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 Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

C.A (Writ) Application No. 312/2013

1. W.M.H. Jayawardane,
   "Kethsiri", Kannimaduwa,
   Galenbindunuwewa.

2. Mudalihamige Jothipala,
   156, Kannimaduwa, Galenbindunuwewa.

3. Nandawathie Kumarasinghe,
   No. 153, Kannimaduwa, Galenbindunuwewa.

4. E.M.Weerakoon Banda,
   No. 168, Kannimaduwa, Galenbindunuwewa.

Petitioners

Vs.

1. Margret P. Kumburage,
   Divisional Secretary, Galenbindunuwewa.

2. National Housing Development Authority,
   Sir Chiththampalam A. Gardiner
   Mawatha, Colombo 2.

3. Jayantha Samaraweera,
   The Chairman,
   National Housing Development Authority,
   Sir Chiththampalam A. Gardiner
   Mawatha, Colombo 2.

3A. Lakvijaya Sagara Palasooriya
Chairman,
National Housing Development
Authority,
Sir Chiththampalam A. Gardiner
Mawatha, Colombo 2.

4. R.M. Piyatissa,
The District Manager,
National Housing Development
Authority,
Bandaranayake Mawatha, Anuradhapura.

5. M.A.S. Weerasinghe,
Commissioner General of Agrarian
Services,
The Department of Agrarian
Development,
Sir Marcus Fernando Mawatha, Colombo 07.

Respondents

Before: **Arjuna Obeyesekere, J**

Counsel: Dr. Jayatissa De Costa, P.C with Wijeratne Hewage and Chanuka Ekanayake for the Petitioners

Suranga Wimalasena, Senior State Counsel for the Respondents

Written Submissions: Tendered on behalf of the Petitioners on 27th August 2018

Tendered on behalf of the Respondents on 21st November 2018

Decided on: 14th February 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 18th June 2018, the learned President's Counsel appearing for the Petitioners and the learned Senior State Counsel appearing for the Respondents moved that this Court pronounce judgment on the written submissions that would be tendered by the parties.

The Petitioners have filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decisions and/or actions of the 1st – 4th Respondents to take over possession of the land depicted as Lot No. 158 in Final Village Plan (FVP) No. 1425[1] or any other portion of land adjoining Lot No.158;

b) A Writ of Certiorari to quash the decision and/or actions of the 1st – 4th Respondents to make use of the lands depicted in Lot No. 158 or any other adjoining portion for the construction of a housing scheme;

c) A Writ of Mandamus to compel the 5th Respondent to take necessary steps against the filling and clearing of and carrying out of any kind of construction on the paddy lands situated within Lot No. 158 or any other adjoining portion of lands.

The facts of this matter very briefly are as follows.

[1] A copy of the Final Village Plan No. 1425 has been annexed to the petition, marked 'P1'.

The Petitioners state that they are residents and farmers of the Huruluwewa colonisation scheme and that this action has been instituted not only to safeguard their interests but also the interests of the public living in the area. The Petitioners state further that the said colonisation scheme was initiated in 1951 by alienating State lands to the general public under the provisions of the Land Development Ordinance. The Petitioners have annexed to the petition, marked '**P1**' a copy of FVP No. 1425 which sets out some of the lands given under the said scheme. The issue that arises in this application relates to Lot No. 158 of '**P1**' which consists of 9A 26P. The Petitioners claim that Lot No. 158 is a rock reservation. The Petitioners state that even though no permits or grants have been issued by the State in respect of Lot No. 158 so far, those who have been issued permits or grants in respect of the lands adjoining Lot No. 158 have over the years cultivated the lands situated within Lot No. 158 as well.

The Petitioners state that they became aware in August 2012 that the State was to allocate lands within Lot No. 158, for the purpose of establishing a housing scheme. The Petitioners state further that as they had cultivated the lands within Lot No. 158, they objected to the said course of action, but the Respondents had cleared the said land and in the process, destroyed the cultivations carried out by the Petitioners on Lot No. 158.

The Petitioners' complaint to this Court is that they are in possession of the lands situated within Lot No. 158 and that if they are to be evicted, steps must be taken in terms of the State Lands (Recovery of Possession) Act No. 7 of 1979, as amended. The Petitioners state further that the construction of the said housing scheme would damage the irrigation canal network that supplies

water to their paddy fields, that the approval of the Department of Agrarian Development has not been obtained to develop the paddy fields situated within Lot No. 158 and that any development of the area would damage the archaeological monuments that are situated in the area.

This Court will now deal with each of the above complaints of the Petitioners.

The Petitioners concede that the State has so far not issued any person a permit in respect of Lot No. 158. The Petitioners state however that the persons who had been issued permits in respect of the adjoining lands have cultivated the lands falling within Lot No. 158 for the last 60 years. If this claim is true, this is an admission by the Petitioners that they are in unauthorised possession of State land and therefore, steps must be taken in terms of the law to evict the Petitioners.

In support of their position that they have cultivated lands within Lot No. 158, a list of farmers who are apparently cultivating the land within Lot No. 158 has been annexed to the petition, marked '**P3**'. This Court has examined '**P3**' and finds that '**P3**' contains the names of 16 persons including the 3rd and 4th Petitioners. Out of these persons in '**P3**', only one person, namely Y.M.Ariyaratne Banda, who is not a Petitioner in this application, is apparently cultivating Lot No. 158.

The Petitioners have stated further that they obtained fertiliser to cultivate the lands within Lot No. 158 and have submitted with the petition receipts marked as '**P4a**' – '**P4f**' as proof. This Court has examined the said receipts and find that the said receipts do not disclose the land in respect of which the fertiliser

has been supplied. Furthermore, this Court cannot accept the letters written by the Petitioners, annexed to the petition marked '**P6a**' – '**P6c**' as proof that they cultivated lands situated within Lot No. 158 as the contents of the said letters do not support the position of the Petitioners.

Thus, this Court is of the view that the Petitioners have failed to substantiate their claim that they are cultivating lands situated within Lot No. 158 or that they are in possession of lands situated within Lot No. 158.

According to '**P3**', the only person cultivating land within Lot No. 158, if at all, is Y.M.Ariyaratne Banda. While the Petitioners have not annexed an affidavit or at the least a letter issued by Ariyaratne to establish that Ariyaratne is in fact cultivating part of the land situated within Lot No. 158, the Respondents have submitted that the learned Magistrate of Kahatagasdigiliya had issued an Order of ejection on 7th March 2002 against Ariyaratne, ejecting him from a portion of Lot No. 158.[2] Thus, not only have the Petitioners failed to substantiate their position that Ariyaratne was cultivating Lot No. 158 at the time this application was filed, the Petitioners have suppressed from this Court the fact that Ariyaratne had been ejected from Lot No. 158 on an order of Court.

It is the position of the Respondents that the land was free of any encroachment and thus there was no necessity to institute proceedings under the State Lands (Recovery of Possession) Act No. 7 of 1979. By a letter dated 20th May 2013, marked '**R4**', an Engineer of the 2nd Respondent, National

[2] The order of ejection issued in Magistrate's Court of Kahatagasdigiliya Case No. 83119 has been submitted by the Respondents, marked '1R4'.

Housing Development Authority has confirmed that the land on which the housing scheme is to be established has not been encroached and that it remains as wasteland.

Taking into consideration the material presented by both parties to this Court, this Court takes the view that the Petitioners have failed to substantiate their position that they are in occupation of any land situated within Lot No. 158. Hence, this Court is in agreement with the submission of the learned Senior State Counsel that the necessity to invoke the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 does not arise.

The Petitioners' next argument is that the allocation of land from Lot No. 158 would obstruct irrigation canals supplying water to the paddy fields of the area. The Petitioners have not submitted any material to prove the existence of any irrigation canals within Lot No. 158 or running through Lot No. 158 or the manner in which irrigation canals supplying water to the lands cultivated by the Petitioners on permits issued to them and situated outside Lot No. 158 would be obstructed. The Petitioners have thus failed to substantiate their position.

The Respondents, while denying that irrigation canals would be obstructed, have produced marked '**1R5**' a letter dated 11th December 2013 issued by the Divisional Irrigation Engineer of Huruluwewa confirming that the farmers in the area, which includes the Petitioners, have already closed the irrigation canals. Thus, the question of the proposed scheme obstructing any irrigation canals, either within or outside of Lot No. 158 does not arise. In the above

circumstances, this Court is of the view that this argument of the Petitioners is without merit.

The Petitioners' third argument is that the lands within Lot No. 158 are paddy lands cultivated by them and hence, any development of the said lands would require the approval of the Department of Agrarian Development. This Court has already held that the Petitioners have failed to substantiate their position that they are in possession of any land within Lot No.158. However, as the Petitioners are complaining of a violation of the provisions of the Agrarian Development Act No. 46 of 2000, as amended, this Court would consider this argument of the Petitioners.

This claim of the Petitioners that the proposed land is a paddy land has been denied by the 5th Respondent, Commissioner General of Agrarian Development who has taken up the position that the necessity to obtain the approval of the Department of Agrarian Development does not arise since the said lands are not paddy lands. The 5th Respondent has stated further that the 1st and 2nd Respondents have not taken any steps to clear any paddy fields and hence, the necessity to obtain the approval of the Department of Agrarian Development for the proposed housing scheme does not arise. This Court also observes that the tenement list attached to '**P1**' does not describe Lot No. 158 as paddy lands but as 'rock, jungle and open wasteland'.

In the circumstances, this Court is of the view that the Petitioners have not substantiated their position that the land that has been identified for the proposed housing scheme is paddy land and that the approval of the

Department of Agrarian Development must be obtained for the development of the said land.

The Petitioners' final complaint to this Court is that any development of the area would damage the archaeological monuments that are situated within Lot No. 158. This position of the Petitioner is contradicted by the letter dated 24th July 2013 written by the Assistant Director of Archaeology (North Central Province), Anuradhapura, annexed to the petition marked '**P11**', which reads as follows:

> "ඒ අනුව අනුරාධපුර දිස්ත්‍රික්කයේ ගලෙන්බිදුනුවැව ප්‍රාදේශිය ලේකම් කොට්ඨාශයේ අංක 162 කන්නිමඩුව ග්‍රාමනිලධාරී වසමෙහි කන්නිමඩුව ගමෙහි පිහිට අ.ග. සි අංක 1425 හි අතිරේක අංක 1 හි 158 දරණ ඉඩම සහ ගල රක්ෂිතය මාගේ නිළධාරීන් විසින් පරීක්ෂා කර මා වෙත වාර්තාවක් ඉදිරිපත් කර ඇත.
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> එම වාර්තාවට අනුව රජයේ සේවකයින්ගේ නිවාස ව්‍යාපෘතිය සඳහා ගල රක්ෂිතය හැර ඉතිරි භූමිය වෙන් කිරීමට යෝජිත බැවි සඳහන් කර ඇත. පුරාවිද්‍යා දෙපාර්තමේන්තුව මගින්ද පරීක්ෂා කර ඉඩම අවට සහ මතුපිට පුරාසාධක නිරීක්ෂණය නොවූ බැවින් අදාල නිර්දේශයන් මේ වන විට ලබා දී ඇත.
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> ඉඩමෙහි දකුණු දෙසින් පිහිට අක්කර 2 ක පමණ වපසරියකින් යුත් ගල්වැටියෙහි උතුරු දෙසින් නැගෙනහිර බැවුමෙහි අනුරාධපුර අවධියට අයත් ශෛලමයහිදි පිලිමයක කොටස් දෙකක් නිරීක්ෂණය වූ බැවින්ද වැඩිදුරටත් එම වාර්ථාවෙහි සඳහන් කර ඇත.
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> නිවාස සංවර්ධන අධිකාරිය මගින් ඉඩම සංවර්ධනය කිරීමේදි පුරාසාධකයන්ට හානි සිදුවී නොමැති බැවින්ද නිවාස ව්‍යාපෘතිය සඳහා යෝජිතව ඇත්තේ ගල රක්ෂිතයට වෙන්කර ඇති ඉඩමෙන් බැහැර කොටස පමණක් බවද කාරුණිකව දන්වා සිටිමි."

The entire extent of Lot No. 158 is 9A 26P. According to the survey carried out by the Survey General's Department, an extent of 3A 10P would be allocated for the housing project[3] and the reservation for the rock has been excluded

[3] This is borne out by the letter dated 14th May 2013 issued by the 1st Respondent, produced by the Respondents marked '1R11'.

from the plan prepared by the Survey Department.[4] By a letter dated 18th July 2013 produced by the Respondents marked '**1R6**', the Assistant Director of Archaeology (North Central Province) has confirmed as follows:

> "එබැවින් ගල්වැටිය පිහිටි භූමිය හැර ඉතිරි ඉඩම් කොටස උක්ත කරුණ සඳහා නිදහස් කිරීම සම්බන්ධයෙන් පුරාවිද්‍යා දෙපාර්තමේන්තුවේ විරෝධතාවයක් නොමැති බැවින් කාරුණිකව දන්වා සිටිමි."

Thus, '**P11**' and '**1R6**' makes it clear that the claim of the Petitioners that the establishment of the housing scheme would damage the archaeological monuments situated within Lot No. 158 is without merit.

The real motive for the Petitioners to present this application is not the unauthorised filling of paddy lands, or the obstruction of irrigation canals or damage to any archaeological monuments. The real reason has been clearly set out in the final paragraph of the letter dated 5th August 2012 sent on behalf of the Petitioners, annexed to the petition, marked '**P5**', which reads as follows:

> "අපගේ තුන් වන පරම්පරාව සඳහා නිවසක් සදාගැනීමට හෝ වෙනත් කටයුත්තක් සඳහා කිසිදු ඉඩ කඩක් මේ ගම තුල නැත. මේසේ හෙයින් අපේ මුතුන් මිත්තන් අවුරුදු 60 කට වඩා වැඩි කාලයක් සංවර්ධනය කළ මෙම ජනපද ඉඩම් වල අමතර ප්‍රමාණයන් එම පරම්පරාවල දු, දරුවන්ට ලබා දීමට අවශ්‍ය කටයුතු කර දෙන ලෙස ද, එම ඉඩම් පිටස්තර පුද්ගලයන්ට බෙදා දීම නොකරන ලෙස ද ඉතා කරුණාවෙන් ඉල්ලමු."

A person invoking the Writ jurisdiction of this Court must do so with clean hands and action should not be filed to achieve a collateral purpose. Unfortunately, in this application, not only have the Petitioners not come with

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[4] This is borne out by the letter dated 17th July 2014 issued by the Senior Superintendant of Surveys, produced by the Respondents marked 'R8'.

clean hands, the Petitioners have suppressed and misrepresented facts, as observed earlier, and this application has been filed to prevent the authorities from allocating the land to any other persons except the Petitioners.

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and utmost good faith. The Supreme Court in **Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others**[5] citing the case of **Jayasinghe v National Institute of Fisheries and Nautical Engineering and Others**[6] has held as follows:

> "The conduct of the Petitioner in withholding these material facts from Court shows a lack of *uberrima fides* on the part of the Petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship requires the Petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court.
>
> In the case of **Blanca Diamonds (Pvt) Limited v. Wilfred Van Els and Two Others**[7], the Court highlighted this contractual obligation which a party enters into with the Court, requiring the need to disclose *uberrima fides* and disclose all material facts fully and frankly to Court. Any party who misleads Court, misrepresents facts to Court or utters falsehood in Court will not be entitled to obtain redress from Court. It is a well-established proposition of law, since Courts expect a party seeking relief to be frank and open with the Court. This principle has been applied even in an

[5] 2013 (1) Sri LR 6 at page 15.
[6] 2002 (1) Sri LR 277.
[7] 1997 (1) Sri LR 360.

application that has been made to challenge a decision made without jurisdiction. Further, Court will not go into the merits of the case in such situations."

A full and fair disclosure of all the material facts must be placed before the Court when an application for a writ is made and the process of the Court is invoked.[8] So rigorous is the necessity for a full and truthful disclosure of all material facts that the Court will not go into the merits of the application, but will dismiss it without further examination. In this application too, the conduct of the Petitioners is sufficient to warrant a dismissal of this application, even without proceeding to consider the matter on its merits.

The dishonest conduct of the Petitioners is further illustrated by the failure of the Petitioners to name as Respondents, the persons to whom the plots of land were to be given. The Petitioners have annexed to the petition, a notice dated 31st May 2013, marked '**P14**' issued by the 3rd Respondent, calling for applications for the allocation of land in the proposed housing scheme to be established within Lot No. 158. However, the Petitioners have not named as parties to this application, the persons who were selected, although wide publicity of the names of such persons had been given through a notice published by the 1st Respondent.[9] The Petitioners cannot claim ignorance of this list and have not explained to this Court, at least in their counter affidavit why they failed to name the said persons as parties to this application.

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[8] See Alphonso Appuhamy vs Hettiarachchi 77 NLR131 at 135; PCP Kumaratunga vs. The Divisional Secretary of Monaragala - CA(Writ) Application No. 365/2009; CA Minutes of 29th April 2013.

[9] By letter dated 22nd August 2013 marked 'R1', the 2nd Respondent informed the 1st Respondent as follows: "උක්ත කරුණ සම්බන්ධයෙන් 2013.07.29 දින පවත්වන ලද සම්මුඛ පරීක්ෂණයෙන් තෝරාගන්නා ලද ඉඩම් කට්ට ලාබන්ගේ නාමලේඛනය හා ඒ සම්බන්ධ දැන්වීම මේ සමග එවන අතර, ඒ සඳහා විරෝධතා හා අභියාචනා ඉදිරිපත් කිරීම් සඳහා එය ඔබ කාර්යාලයේ නාම පුවරුවේ ප්‍රදර්ශනය කිරීමට කටයුතු කරන ලෙස කාරුණිකව දන්වමි."
The list marked 'R3' had been published with the notice marked 'R2'.

The relief prayed for by the Petitioners is to quash the decision to establish a housing scheme within Lot No. 158 and to allocate lands to the persons who have been selected through a transparent procedure.[10] Such an order would affect the rights of the 37 individuals who applied in response to **'P14'** and have been selected as being eligible to receive lands. It has been consistently held by our Courts that failure to name the necessary parties is fatal to a Writ application.[11] This Court is in agreement with the submission of the learned Senior State Counsel that the selected applicants would be directly affected by the outcome of this application and thus are necessary parties to this application and that they should have been named as Respondents. This Court is therefore of the view that the failure to name the said beneficiaries as Respondents is fatal to the maintainability of this application.

Taking into consideration the totality of the above circumstances, this Court does not see any legal basis to grant the Writs of Certiorari and Mandamus prayed for by the Petitioners. This application is accordingly dismissed. Although this Court is of the view that the conduct of the Petitioners warrant the imposition of costs, considering the fact that the Petitioners are farmers, this Court refrains from ordering costs.

Judge of the Court of Appeal

[10] According to 'R1', the beneficiaries have been selected through an interview process.

[11] See Farook vs. Siriwardena, Elections Officer and Others (1997) 1 Sri LR 145; Rawaya Publishers and Other vs. Wijedasa Rajapaksha, Chairman, Sri Lanka Press Council and Others (2001) 3 SLR 213; Abayadeera and 162 Others v. Dr. Stanley Wijesundara, Vice Chancellor University of Colombo and Another [1983] 2 Sri LR 267.