

KUSUMAWATHIE
v
KANTHI

COURT OF APPEAL
SOMAWANSA, J. AND
EKANAYAKE, J.
C.A.894/89 (F)
D.C. MT LAVINIA 23/L
SEPTEMBER 16, 2004

Civil Procedure Code, sections 760, and 760A – Supreme Court Rules, Rule 38 – General Marriages Ordinance, section 18 – Substitution in the Court of Appeal – Bigamous marriage – Could the 2nd wife be substituted after the death of the legal wife?

The defendant-appellant died pending appeal. Thereafter one “K” sought to have herself substituted on the basis that she was the wife of the deceased appellant.

It was contended that at the time of the purported marriage to “K” the deceased-appellant was already married to one “G”. At the time when “K” sought to substitute herself “G” was dead.

Held:

The petitioner had entered under a form of marriage and lived as husband and wife.

Per Somawansa, J.,

"Though there was an impediment to the marriage it can be presumed that there was a legal marriage when the impediment was removed, on the death of "G".

Per Somawansa, J.,

"Though in the original court the person entitled to be substituted is the next of kin who has derived the inheritance there is no such requirement in the case of an appeal."

Preliminary objection regarding substitution.

Cases referred to:

1. *De Thorens v Attorney-General* – 1876 CAC 686

2. *Seelawathie Maljawa v Keerthiratne* – (1982) 1 Sri LR 384 at 391.

Upali de Almeida with Anna de Almeida for petitioner

Riza Muzni for plaintiff-respondent

Cur.adv.vult

October 22 2004

SOMAWANSA, J.

This order relates to the objection taken by the plaintiff-respondent to the petitioner's application to have herself substituted in the room of the deceased defendant-appellant on the basis that she was the wife of the deceased defendant-appellant. 01

The relevant facts are that by motion dated 14.03.2002 plaintiff-respondent brought to the notice of Court that the defendant-appellant, W. Eatin Singho had died on 24.08.2001. A certified copy of his death certificate was annexed marked X2. On this information notice was issued on the registered attorney-at-law of the deceased defendant-appellant. Thereafter by petition and affidavit dated 05.02.2003 the petitioner A.V. Kusumawathie sought to have herself substituted in the room of the deceased defendant-appellant on the basis that she was the wife of the deceased defendant-appellant and that she was a fit and proper person to be substituted. The marriage certificate was annexed marked X1. 10

The plaintiff-respondent objected to the petitioner's application for substitution on the basis that at the time of the petitioner's purported marriage to the deceased defendant-appellant on 03.05.1995 the petitioner was already married to one Kodippillage Gardiyas and the said marriage had been registered on 25.01.1971 as per marriage certificate marked Z. The birth certificate of the aforesaid Gardiya's daughter Kodippillage Shirani has been marked Y1 wherein the mother's name is given as A.V. Kusumawathie viz: the petitioner's name. Therefore when the petitioner's marriage to the deceased defendant-appellant was registered on 03.05.95 her earlier marriage to Gardiyas was still in existence and thus her second marriage to the deceased defendant-appellant was null and void and therefore on the death of the deceased defendant-appellant no rights passed on to the petitioner. In the circumstances the plaintiff-respondent pointed out that the petitioner is not a fit and proper person to be substituted in the room of the defendant-appellant.

The petitioner filed an affidavit stating that Kodippillage Shirani is her daughter but denied that she the petitioner was lawfully married to Kodippillage Gardiyas, that she is unable to comment on the annexure marked Y1 which purportedly is the birth certificate of her daughter Shirani and that in any event the entry 'married' in the cage 'were parents married' is wrong.

When the matter was taken up for inquiry parties agreed to resolve the matter by way of written submissions and accordingly both parties have tendered their written submissions.

Counsel for the plaintiff-respondent strenuously contends that matters that are called upon to consider by this Court at this stage are two fold in that

- a) What is the legal status of the petitioner? ; and
- b) Depending on that legal status is she a fit and proper person to be substituted in the room of the deceased defendant-appellant?

He submits section 760A of the Civil Procedure Code and Rule 38 of the Supreme Court Rules required the Court to appoint a fit and proper person in the room of the deceased party. Furthermore, Rule 38 requires such applicant to place before the Court sufficient

material to establish who is the proper person to be substituted? He points out that when one considers the birth certificate Y1 and the marriage certificate marked Z there is no doubt that the petitioner had been lawfully married to Gardiyas at the time of contracting a second marriage to the deceased defendant-appellant in 1995 vide marriage certificate marked X1. There is also no evidence that her first marriage to Gardiyas had ever been annulled. The petitioner failed to adduced any evidence to this end. Thus there is no doubt that the petitioner's second marriage to the deceased defendant-appellant was in truth and in fact a bigamous marriage; thus the second marriage to the deceased defendant-appellant being null and void *ab initio* and (accordingly in terms of the provisions in section 18 of the General Marriage Ordinance) the bigamous second marriage cannot confer any rights on the petitioner and thus she cannot be considered to be a fit and proper person to be substituted in the room of the deceased defendant-appellant.

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On the face of the documents marked by the plaintiff-respondent, it appears that when the petitioner contracted the second marriage with the defendant-appellant she was already married to Gardiyas and there is no evidence that the first marriage to Gardiyas had been annulled or dissolved. Therefore one has to accept the fact that the second marriage is an invalid marriage and therefore the second marriage does not confer any rights on the petitioner. Be that as it may, in view of the marriage certificate marked X1 one could presume that the petitioner was living with the defendant-appellant though the marriage was invalid and even after the death of Gardiyas on 28.04.98 until the death of the defendant-appellant in the year 2001. In the circumstances one could argue that the petitioner entered under a form of marriage and lived as husband and wife. Though there was an impediment to the marriage, it can be presumed that there was a legal marriage when the impediment was removed as in the instant action on the death of Gardiyas.

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In the case of *De Thorens v Attorney-General* (1) the parties went through a form of marriage though there was an unknown impediment. Everyone believed that the marriage was good. It is improbable that the parties would go through another form of marriage once the impediment was removed and the House of Lords

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held that it was not necessary. I think however as for the issue at hand it is unnecessary for us to inquire into the legitimacy or the illegitimacy of the petitioner's second marriage to the defendant-appellant nor is it necessary to inquire as to whether the second marriage confer any rights on the petitioner. In such an eventually this inquiry itself would be a long and protracted one on matters unconnected with this appeal, for I am only concerned with the issue of substituting a fit and proper person in the room of the deceased defendant-appellant solely for the purpose of prosecuting this appeal. The intent and purpose of section 760 of the Civil Procedure code as well as Rule 38 of the Supreme Court Rules is substitution for the purpose of prosecuting the appeal. Though in the original Court the person entitled to be substituted is the next of kin who has derived the inheritance there is no such requirement in the case of an appeal. In the circumstances, I would consider the petitioner to be a fit and proper person to be substituted in the room of the deceased defendant-appellant. 100

Counsel for the plaintiff-respondent has cited a passage from the decision in *Seelawathie Mallawa v Keerthiratne*⁽²⁾ at 391 which reads as follows: 110

"However, the District Judge had addressed his mind to underlying principle that if a person in unlawful possession could not be ejected pending trial, he could still be restrained from taking any benefits arising out of such wrongful possession, otherwise the court would be a party to the preserving for the defendant-appellant a position of advantage brought about by her own unlawful or wrongful conduct."

It is to be seen that the aforesaid passage has no relevance to the issue at hand for what was considered in that case was a lease agreement and it was held: 120

"That the order made by District Judge in restraining the defendant-appellant from taking any benefits arising out of wrongful possession after expiry of lease was justified".

For the above reasons, I would over-rule the objections of the plaintiff-respondent and accept the petitioner as a fit and proper

person to be substituted in the room of the defendant-appellant solely for the purpose of prosecuting this appeal. The defendant-appellant is entitled to costs of this inquiry.

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EKANAYAKE, J. - I agree.

Preliminary objection overruled;

Petitioner is a fit and proper person to be substituted.