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

In the matter of an Application for mandates 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

CA (Writ) Application No: 218/2017

1. Nallaperuma Thanthrige Leelawathie

2. Ilandari Dewa Ajantha Deraniyagala

Both of, Keeragahawela,
Agulugalle, Nawadagala.

PETITIONERS

Vs.

1. Divisional Secretary,
Divisional Secretariat,
Karandeniya.

2. Provincial Land Commissioner,
Department of Commissioner of Lands
– Southern Province,
211, Wakwella Road, Galle.

3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: **Yasantha Kodagoda, P.C., J / President of the Court of Appeal**
Arjuna Obeyesekere, J

Counsel: Lakshan Dias with Dayani Panditharatne and Priyalal Sirisena for the Petitioners

Maithri Amerasinghe Jayathilake, State Counsel for the Respondents

Written Submissions: Tendered on behalf of the Petitioner on 21st March 2019 and 2nd July 2019

Tendered on behalf of the Respondents on 25th April 2019

Decided on: 2nd December 2019

Arjuna Obeyesekere, J

When this matter was taken up for argument on 1st October 2019, learned Counsel for the parties moved that this Court be pleased to pronounce judgment based on the written submissions that had already been tendered.

The Petitioner has filed this application, seeking *inter alia* the following relief:

a) A Writ of Certiorari to quash the decision taken by the 1st and 2nd Respondents to issue Permit No. LL177, a copy of which has been annexed to the petition marked '**P10**', to Illandari Deva Nimal Perera;[1]

b) A Writ of Mandamus to compel the 1st and the 2nd Respondents to issue a fresh permit in favour of the Petitioners.

[1] The number of the permit should be corrected as 'LL771'.

The facts of this matter very briefly are as follows.

The State has issued Illandari Dewa Rachel, Permit No. 6882 in terms of Section 19(2) of the Land Development Ordinance. The extent of the said land had apparently been 1A 2R, but it is not in dispute that in terms of a re-survey carried out in 2005, the present extent of the land is 1A 1R 4P. The said Rachel passed away in 1971, leaving behind his wife, D.K.Leyino, who passed way in 1982. It appears that Rachel had not nominated a successor, nor had Leyino succeeded to the said permit.

The Petitioners state that after the death of Leyino, Rachel's eldest son, Illandari Dewa Jeeniel and another son, Illandari Dewa Somasiri had occupied the said land and had jointly developed it.[2] The 1st Petitioner is the wife of Somasiri while the 2nd Petitioner is the son of Somasiri. Jeeniel was not married and did not have any issues.

It appears that disputes had arisen between Jeeniel and Somasiri with regard to the said land, and that pursuant to an inquiry conducted by the 2nd Respondent,[3] the said permit No. LL6882 had been cancelled by the 2nd Respondent on 7th February 2000.[4] Pursuant to the said cancellation, the 1st Respondent, by his letter dated 14th March 2001, annexed to the petition marked '**P4**', had sent the following letter to the said 2nd Respondent, recommending that permits be issued to Jeeniel and Somasiri:

[2] Vide paragraph 7 of the petition.
[3] This is borne out by the letter dated 1st December 1997, annexed to the petition marked 'P2'sent by the 1st Respondent to Jeeniel and Somasiri.
[4] The notice of cancellation has been annexed to the petition marked 'P3'.

"ඉඩම් සංවර්ධන ආඥා පනත යටතේ ලබා දී අවලංගුකර ඇති ඉඩම් සඳහා එම පනතේ 20 'අ' වගන්තිය යටතේ අනුමැතිය ඉල්ලීම

උක්ත කරුණ සම්බන්ධයෙන් 106, 109 වගන්ති යටතේ අවලංගු කර ඇති/රජයට භාර දී ඇති 95 ඒ, අඹුළුගල්ල, ගුම නිලධාරී වසමේ පිහිටි එල්. එල්. 6882 අංක දරණ ඉඩම හුක්ති විඳින අනවසරකරුට/අනවසරකරුවන්ට පහත සඳහන් ආකාරයට බලපත්‍ර ලබා දීම පිණිස සම්පූර්ණ කරන ලද අනවසර වාර්තාව/අනවසර වාර්තා ඔබගේ ඔබගේ අනුමැතිය සඳහා මේ සමග අමුණා අවමි.

ඒ සඳහා ඔබගේ අනුමැතිය ලබා දෙන ලෙස කාරුණිකව ඉල්ලමි.

1. ඉලන්දාරි දේව සෝමසිරි
2. ඉලන්දාරි දේව පිනියෙල් "

Jeeniel had passed away on 29th September 2002, while the recommendation in '**P4**' to give him a permit in respect of half of the land was under consideration. The Petitioners state that after the death of Jeeniel, Somasiri continued to possess and cultivate the entire land.

The Petitioners have produced with the petition, marked '**P1**', a copy of Plan No. CA/KRN/03/1148 prepared by the Survey Department in March 2004, pursuant to a request made by the 1st Respondent in December 2003.

The said Plan '**P1**' consists of two lots of land with the following comments:

Lot No.	Extent (hectares)	Remarks
A	0.258	මු.පි. S1831 හි කැබලි අංක 6 හි කොටස් ඉඩම් සංවර්ධන ආඥා පනත යටතේ අයි.ඩී. ටීවෙල් විසින් බලපත්‍ර අංක එල්.එල්. 6882 මත වගා කර ඇති අතර ඔහු මිය ගොස් ඇති බැවින් ඔහුගේ පුත්‍රයකු වන අයි.ඩී.ටී. සෝමසිරි විසින් හුක්ති විඳී. සුදුස්සක් කිරීම සඳහා - (අ.0 රූ.02 පර් 22.0)

B	0.258	මු.පි.S1831 හි කැබලි අංක 6 හි කොටස ද ඉඩම් සංවර්ධන ආඥා පනත යටතේ අයි.ඩී. ටිවෙල් විසින් බලපත්‍ර අංක එල්.එල්. 6882 මත වගා කර ඇති අතර, ඔහු මිය ගොස් ඇති බැවින් ඔහුගේ පුත්‍රයකු වන අයි.ඩී. පිනියෙල් විසින් විසින් භුක්ති විඳි අතර ඔහුද මෙවන විට මිය ගොස් ඇත. සුදුස්සක් කිරීම සඳහා - (අ.0 රූ.02 පර්.22.0)

The Petitioners submit that the State had issued Illandari Dewa Nimal Perera, another son of Rachel, and an elder brother of Somasiri, permit No. LL771 on 25th July 2005. A copy of the said permit has been annexed to the petition marked '**P10**'. It appears that the land that has been given to Nimal Perera on the said permit is the land that had been identified to be given to Jeeniel, and in respect of which a permit was scheduled to be issued to Jeeniel, if not for his death prior to the permit being issued. The entitlement of Nimal Perera to the land that was to be given to Jeeniel stems from the fact that he was a brother of Jeeniel and an elder brother of Somasiri. At the same time that '**P10**' was issued, the State had also issued Somasiri, permit No. LL 770 in respect of the land that was occupied by him. The Petitioners have however suppressed this material fact from this Court.

Pursuant to the issuance of the permit '**P10**' on 25th July 2005, Nimal Perera had attempted, on 11th August 2005 and once again on 23rd August 2005, to enter the land referred to in the said permit,. These attempts of Nimal Perera had been resisted by Somasiri, who appears to have by then occupied the land that was to be allocated to Jeeniel. Owing to a possible breach of the peace, the Karandeniya Police had filed proceedings in terms of Section 66 of the Primary Courts Procedure Act No. 44 of 1979, as amended, in the Magistrate's Court of Elpitiya. The learned Magistrate had held in favour of Somasiri and the

subsequent appeal had been rejected by the Provincial High Court of Balapitiya.

Nimal Perera had thereafter filed action in the District Court of Elpitiya seeking a declaration of title and an order to evict the Petitioners. The learned District Judge, by her judgment dated 9th March 2017, had granted the said relief. It appears from the caption of the judgment of the District Court that Nimal Perera had died during the pendency of the trial and that his wife, Kaluwadeva Kusumalatha had been substituted as Plaintiff. The Petitioners have pleaded that Somasiri too passed away on 5th November 2014. Although the Petitioners have claimed that an appeal has been filed, details of such appeal have not been pleaded with the petition, nor was any information placed before this Court regarding the present status of that appeal.

It is only thereafter that the Petitioners filed this application seeking the aforementioned relief. Although the Respondents have filed their Statement of Objections supported by an 'affidavit' said to be that of the 2nd Respondent the Provincial Land Commissioner,[5] the learned Counsel for the Petitioners have pointed out that the said affidavit does not have the name of the affirmant, and have moved that the objections of the Respondents be rejected. The Respondents have not moved to file a fresh affidavit nor has any explanation been offered in this regard.

The fact that a person by the name of T.G.Sarath Kumara, Provincial Land Commissioner placed his signature on the said 'affidavit' is evident only because his seal has been placed under his signature. The fact that a signature

[5] Vide motion dated 14th November 2018. Rule 3(7) of the Court of Appeal (Appellate Procedure) Rules 1990 specifies that the 'statement of objections containing any averments of fact shall be supported by an affidavit in support of such averments.'

was placed on an affidavit which does not bear a name means that the contents of the affidavit have not been read out to the affirmant, and the *jurat* clause claiming that it was in fact read out, is therefore false. If it was in fact read out, this omission would have been discovered. This Court is of the view that an 'affidavit' which does not have the name of the affirmant cannot be considered as being an 'affidavit' which has legal value, and is therefore not of any evidentiary value. For that reason, this Court will not rely on the matters of fact that have been pleaded in the Statement of Objections of the Respondents, unless they have been admitted by the Petitioners.

This Court will now consider the complaint of the Petitioners to this Court. The learned Counsel for the Petitioners submitted that the Petitioners are not claiming the land on the basis that Somasiri is a son of Rachel, but on the basis that the entire land that was the subject matter of Permit LL6882 has been developed by Somasiri and that the decision to give half of the land to Nimal Perera is arbitrary and unreasonable. The learned Counsel for the Petitioners submitted further that as the entire land has been developed by Somasiri, the Petitioners, by virtue of being the wife and son of Somasiri, have a legitimate expectation that the entire land would be given to them.

The argument that Somasiri developed the land on his own is not factually correct, as the Petitioners themselves admit that the land was developed jointly by Somasiri and Jeeniel.[6] However, due to the disputes that had arisen between the two brothers, the 1st Respondent had recommended as far back as 2001, by '**P4**', which had been copied to Somasiri, that individual permits be given in favour of Somasiri and Jeeniel. Thus, by the time Jeeniel passed away in 2002, the State had decided to grant a permit to Jeeniel over half the land

[6] Supra.

that was originally held by his father, Rachel. Neither Somasiri nor the Petitioners appear to have objected to the said recommendation, as no material in this regard has been produced with the petition. In this factual background, this Court is of the view that neither Somasiri nor the Petitioners can have any legitimate expectation that a permit would be given to them for the entirety of the land, especially in view of the specific admission that the land was jointly developed by Somasiri and Jeeniel.

In paragraph 26(f) of the Statement of Objections, it has been pleaded that after the death of Jeeniel, '*the succeeding eldest male sibling of the family, Nimal Perera has requested the 1st Respondent that he be named as the successor to the portion of land which was possessed and held by Jeeniel*'. In their counter affidavit, the Petitioners have not denied this averment but only stated that they '*have a legitimate expectation for a fresh permit considering the development of the land by Somasiri and the Petitioners for a period of 3 decades.*'

The 2nd Respondent, by a letter dated 3rd June 2005 marked '**R5**' issued to the 1st Respondent had granted approval to issue permits to Somasiri and Nimal Perera. Pursuant to this approval, Permit No. LL771 marked '**P10**' had been issued on 25th July 2005 to Nimal Perera. The permit that was granted to Nimal Perera is the permit that was scheduled to be granted to Jeeniel. In addition to '**P10**', the State has given due recognition to the development activity that Somasiri had carried out on the said land, which is borne out by their decision to issue Somasiri permit No. LL770 in respect of half the land on the same date that the State issued '**P10**'. Thus, the steps that were commenced by the 1st and 2nd Respondents in 2001 to divide the land into two and give one half to Jeeniel and the other half to Somasiri, culminated with the issuance of the said

permits in July 2005. In these circumstances, this Court is of the view that there is no merit in the submission of the learned Counsel for the Petitioners.

Furthermore, if Somasiri and/or the Petitioners were dissatisfied with the said process, or by the issuance of '**P10**', such decision ought to have been challenged soon thereafter. This application has been filed only in June 2017, which is 12 years after '**P10**' had been issued, seeking a Writ of Certiorari to quash '**P10**'. Thus, on the face of the application, the Petitioners are guilty of undue delay.

The Superior Courts of this country have consistently held that a petitioner seeking a discretionary remedy such as a Writ of Certiorari must do so without delay, and where a petitioner is guilty of delay, such delay must be explained to the satisfaction of Court. In other words, unexplained delay acts as a bar in obtaining relief in discretionary remedies, such as Writs of Certiorari and Mandamus.

In **Biso Menika v. Cyril de Alwis**[7] Sharvananda, J (as he then was) set out the rationale for the above proposition, in the following manner:

> *"**A Writ of Certiorari is issued at the discretion of the Court**. It cannot be held to be a Writ of right or one issued as a matter of course. But exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue a Writ at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, like*

[7][1982] 1 Sri LR 368; at pages 377 to 379. This case has been followed by the Supreme Court in Ceylon Petroleum Corporation v. Kaluarachchi and others [SC Appeal No. 43/2013; SC Minutes of 19th June 2019].

submitting to jurisdiction, laches, undue delay or waiver..... The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chances of his success in a Writ application dwindle and the Court may reject a Writ application on the ground of unexplained delay..... An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed." (emphasis added)

In **Seneviratne v. Tissa Dias Bandaranayake and another**[8], the Supreme Court, adverting to the question of long delay, held as follows:

"If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect, nam leges vigilantibus, non dormientibus subveniunt,[9] *and for other reasons refuses to assist those who sleep over their rights and are not vigilant."*

In **Issadeen v. The Commissioner of National Housing and others**[10] Bandaranayake J, dealing with a belated application for a Writ of Certiorari held as follows:

"It is however to be noted that delay could defeat equity. Although there is no statutory provision in this country restricting the time limits in filing an application for judicial review and the case law of this country is indicative

[8] [1999] 2 Sri LR 341 at 351.
[9] For the law assists the watchful, (but) not the slothful.
[10] [2003] 2 Sri LR 10 at pages 15 and 16.

of the inclination of the Court to be generous in finding 'a good and valid reason' for allowing late applications, I am of the view that there should be proper justification given in explaining the delay in filing such belated applications. In fact, regarding the writ of certiorari, a basic characteristic of the writ is that there should not be an unjustifiable delay in applying for the remedy".

Sharvananda, J[11] in **Biso Menike's** case went on to consider if an application for a writ should be dismissed on account of delay where the act complained of is an illegality, and held as follows:

*"When the Court has examined the record and is satisfied the Order complained of is **manifestly erroneous** or **without jurisdiction** the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, **unless there are very extraordinary reasons to justify such rejection**. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction."* (emphasis added)

The following passage from **Lindsey Petroleum Co., Vs. Hurd** was also referred to in **Bisomenike's** case:[12]

"Two circumstances always important in such cases are the length of the delay and the nature of the acts done during the interval which might

[11] Supra; page 379.
[12] (1874) L.R., 5 P.C 221 at 239.

affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as related to the remedy."[13]

The above judgments clearly illustrate four important matters, although not necessarily in a particular order. The first is that an application for a Writ must be filed without delay. The second is that where there is, on the face of the application, a delay, such delay must be explained to the satisfaction of Court. The third is that delay can be ignored, if the act complained of is manifestly illegal, such as a decision of a statutory authority made in excess of jurisdiction. The fourth is the nature of the acts that have taken place during the time period between the impugned decision or act and the filing of the application. These factors are relevant when determining whether an application should be dismissed on account of the Petitioner being guilty of delay.

As this Court is of the view that there has been undue delay in filing this application, the next question that this Court must consider is whether the Petitioners have explained this long delay. The petition, and the written submissions filed on behalf of the Petitioners have not addressed the issue of delay at all. This Court is of the view that the filing of an application in the Magistrate's Court under Section 66 cannot be an excuse for the delay, as the said application could not have resolved the issue that is presently before this Court. On the contrary, since Nimal Perera was trying to enter the land by virtue of the permit '**P10**' issued to him, and as Somasiri was of the view that he should be given the entirety of the land, this Court is of the view that Somasiri should have challenged the issuance of the permit soon thereafter. In the absence of any explanation, this Court is of the view that the Petitioner is

[13] Supra; page 378.

guilty of laches and that this application is liable to be dismissed in view of the inordinate delay in invoking the jurisdiction of this Court.

In any event, if this Court is to consider quashing the permit '**P10**', it must hear the successors of Nimal Perera, who, as observed earlier, were substituted as the Petitioners in the District Court action. The Petitioners have however not named the successors of Nimal Perera as parties to this application.

It is trite law that failing to name the necessary parties is fatal to a Writ application. [14]

In the case of **Rawaya Publishers and Other vs. Wijedasa Rajapaksha, Chairman, Sri Lanka Press Council and Others**[15] it has been held that:

> *'In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings."*

The Supreme Court in **Abayadeera and 162 Others v. Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo and Another**[16] described in the following manner as to who is a necessary party:

> *"It appears to us that the principle to be discerned from these cases is what was stated by Nagalingam, A.J. (in James Perera v. Godwin Perera*

[14] Vide Farook vs. Siriwardena, Elections Officer and Others [(1997) 1 SLR 145 at page 148; Kulatunga, J.]
[15](2001) 3 SLR 213.
[16] (1983) 2 Sri LR 267.

48 NLR 190) where an order would affect adversely a party who is not before Court, that party must be deemed to be a necessary party and consequently the failure to make the necessary party a respondent to the proceedings must be regarded fatal to the application."

The facts in **James Perera v. Godwin Perera**[17] are similar to the facts in this application. In that case, the petitioner had been carrying on the business of a bakery for a number of years at premises belonging to one Jayasinghe. After the petitioner had made his application for the renewal of his licence in respect of the premises, Jayasinghe appears to have made an application himself in respect of the same premises. The Chairman of the Village Committee had issued the licence in favour of the petitioner till March and granted the licence to Jayasinghe from April 1. However, Jayasinghe had not been named as a respondent. On an objection taken that the issue of writ would affect prejudicially the rights of Jayasinghe who is not before the Court, the Supreme Court held as follows:

"It would manifestly be unsatisfactory to have two persons licensed to run the business of a baker at one and the same place of business where the two parties are at arm's length. The issue of a licence to the petitioner must necessarily involve the cancellation of the licence issued in favour of Jayasinghe. I am therefore of the view that the objection is sound and that the failure to make Jayasinghe a party respondent must be held to be a fatal irregularity."

This Court is of the view that the wife and/or children of Nimal Perera would be entitled, in terms of the provisions of the Land Development Ordinance, to

[17] 48 NLR 190 at page 191; Nagalingam. J.

succeed to the permit '**P10**' and hence, they are necessary parties to this application. Any decision that this Court takes on the validity of '**P10**' without affording the wife and children of Nimal Perera a hearing would affect their rights. This Court cannot make any determination in their absence. This Court is therefore of the view that the failure on the part of the Petitioners to name as respondents, the wife and children of Nimal Perera, is fatal to the maintainability of this application, and that for this reason too, this application must be dismissed.

There are two other matters that this Court must advert to.

By the averments in the petition, the Petitioners have attempted to convey to this Court that even though Somasiri jointly developed the land, and even though initially Somasiri and after his death, the Petitioners are in occupation of the said land, that the Respondents have failed to give due recognition to their rights. The truth however is that the State did in fact issue Somasiri a permit way back in 2005. This fact is a material fact, especially as the Petitioners are impugning the conduct of the Respondents, and should have been disclosed by the Petitioners. By their failure to do so, the Petitioners have suppressed a material fact.

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and in utmost good faith. The rationale for this principle has been laid down by the Supreme Court in **Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others**[18] citing the case

[18] 2013 (1) Sri LR 6 at page 15.

of **Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others**[19] which had held as follows:

> *"The conduct of the petitioner in withholding these material facts from Court shows a lack of uberrimae 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 **M.P.A.U.S Fernando, the Conservator General of Forests and two others vs. Timberlake International Pvt. Ltd. and another**[20], the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of Court, stated as follows:

> *"It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show uberrimae fides or ultimate (utmost) good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application."*

This Court has also repeatedly expressed the view that parties seeking relief from this Court should present all relevant facts to this Court without suppressing material facts.

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[19] 2002 (1) Sri LR 277.
[20] S.C. Appeal No. 06/2008; SC Minutes of 2nd March 2010.

On this ground too, this Court is of the view that this application is liable to be dismissed.

The second matter that this Court must advert to is the fact that this application is a collateral attack on the judgment of the District Court, which recognised the entitlement of Nimal Perera and his wife, the substituted Plaintiff, to occupy the land that is the subject matter of Permit No. 771 marked '**P10**'. If this Court issues the Writ of Certiorari, it would amount to a setting aside of the said judgment.

In the above circumstances, this Court is of the view that the Petitioners are not entitled to the relief prayed for. This application is accordingly dismissed, without costs.

Judge of the Court of Appeal

Yasantha Kodagoda, P.C., J/
President of the Court of Appeal

I agree

President of the Court of Appeal