxy cannot subsequently be supplied.

Weeramantry in his Law of Contracts vol. 1 page 204 para 215 states that: "The writing must be signed by the party to be charged or his agent on his behalf. It is immaterial in what part of the document the signature appears as long as it can be reasonably inferred that the party thereby intended to recognize the documents as an expression of his will".

In this case the Attorney himself has signed the proxy and affixed his signature. This clearly shows that Mr. Hettiarachchi accepted his appointment as the Attorney-at-law for the petitioner before presenting the petition to the Court of Appeal. Thereafter he has taken these steps not for himself but on behalf of the petitioner.

It is to be noted that the doctrine of ratification too comes into play in this instance. As explained by Tindal, CJ. in *Wilson v. Tumman and Fretson*[6]. (Cited by Perera, J. in Lorna Maritime Corporation case page 138).

"That an act done for another person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and established rule of law. In that case the principal is bound by his act whether it be for his detriment or advantage". In the light of these decisions I hold that the irregularity occasioned by the absence of a proper proxy in favour of an attorney-at-law is curable.

The second objection raised was with regard to the acceptability of the amended petition of the defendant-petitioner. It was the contention of counsel for the respondent that since the original application was defective there is no proper application before court and that application cannot be amended subsequently. It was submitted that the provisions of chapter LX of the Civil Procedure Code do not in the absence of express provisions contemplate an amendment to a petition thereunder otherwise than as expressly provided for under section 759 (1) of the Civil Procedure Code. Hence the petition of the petitioner could not have been amended for the production of Mrs. Sheila Jayawardena's affidavit the absence of which was one of the defects in the petition.

The Court of Appeal (Appellate Procedure Rules 1990 – Rule 8) permits a party "with prior permission, amend his pleadings or file additional pleadings or other documents within two weeks of the grant of such permission unless the court otherwise directs. Rule 15 specifically states that: "These rules shall also apply *mutatis mutandis* to applications made to the court under any provision of the law, other than Articles 138, 140 and 141 of the Constitution". The above mentioned rules therefore empowers the Court of Appeal to permit amendments of any application made to the Court of Appeal. The petitioner had effected the amendments with permission of court. In these circumstances the submission that this court has no power to permit the amendment is devoid of any substance.

The 3rd objection of the respondent was that Mr. Hettiarachchi could not have filed proxy in the instant matter without a revocation of the proxy of Mrs. Sheila Jayawardena who appeared for the respondent in the District Court. To drive home this point counsel gave the following illustration. A party intending an appeal files a valid notice of Appeal within time but omits to file a petition of Appeal and as in the instant case tenders a petition of Appeal under section 765 to the Court of Appeal notwithstanding lapse of time through an Atorney-at-law other than his registered Attorney-at-law in the lower court. Counsel submitted that this will lead to an incongruous position in that the notice of Appeal having been tendered by the petitioners registered attorney in the lower court and the petition of Appeal tendered by a different attorney whilst the original proxy of the registered Attorney still stands.

It is to be noted that the application to the Court of Appeal is a totally different application. It does not stem from the notice of Appeal and it has nothing to do with the notice of Appeal in the original court. A complete answer to this contention is found in the decision of Seneviratne, J. in the case of *Saravanapavan v. Kandasamydurai*[7] where he observed "an application for leave to Appeal is a step which originates in this court as in an application in revision and that the proxy in such an application can be filed either by the registered attorney in the original court or by any other attorney. It cannot be said that this will result in there being two registered attorneys and two proxies in the case".

Applying the above ratio it could be said that an application for leave notwithstanding lapse of time originates in the Court of Appeal. Therefore a fresh proxy could be tendered by the attorney on record in the original Court or by a different attorney. The question of the revocation of the proxy in the original court does not arise.

The 4th point raised by the respondent was that whether there is a petition of appeal to be admitted and entertained by the Court of Appeal in the absence of a petition submitted to the original court. Counsel contended that for this court to give an order to admit the appeal there must be a petition of Appeal submitted to the original court which has been rejected because it had been filed out of time. On a careful consideration of the provisions of section 766 it is clear that there is no substance in this submission. On the petition of appeal submitted to this court necessary directions could be given to the original court to comply with. Section 766 specifically states that the petition of Appeal should be presented to the Court of Appeal.

In these circumstances I reject the 4 preliminary objections raised by the respondent and permit the petitioner to take steps to cure the defects in the proxy by filing a duly perfected proxy within two weeks from today. Thereafter the main application could be listed for further hearing.

**WEERASURIYA, J.** – I agree.

*Preliminary objections overruled.*