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

In the matter of an application for orders in the nature of writs of certiorari, mandamus and prohibition under Article 140 of the Constitution

CA Writ application No. 43/2012

Kahapolage Kithsiri Palitha Fernando,
254, Bolgoda, Bandaragama.

Petitioner.

Vs.

1. The Registrar General,
   No. 234/A3, Denzil Kobbakaduwa Mawatha, Battharamulla.
2. The Registrar,
   High Court of Kaluthara, Kaluthara.

Respondents.

Before : K.T. Chitrasiri, J &
L.T.B. Dehideniya, J

Counsel : K.V.S.Ganesharajah with Tharanga Rajapakse for the Petitioner.
Janak de Silva, DSG for the Respondents.

Argued on : 05.05. 0215
Decided on : 07.07.2015

L.T.B. Dehideniya, J.

The Petitioner is a Notary Public licensed to practice in Sinhala within Kaluthara High Court Judicial Zone from 2003. He has failed to renew his Notary license for the year 2005. In 2006, his application to renew has been returned by

the Registrar High of Kaluthara (the 2nd Respondent) indicating that his license was not renewed for the year 2005 and requesting him to submit an affidavit showing reasons as to why it was not renewed. (P6). Thereafter there were some negotiations taken place between the Petitioner, the 2nd Respondent and the Registrar General (1st Respondent), till 2011. The Petitioner went on attesting deeds until he was asked to stop attesting deeds in 2008. (P17). He has applied to the High Court for renewal of his license for the years 2007, 2008, 2009, 2010 and 2011. The Petitioner, in paragraph 13 of his petition, says that though he has submitted relevant document for the years 2005 and 2006, he was not informed that his license was not renewed. This is an incorrect submission. The 2nd Respondent returned the application for the year 2006 informing him that the license not renewed for the year 2005. Finally he was asked to pay a penalty of Rs. 9022050/- for attesting deeds without a license during the said period. The Petitioner instituted this action seeking a writ of certiorari to quash the said decision, a writ of prohibition to prevent the 1st Respondent from taking any legal action and a writ of mandamus to direct the 2nd Respondent to issue license from 2005.

At the argument, the learned Deputy Solicitor General took up two preliminary objections but later agreed to argue the case in full, the preliminary objections as well as the merits of the action.

One point taken up by the learned DSG is that the 2nd Respondent is neither a natural person nor a juristic person. The 2nd Respondent named in the action is the Registrar, High court of Kaluthara. He is not a natural person. The 2nd Respondent has been sued *nominii officii.* Court of Appeal (Appellate Procedure) Rules 1990, Rule 5 provides that in an application under Articles 140 and 141of the Constitution, a public officer may be made a respondent in any such application by reference to his official designation only.

The second objection taken up by the learned DSG is that a writ of mandamus does not lie against a *nominii officii.* He argues that a writ of mandamus lies only against a natural person.

The nature of a writ of certiorari and a writ of mandamus is explained in Wade's Administrative Law, Ninth Edition. At page 602 it says "*Certiorari is*

used to bring up in to the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test, it is quashed – that is to say, it is declared completely invalid, so that no need to respect it." At page 615, *"the prerogative remedy of mandamus has long provided the normal means of enforcing the performance of public duties by public authorities of all kind. ..... the commonest employment of mandamus is as a weapon in the hands of the ordinary citizens when a public authority fails to do its duty by him."*

The writ of mandamus is a weapon. It can be used against a public officer or authority if he fails to do his public duty by him. The way of enforcing the order of Court, that is to say the way of using the weapon, is punishing the person for contempt of Court if he fails or neglects to act according to the direction given by court. Unless the order is directed to a natural person, it cannot be enforced by keeping the sword of "punishment for contempt of Court" behind his neck. As such, the writ of mandamus has to be against a natural person holding public office.

The learned DSG cited the unreported case of Mohideen and others v. Director General of Customs (CA 784/1998, CA minutes of 12.12.2011) where Goonaratne J. held that *an order cannot be enforced unless it is directed to a natural or juristic person* and further held that *no Court should make orders which cannot be enforced.* In Haniffa v. Chairman Urban Council Nawalapitiya 66 NLR 48, Thambiah J. held that *a mandamus can only issue against a natural person, who holds a public office.* In Samarasinghe v. De Mel and another [1982] 1 Sri LR 123 at 128 it was held that *a mandamus can only issue against a natural person who holds a public office. If such person fails to perform the duty after he has been ordered by Court, he can be punished for contempt of Court.* In Dayarathne v. Rajitha Senarathne [2006] 1 Sri LR 11 at 17 Marsoof J. held that *this being an application for mandamus, relief can only be obtained against a natural person who holds a public office as was decided by the Supreme Court in Haniffa v. Chairman Urban Council, Nawalapitiya.*

The Petitioner in this case is praying for a writ of mandamus against the 2nd Respondent, the Registrar High Court Kaluthara, who is neither a natural person nor a juristic person. I uphold the second preliminary objection that the

Petitioner cannot maintain this application for a writ of mandamus against the 2nd Respondent.

Now I will consider the merits of the case. The Petitioner is a Notary Public licensed to practice in the Judicial Zone of Kaluthara High Court from 2003. According to him, he has forwarded the application to renew the license for the year 2005, mistakenly to the Registrar of the District Court of Kaluthara instead of sending it to the 2nd Respondent, the Registrar of Kaluthara High Court. After forwarding the application he has continued to execute the legal documents. His contention is that the 2nd Respondent normally takes about six months to process the application and therefore continued to execute the deeds. He has not got any communication from the 2nd Respondent during the year 2005. The 2nd Respondent cannot be blamed for that because the application was not forwarded to him. There is no any reason for the 2nd Respondent to have any communication with the Petitioner in the year 2005. It is the responsibility of the Petitioner to inquire in to the matter if he has not got the license even after six months of forwarding the application. It is he who cannot practice as a N.P. without a license.

Once he forwarded the application to renew license for the year 2006, his application was returned by the 2nd Respondent informing him that his license for the year 2005 has not renewed and requested an affidavit to rectify the situation. (P6) This letter was sent on 2006.05.31. Then he is ought to know that there is something wrong with his application for the renewal for the year 2005, and the renewal for the year 2006 has been denied. A Notary Public is expected to know that he cannot execute legal documents without a proper license. Once his application to renew the license is returned without renewing the license, he should know that it is not the normal practice of issuing license, but some extraordinary situation has arisen. What the Petitioner did was without paying any attention to the situation, continued attesting deeds. He submitted an affidavit only after 3 months, on 2006.08.19 (P7). He did not consider stopping the practice until gets the license renewed.

The 2nd Respondent sought the opinion of the 1st Respondent, the Registrar General on the renewal of the license. He has expressed his opinion to the 2nd Respondent. The 1st Respondent did not object in renewing the license

subject to paying the penalty calculated according to the relevant Act. When the Petitioner came to know this, he submitted an appeal and kept on attesting deeds. He submitted applications to renew the license for the years 2007, 2008, 2009, 2010 and 2011. Without getting the license renewed, practiced as a N.P. until he was asked to stop in 2008. This type of conduct cannot be appreciated. When he knows that there is a problem in renewing his license, his primary duty is to get the license renewed before continuing. This Court held in the case of Perera v. National Housing Development Authority [2001] 3 Sri LR 50 that "*Writ being a discretionary remedy the conduct of the applicant is also very relevant. The conduct of the applicant may disentitle him to the remedy. (R v. Garland(5))*"

Under section 27(1) of the Notaries Ordinance the Registrar of the High Court is empowered to issue the license called the "certificate that such person is a notary and duly authorized to practice as such". Sub section 2 provides for the notary to submit an appeal to the High Court Judge if he has failed to submit the application within the stipulated time i.e. before the 1st day of March every year. The Petitioner in this case would have acted under this sub section when he realized that he has submitted his application for the year 2005 to the Registrar District Court instead of the 2nd Respondent. When the 2nd Respondent declined to issue the certificate for the year 2006, the Petitioner would have acted under section 29 and made an application to the High Court Judge.

The 2nd Respondent has informed the Petitioner by letter P19 to pay Rs. 9022050/- as a penalty to obtain the certificate. The Petitioner appealed to the 1st Respondent against this decision who in return informed the Petitioner to appeal to the High Court Judge. The Petitioner has not tendered any document to show that he has appealed to the High Court Judge, but the document P22 shows that he has been summoned by the High Court Judge for an interview. The finding of the said interview is not tendered to this Court. In this application the Petitioner does not intend quash any determination of the High Court judge.

There are alternative remedies against a refusal to issue a certificate. Mandate in the nature of a writ is being a discretionary remedy, will not grant if alternative remedy is available.

K. A. Gunasekera V. T. B. Weerakoon (Assistant Government Agent, Kurunegala)73 NLR 262,

Held, that the application should be refused because (a) the petitioner was guilty of undue delay in making the application, (b) the petitioner had an alternative remedy.

Dedigama V Preventive Officer, Sri Lanka Customs And Others [2004]1 Sri LR 371

Availability of an alternative remedy (section 164) prevents the petitioner from seeking relief by way of a prerogative writ.

In certain exceptional circumstances writs have been allowed even though the alternative remadies were available. It has been held in the case of Kanagaratna V. Rajasunderam [1981] 1 Sri LR 492 that "*The availability of an alternative remedy does not prevent a Court from issuing a Writ of Prohibition in cases of excess or absence of jurisdiction. ..... There is no technical obstacle to the co-existence of a right of appeal and to a writ of prohibition.*"

In the case before us the 2nd Respondent acted within his jurisdiction. He has sought the opinion of the 1st Respondent, but the decision was his. The law does not prevent the Registrar from seeking opinion. In any event, the Petitioner had alternative remedies against the decision of the 2nd Respondent. Therefore writ does not lie.

Under these circumstances, I dismiss the application.

Judge of the Court of Appeal

K.T.Chitrasiri J.

I agree.

Judge of the Court of Appeal