

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

In the matter of an application for a Writ of Prohibition and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA /Writ Application No.
149/2020

Lindagawa Gedara Lalani Dhamayanthi
Karunasena,
No. 17 Welihinda, Kotadeniyawa.

Petitioner

Vs.

1. Mr. R.M.C.M. Herath
Land Commissioner General
Mihikatha Medura, No. 1200/6
Rajamalwatta Road,
Battaramulla

2. Ms. Ajantha wickramarathna
Provincial Land Commissioner
Provincial Council Complex
Pallekele
Kundasale

3. Ms. Chandani Ekanayake,
The Divisional Secretary
Pallepola Division
Divisional Secretariat
Pallepola

4. L.G. Sumith Karunasena alias L.G. Somadasa
No. 280 A
School Road
Maningomuwa
East, Maningomuwa, Matale
5. Lidagawa Gedara Jayanthi Karunasena
School Road
Maningomuwa
East, Maningomuwa, Matale
6. Hon. Attorney General
The Department of Attorney General
Hulstdorp Street
Colombo 12.

Respondents

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : D. P.L.A. Kashyapa Perera for the Petitioner
A.Gajadeera SC for the 1st, 3rd and 6th Respondent
Saliya Peiris PC with Thanuka Nandasiri for the 4th Respondent
Ahan Fernando with M. Konara for the 5th Respondent

Written

Submissions : 4th Respondent on 23.03.2022

On : Petitioner on 21.03.2022

Argued On : 07.03.2022

Order On : 05.04.2022

B. Sasi Mahendran, J.

The Petitioner, in the instant application, is seeking, inter alia, a Writ of Prohibition against the 1st, 2nd, and 3rd Respondents to prohibit and prevent the 1st, 2nd, and 3rd Respondents from transferring or disposing the land to the 4th or 5th Respondents (her siblings) and a Writ of Mandamus against the 1st, 2nd, and 3rd Respondents to perform their statutory duties under the Land Development Ordinance No.19 of 1935, as amended, to hand over vacant possession of the block of land more fully described in the Second Schedule to the Petition.

When this matter came up for support on 07.03.2022, this Court posed the question to the Petitioner whether the necessary requisites to obtain a Writ of Mandamus in her favour were satisfied?

The following facts are relevant to determine this dispute.

The late L.G. Kiriya alias L.G. Karunasena, the father of the Petitioner, the 4th, and 5th Respondents, the original permit holder of the land more fully described in the first schedule, was awarded the same by virtue of a Land Grant under the Land Development Ordinance. During his lifetime he nominated all three of his children as successors to the said land. According to paragraph 6 of the Petition, the 4th Respondent had submitted a forged document representing that the late L.G. Karunasena had cancelled the earlier nomination and instead nominated the 4th Respondent as the sole and singular successor to the entire property. Upon discovery of the forgery, the 3rd Respondent had cancelled the said nomination. The 4th Respondent, seeking to quash that decision, instituted an action in the Civil Appellate High Court of Central Province holden in Kandy. Consequently, the Civil Appellate Court quashed the decision. The judgment is marked as P6 in the Petition. Thereafter, the 3rd Respondent referred the matter to the Attorney General for his opinion on what steps are to be taken with regard to the nomination.

According to the advice given by the Attorney General, the 3rd Respondent conducted an inquiry and has taken steps to register the said nomination of all three nominees at the Land Registry in accordance with Section 56 of the Land Development Ordinance. It is at this stage that the Petitioner has come to this Court by way of a writ application.

There is no dispute that the Petitioner in view of the nomination by the original grantee, i.e., the father of the Petitioner, is one of the successors. She derives a statutory right under the Land Development Ordinance. Nonetheless, with regard to the possession of the land, she should legally succeed the original grantee of the earlier grant. This is emphasised in Section 84 (b) of the Land Development Ordinance which reads as follows:

if the permit-holder is not survived by his or her spouse or if the spouse does not succeed to the land, any other person who is a duly nominated successor of the deceased permit-holder shall be entitled to succeed to that land on such person obtaining a permit from the Government Agent under the provisions of this Ordinance to occupy that land.

The rights of a successor to a property are granted under a permit upon the said nominee adhering to the applicable statutory provisions. Thus far, the Petitioner has not obtained the permit.

Here in the instant case, the 3rd Respondent has accepted the Petitioner as a nominated successor and according to Section 58 of the Land Development Ordinance, the particular nomination of the successor has been effective.

The issue before this Court is whether the nominated successor is eligible to enjoy the rights of a permit holder?

In the present case, the Petitioner does not have a permit. There is no evidence to show she has so requested one. According to Section 55, which reads as follows, it clearly states:

The act or transaction whereby a successor is lawfully nominated under the provisions of this Chapter shall not be construed as a disposition of the land for which such successor is nominated.

The Ordinance defines the term “Disposition” in Section 2 and reads thus:

“Disposition” with its grammatical variations and cognate expressions means any transaction of whatever nature affecting land or the title thereto, and includes any conveyance, devise, donation, exchange, lease, mortgage or transfer of land.

The above section was considered by His Lordship Justice Aluwihare in Palamkumbura v. Damayanthie (2016) BLR 171.

“Thus, it appears that the mere nomination of a successor does not tantamount to automatic transfer of the land to the successor nominated; the nominee is then required to have the permit officially transferred upon making an application to that effect to the relevant authority. In view of the statutory provision embodied in section 55 of the Land Development Ordinance, only upon regularising the permit, can the successor gain full benefit of the enjoyment of the land.”

The Ordinance sets out a procedure to obtain a permit, and subsequently a grant. According to Section 23 of the Land Development Ordinance, there will be a land kachcheri for the alienation of the land.

Section 23 reads as follows,

- (1) At a Land Kachcheri the Government Agent may, having considered the applications referred to in Section 22-*
- (a) Select the applicants to whom state land shall be alienated either immediately, or on, or before, a future date in accordance with the provisions of this Ordinance; or*
 - (b) Reject any application where the provisions of this Ordinance relating to such applications have not been complied with.*

In the light of this Section, a merely nominated successor is not automatically eligible to possess the land. The nominated successor has to make an application to the relevant authority to have the permit officially transferred to her, as per her share entitlement. Thereafter only can the successor gain the full benefit of the enjoyment of the land.

It must be borne in mind that the original grantee nominated the Petitioner along with the 4th and 5th Respondents as successors to the said land. As the land has to be divided amongst the three of them the 3rd Respondent has to take steps under the Land Development Ordinance to survey the land.

Accordingly, there are provisions to be followed by the 3rd Respondent before issuing the permit. The Petitioner, who is merely a nominee, accepted by the 3rd Respondent as entitled to 1/3rd share of the land, has not yet been elevated to the status of a permit holder. Thus, the filing of this application before the 3rd Respondent can take steps that he is obliged to do is premature.

In Sunil F.A. Coorey's Principles of Administrative Law in Sri Lanka Volume 3 (at p.972), it is stated,

“An application for mandamus to compel the valid exercise of power should not be made prematurely. If there has already been an invalid exercise of power an application for the remedy thereafter to compel a fresh and valid exercise of power in place of the invalid one is never premature. If there has been no attempt to exercise power even invalidly, an application for mandamus is premature unless there has been a demand for the exercise of that power followed by an express or implied refusal.”

This view has been reaffirmed by our Courts as well, as evident from the following decisions:

In Ceylon Mineral Water, Ltd v. District Judge, Anuradhapura 70 NLR 312 His Lordship Abeyesundere, J. held;

“The application made by the petitioner for Writs of Certiorari and Prohibition is premature. At the present moment, there is no order of the District Court of Anuradhapura to be reviewed by this court and so there is no reason to issue a writ of certiorari. As there is no evidence to show that the District Court of Anuradhapura is about to determine the claim made to the motor car seized in execution of the decree of that Court, no writ of prohibition can be issued. We therefore dismiss the petition. The dismissal of this petition should not be considered as a bar to the petitioner, if so advised, filing a new petition in appropriate circumstances.”

We are of the view that whether to alienate or not the land more fully described in the First Schedule, is a matter for the Divisional Secretary to consider at the Kachcheri. That is to say, there is no decision taken by the 3rd Respondent. We hold that this is a premature application and we dismiss the application without costs.

Unless otherwise the permit is issued there is no statutory duty cast on the Divisional Secretary to remove the 4th Respondent from encroaching upon the share of land belonging to the Petitioner as the 4th Respondent too, along with the 5th Respondent, are entitled to an undivided 1/3rd Share of the land, where their rights were accepted by the 3rd Respondent.

For the foregoing reasons, we hold that this application must be dismissed.

JUDGE OF THE COURT OF APPEAL

D.N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL