

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

Talib Tawfiq Al Nakib,
Flat No. 16-3C,
Crescat Residencies,
No. 75,
Galle Road,
Colombo 3. (Deceased)
Petitioner-Appellant

Abeer Talib Tawfiq Al Nakib,
Shamiyah, House 2,
Plot No. 8, No. 85,
Ahamad Al Shuwaib,
Kuwait.
The Party Sought to be Substituted for the
Petitioner-Appellant

SC/CHC/APPEAL/13/2012
HC/CIVIL/27/2010/CO

Vs.

1. Hunter & Company PLC.,
No. 130, Front Street,
Colombo 1.
2. Mohammed Furqan Dossa,
3. Mrs. Lakshmi Renuka Premani Dossa,
No. 12, 37th Lane, Off Queens,
Colombo 3.

4. Dias Karunaratne Hettiarachchi,
The Registrar General of Companies,
“Samagam Medura”, No. 400,
D.R. Wijewardene Mawatha,
Colombo 10.
- 4A. Mr. D.N.R. Siriwardena,
The Registrar General of Companies,
“Samagam Medura”,
No. 400, D.R. Wijewardene Mawatha,
Colombo 10.

Respondents-Respondents

Before: Hon. Justice Mahinda Samayawardhena
Hon. Justice Arjuna Obeyesekere
Hon. Justice M. Sampath K.B. Wijeratne

Counsel: Faisz Mustapha, P.C., with Faisza Mustapha Markar, P.C.,
H.K.M. Kevin Rajitha and Zainab Markar Akram for the
Petitioner-Appellant.

Dr. Romesh De Silva, P.C., with Harsha Amarasekara, P.C.,
Naomal Pelpola and Yasith Jayasundara for the 1st, 2nd and
3rd Respondents-Respondents.

Argued on: 19.09.2025

Written submissions:

By the Party Sought to be Substituted for the Petitioner-
Appellant on 17.10.2025

By the 1st, 2nd and 3rd Respondents-Respondents on
17.10.2025.

Decided on: 13.01.2026

Samayawardhena, J.

The petitioner-appellant filed this appeal against the judgment of the Commercial High Court dated 11.11.2011. Before the appeal was taken up for argument, the appellant passed away. The appellant's daughter, Abeer Talib Tawfiq Al-Nakib, filed an application seeking that she be substituted in his place for the purpose of prosecuting this appeal. The 1st to 3rd respondents objected to the said application. Learned President's Counsel appearing for both parties agreed that the matter be disposed of by way of written submissions. Hence this order.

One of the grounds on which she sought to be substituted is that her father left a last will bequeathing all his properties to her, and that proceedings have been instituted in the District Court to prove the said last will.

In the written submissions, learned President's Counsel for the 1st to 3rd defendants states that the other three children of the deceased plaintiff have been made respondents in the said action, and that the present application for substitution is premature, as there is no finality with regard to the estate of the deceased plaintiff. He further states that a Court in Kuwait has held that the said last will cannot be enforced under Islamic law. It is further submitted that the party seeking to be substituted is neither a legal representative of the deceased plaintiff nor has she demonstrated that she is a fit and proper person to be substituted in place of the deceased plaintiff. Learned President's Counsel finally submits that, if all four children are substituted in place of the deceased plaintiff, the 1st to 3rd defendants would have no objection to the application for substitution.

Substitution in the District Court is principally governed by Chapter XXV of the Civil Procedure Code, comprising sections 392 to 404. The Civil Procedure Code (Amendment) Act No. 8 of 2017 simplified the previously complex procedure relating to substitution by repealing sections 393 to 398

of the principal enactment and replacing them with new provisions, while also amending section 27. A salient feature of this amendment is the introduction of a mandatory requirement that each party file a memorandum nominating not less than one and not more than three persons as his legal representatives for the purpose of proceeding with the action in the event of his death prior to its final determination. Where such a memorandum has not been filed, the procedure stipulated in the said Chapter must be followed for substitution.

The legislature has also introduced special provisions to simplify the procedure relating to substitution in partition actions by repealing and replacing section 81 of the Partition Law through the Partition (Amendment) Act No. 17 of 1997.

Strict adherence to these provisions by District Judges would substantially reduce the time and judicial resources presently expended on substitution proceedings.

Substitution in proceedings before the Court of Appeal is governed by section 760A of the Civil Procedure Code, which empowers the Court to make appropriate orders to ensure the continuation of the appeal upon the death of a party.

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 proceedings before the District Court, where substitution is governed by several provisions of the Civil Procedure Code applicable at different stages, section 760A of the Civil Procedure Code vests the Court of Appeal with wide discretion to determine who, in the opinion of the Court, is the “proper person” to be substituted. Section 760A does not even prescribe the mode by which an application for substitution should be made. The inquiry undertaken in determining the “proper person” under section 760A, for the limited purpose of prosecuting the remaining part of the appeal, is directed at ensuring the continuation of the appeal despite the death or change in status of a party, and not at adjudicating upon the substantive rights of the parties concerned. This position has been recognised in *Careem v. Sivasubramaniam* [2003] 2 Sri LR 197, *Chandana Hewavitharane v. Urban Development Authority* [2005] 2 Sri LR 107, and *Kusumawathie v. Kanthi* [2004] 1 Sri LR 350.

Substitution in proceedings before 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.

An application for substitution may be made “*by any person interested*”, and not necessarily by a legal representative or next of kin who has adiated the inheritance of the deceased. Upon “*sufficient material*” being placed before the Court, it is for the Court to determine who is the “*proper person*” to be substituted. The Court may 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 fettered by technicalities. This is because substitution does not confer upon the person substituted the status of a legal heir of the deceased party. It is therefore not necessary to substitute all heirs of the deceased as parties to the appeal. As I have already stated, substitution is solely for the limited purpose of prosecuting the appeal. Consequently, devoting excessive judicial time to substitution proceedings is unwarranted, unless the Court is of the view that the application for substitution is *mala fide*. This position has been consistently recognised in *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), and *Ven. Aludeniye Subodhi Thero v. Ven. Kotapola Amarakiththi Thero* (SC/APPEAL/144/2019, SC Minutes of 31.10.2023).

In the instant case, although the 1st to 3rd defendants state that they have no objection for substitution being effected provided all four children of the deceased plaintiff are substituted, no such application has been made or affidavits tendered by those three children to that effect. There is also no necessity to await the conclusion of the testamentary proceedings, as substitution does not confer upon the person substituted the status of a legal heir of the deceased party.

Taking all the facts and circumstances into account, I overrule the objection of the 1st to 3rd defendants and hold that Abeer Tawfiq Al Nakib is a proper person to be substituted in place of the deceased plaintiff 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

Arjuna Obeyesekere, J.

I agree.

Judge of the Supreme Court

M. Sampath K.B. Wijeratne, J.

I agree.

Judge of the Supreme Court