

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for a
Mandate in the nature of a Writs of
Certiorari under and in terms of Article 140
of the Constitution of the Republic.

Weera Henedige Shian Hiresh Ferando,
Of No. 4, De Vos Avenue,
Colombo-04.

Petitioner.

CA 878/2008 & CA 879/08

Vs.

- 1, The Municipal Council of Moratuwa
2. His Worship , Lord Mayor of Moratuwa.
3. The Municipal Commissioner

1st to 3rd above all of

Moratuwa Municipal Council
Galle Road, Moratuwa.

Respondents.

BEFORE: Sathya Hettige P.C. J, President of the Court of Appeal
Anil Goonaratne J, Judge of the Court of Appeal.

COUNSEL: Chrismal Warnasuriya with M.I.M Iyanullah for the petitioner
S Mudalige for the 1st, 2nd and 3rd respondents.

Argued on 19.7.2010 & 9.11.2010

Written submission tendered on 07.12.2010

Decided on 12.05.2011.

SATHYA HETTIGE P.C J, (P/CA)

The petitioner states that by virtue of Deeds of Transfer bearing no. 1597 and 1598 dated 2/03/1994 that he was bestowed with the lawful title to the land and premises in lot 3 and 4 of the plan marked P 1 (c) bearing assessment nos. 35/18 and 35/19 Jubilee Road Moratuwa (P1a , P 1b and P 1c). It is stated in the petition that the 1st respondent accordingly registered the petitioner as the lawful owner of the said land for assessment purposes.

The petitioner states further that he became aware that one Dickman Cooray is in unlawful occupation of his land which is the subject matter of this application without the approval of the 1st respondent. Petitioner made request to the 1st respondent through his Attorney to have the said unauthorized construction cleared and removed from the land. The petitioner is seeking , inter alia, a writ of Mandamus to compel the 1st to 3rd respondents to comply with the statutory duties vested in it.

When the above matter was taken up for argument on 19/07/2010 the counsel for the petitioner raised a preliminary objection on the basis that the affidavits filed by the respondents dated 26/05/2009 annexed to the statement of objections were defective in law and hence there is no valid affidavit in support of the averments contained in the statement of objections. It is also submitted that the mandatory provisions in the Court of Appeal Rules have not been complied with.

Counsel for the respondents admitted that there is no valid affidavit filed by the respondent and counsel moved for correction of the defect by filing a fresh affidavit. However, the application of the counsel for the respondent to file a fresh affidavit was not allowed by court due to strong objection by the petitioner.

The preliminary objection raised by the learned counsel for the petitioner was that the statement of objections filed by the 2nd and 3rd respondents was without a valid affidavit in law as required by the Rule 3 of the Court of Appeal (appellate Procedure) Rules of 1990. 2nd and 3rd respondents in their affidavits state that each of them is the Mayor of the 1st respondent Council. Further the 2nd respondent states in the affidavit that he is also the Municipal Council Commissioner of the 1st respondent Municipal Council by exacerbating the confusion.

As such counsel submitted that 2nd and 3rd respondents have made false and mendacious statements to the court under oath. I agree with the submissions of Mr. Warnasuriya objecting to the statement of objections being accepted by court on the basis that there is no valid affidavit in law in terms of the provisions Oaths and Affirmations Ordinance as amended. The contents in a defective affidavit cannot be accepted as true evidence and therefore should be rejected. In fact a valid affidavit furnishes prima facie evidence of facts. The affidavit should conform to the provisions in the Oaths and Affirmations Ordinance as amended and also the provisions in sections 181, 182 and 437 of the Civil Procedure Code.

In the case of **The King v Wijetunga Pereira J 18 NLR 343 at 345** observes that where there is a false statement that affidavit should be rejected . The court in that case held that ***“ on the facts of the case I am in entire agreement with the District Judge in his finding that the statement made by the accused in his affidavit that he had not been served with the notice of the application for substitution is false. For these reasons I think that the appeal should be dismissed.”***

Rule 3 (7) The court of Appeal (Appellate Procedure) Rules of 1990 provides as follows:-

“ Upon application being registered , the respondent shall be entitled to take notice of it and file a statement of objections at any time before the date fixed by court for filing objections . A statement of objections containing any averments of fact shall be supported by an affidavit in support of such averments”

In this application the learned counsel for the respondents has admitted that the affidavits of the 2nd and 3rd respondents filed of record in support of the averments of facts are defective.

I have considered carefully the written submissions of the petitioner and the respondents and I observe in pursuance of the development plan based upon the undisputed good and lawful title to the land and premises the petitioner has requested the 2nd and 3rd Respondents by letters dated 04.09.2008, and 05.10.2008 marked respectively P6 and P7 to carry out the statutory duties to remove and demolish unlawful constructions on the land in terms of the provisions of Municipal Council Ordinance as amended.

I also observe that the petitioner has made preparations to develop his property situated in close proximity to the land and premises in question and the non performance of the statutory duties by 1st to the 3rd respondents though demanded, is illegal and needs intervention of this court to grant relief to the petitioner since the petitioner has a legal right to request the 1st to the 3rd

respondents to perform the statutory duties under the provisions of the Municipal Council Ordinance and other relevant Clause .

In the circumstances , I am of the view that the statement of objections filed by the respondents is not in conformity of the law and should be rejected.

Accordingly I uphold the preliminary objection raised by the learned counsel for the petitioner and reject the statement of objections filed by the respondents and I am of the view the relief sought by the petitioner should be granted and accordingly a writ of mandamus compelling 1st to the 3rd respondents to perform their statutory duties should be issued.

Accordingly, the court issues a writ of Mandamus as per paragraph (c) of the prayer to the petition .

In the circumstances I order no costs.

This order is applicable and binding on the parties in CA application No. 879/2008 as well.

No costs.

PRESIDENT OF THE COURT OF APPEAL

Anil Goonaratne J,

I agree.

JUDGE OF THE COURT OF APPEAL.