

**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 under and in terms of Article 140
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

1. Kumburegedara Herath Banda,
46/2, Sansungama, Kawudulla

PETITIONER

CA No. CA/Writ/0340/2019

v.

1. C. M. Karunaratna,
Divisional Secretary,
Divisional Secretariat,
Medirigiriya.
- 1(A) W. M. Indika Karunaratna
Divisional Secretary,
Divisional Secretariat,
Polonnaruwa.
2. Panduka S. P. Abewardhana,
District Secretary,
District Secretariat Office,
Polonnaruwa.
- 2(A) W. A. Darmasiri,
District Secretary,
District Secretariat,

Polonnaruwa.

3. K. H. M. D. Wijewardhana,
Deputy Commissioner of Lands,
District Secretariat,
Polonnaruwa.
4. R. M. C.M. Herath,
Commissioner General of Lands,
Land Commissioner General's Department,
"Mihikatha Madura",
No.1200/6,
Rajamalwaththa Road,
Battaramulla.
- 4(A) K. D. Bandhula Jayasinghe,
Commissioner General of Lands,
Land Commissioner General's Department,
"Mihikatha Madura",
No.1200/6,
Rajamalwaththa Road,
Battaramulla.
5. Ajith Kumarasingha,
46, Sansungama, Kawudulla.
6. Munasinghe Mudiyansele,
Palingu Manike,
46/1, Sansungama, Kawdulla.
7. Kumburegedara Rambanda,
46/2, Sansungama, Kawdulla.
8. Secretary to the President of the
Democratic Socialist Republic of Sri
Lanka,
Presidential Secretariat,
Galle Face, Colombo 01.
9. Honourable Attorney General,

Attorney General's Department,
Colombo 12.

RESPONDENTS

BEFORE : M. Sampath K. B. Wijeratne J. and
Wickum A. Kaluarachchi J.

COUNSEL : Nuwan Bopage with Manoj Jayasena for
the Petitioner.

Shantha Jayawardena with Thilini
Vidanagamage for the 5th Respondent.

Suranga Wimalasena, D. S. G. with S. C.
Shamanthi Dunuwila for the 1st - 4th, 8th
and 9th Respondents.

ARGUED ON : 03.05.2023

DECIDED ON : 22.06.2023

M. Sampath K. B. Wijeratne J.

Introduction

The Petitioner instituted these proceedings seeking *inter-alia*, writs of *certiorari* quashing the Grants marked 'P 7(i)', 'P 7(ii)' and quashing the decisions marked 'P 9(i)', 'P 9(ii)'; a writ of *mandamus* directing the Respondents to grant a Permit and/or a Grant in favour of the Petitioner. The 1st to 4th, 8th and 9th Respondents filed their objections seeking dismissal of the Petition. The 5th Respondent also filed objections seeking dismissal of the Petition.

The Petitioner's case

Admittedly,¹ Kumburegedara Ukkurala was the permit holder² of the two allotments of land named Kaudullamukalana; Lot No. 294 in an extent of 2 A. 2 R. 21 P. ('P 1(a)') and Lot No. 172 in an extent of 5 A. 0 R. 39 P. ('P 1(b)'). The subject matter of this application is the aforementioned two allotments of land. Ukkurala died on the 26th November 1978³. The Petitioner's contention is that Ukkurala died without nominating a successor to his two allotments of land. According to the Petitioner, Ukkurala left his wife and nine children as his heirs. Petitioner stated that at the time of his death, Ukkurala was separated from his wife and thus, she did not succeed to the subject matter, exercising her rights under the Land Development Ordinance⁴.

The Petitioner is one of the sons of the deceased Ukkurala. The Petitioner states that as the surviving eldest son of the family, he allowed Kumburegedara Gunarathnabanda, Kumburegedara Lokubanda, and Kumburegedara Rambanda to occupy the two lands. Kumburegedara Gunarathnabanda married Meragalge Anulawathie on the 12th July 1982 ('P4'). At the time of marriage, Meragalge Anulawathie had a child, the 5th Respondent Ajith Kumarasinghe, born on the 8th June 1977 ('P 8'). According to the Petitioner, the 5th Respondent was born from an earlier relationship of Meragalge Anulawathie.

The Petitioner states that the other children of Ukkurala gave permission to Gunarathnabanda to possess part of the subject matter together with his family. Aforesaid Gunarathnabanda died untimely on the 18th March 1983 ('P5'). The Petitioner states that subsequently Ukkurala's two elder sons also passed away⁵ and the Petitioner became the surviving eldest son of the family.

The two elder sons, Kumburegedara Abeyrathnabanda died in 2014 and Kumburegedara Kiribanda died in 2015. Kumburegedara Gunarathnabanda died in 1983. Accordingly, the statement of the Petitioner that the Petitioner

¹ Paragraph 9 of the 1 to 4, 8 and 9 Respondent's objections and paragraph 4 of the 5th Respondent's objections.

² '5 R 1(a)'.

³ Death certificate marked 'P 2'.

⁴ Section 48A of the Land Development Ordinance.

⁵ 'P 6(i)' and 'P 6(ii)'.

being the surviving eldest son of the family gave leave and license to Kumburegedara Gunarathnabanda, Kumburegedara Lokubanda and Kumburegedara Rambanda to occupy the property is obviously false since the Petitioner could be the surviving eldest son, only upon their deaths⁶.

The Petitioner claims that he, a retired bank officer, wanted to clear the title of the subject matter in his favour and give the subject matter to Gunarathnabanda's legitimate child Sandeepa Jayamenike. I can understand the Petitioner not intending to give the subject matter to the 5th Respondent since the Petitioner does not accept him as a legitimate child of Gunarathnabanda. But it is curious as to why the Petitioner wanted to give the subject matter only to Sandeepa Jayamenike when there is an elder daughter of Gunarathnabanda named Nirosha Damayanthi. Even under the devolution prescribed in Rule 1 of the Third Schedule of the Land Development Ordinance, the older is preferred to the younger. Furthermore, if the Petitioner's intention was to secure title to the true heirs of Gunarathnabanda, he could have done so through the Divisional Secretary. There is no need to clear the title in his name first.

Accordingly, it appears to me that once the Petitioner became the surviving eldest child upon the death of the two eldest sons of Ukkurala, the Petitioner had attempted to succeed to the land. However, this attempt had been after a long delay from the death of the two elder sons of Ukkurala.

Analysis

As I have already stated above in this judgment, the Petitioner instituted these proceedings on the basis that there was no nomination of a successor by Ukkurala at the time of his death and therefore, the Petitioner being the surviving eldest child is entitled to succeed. However, the 5th Respondent, along with the objections, tendered to this Court the permit issued to Ukkurala in respect of the two lands in the extent of 5 A. 0 R. 0 P. and 2 A. 2 R. 2 P. ('5R 1(a)' and/or 'R 1'). According to the 1st to 4th, 8th and 9th Respondents, the permit was issued in the year 1955⁷. The Petitioner submitted that the 5th Respondent has stated in his objections that the permit was issued in or about the year 1973⁸. The 5th Respondent appears to have taken into consideration

⁶ Paragraph 19 of the affidavit.

⁷ Paragraph 9 of 1st to 4th, 8th and 9th Respondent's objections.

⁸ Paragraphs 4 of 5th Respondent's objections.

the year of making plans ‘P 1(a)’ and ‘P 1(b)’ as the date on which the permit was issued. Be that as it may, according to the ledger maintained in respect of the aforementioned two allotments of land, the date on which the two lands were allotted is 20th October 1950⁹.

More importantly, although the Petitioner submitted that Ukkurala died without making a nomination, the above ledger clearly states that Ukkurala nominated his son Gunarathnabanda as his successor on the 23rd October 1958.

As I stated before in this judgment, Ukkurala died on the 26th November 1978 (‘P 2’ and/or ‘5 R 3’). According to Section 84 (b) of the Land Development Ordinance Gunarathnabanda being the nominated successor is entitled to succeed to the land by obtaining a permit from the Government Agent under the Provisions of Land Development Ordinance. However, no permit obtained by Gunarathnabanda in terms of Section 85 of the Land Development Ordinance was brought to light in this application. Ordinarily, in terms of Section 84, if the nominated successor fails to succeed to the land upon the death of the permit holder, the land should be deemed to have been surrendered to the state. However, in the instant case, Gunarathnabanda was issued with two Grants in terms of Section 19 (6), read along with Section 19 (4) of the Land Development Ordinance for the two allotments of land, subsequently¹⁰. The documents ‘5 R 14’ and ‘5 R 15’ are the extracts of the register in which these two Grants are registered. The two allotments of land are depicted in plans ‘P 1(a)’ and ‘P1(b)’.

The aforementioned two Grants had been issued on the 3rd May 1983, after the death of Gunarathnabanda on the 18th March 1983. Therefore, as admitted by all the parties, these two Grants are invalid. Be that as it may, a grant under Section 19 (4) would be issued to a *permit holder* in respect of the land of which he is in occupation. Accordingly, it is obvious that Gunarathnabanda would have been the permit holder who was in occupation of the subject matter. Above all, the letter of the Divisional Secretary of Medirigiriya marked ‘P 10’ confirms that according to the ledger, Gunarathnabanda succeeded to the land on the 31st October 1979.

⁹ ‘R 1’ and/or ‘5 R 1(b)’.

¹⁰ ‘5 R 8 and/or ‘P 7(i)’ and ‘5 R 9’ and/or ‘P 7(ii)’.

Gunarathnabanda died without nominating a successor. If there is no nomination of a successor by a deceased permit holder, the succession should be in terms of Chapter VII of the Land Development Ordinance.¹¹

According to Section 48 A, upon the death of a permit holder the spouse of that permit holder, whether he or she has or has not been nominated as the successor by the permit holder, shall be entitled to succeed to the land which is alienated to the permit holder. However, in the instant case, Gunarathnabanda's wife Anulawathie did not succeed to the land but, informed the Divisional Secretary of Medirigiriya by letter dated 29th June 1999 that she has no objection to the land being alienated to her son. Kumburegedara Ajith Kumarasinghe, the 5th Respondent ('5 R 11'). Gunarathnabanda's two daughters Kumburegedara Nirosha Damayanthi and Kumburegedara Sandeepa Jayamenike also informed the Divisional Secretary of Medirigiriya that they have no objections to the alienation of the land to their brother Kumburegedara Ajith Kumarasinghe ('5 R 11'). According to Section 49 of the Land Development Ordinance, in the event the spouse fails to succeed to the land alienated to the permit holder, the nominated successor has the right to succeed to the land. However, as I have already stated above, in this instance, there was no successor nominated. Consequently, the 5th Respondent Ajith Kumarasinghe being the son of Gunarathnabanda has requested the Divisional Secretary of Medirigiriya to alienate the land in his name ('5 R 11')

If the spouse of the deceased permit holder refuses to succeed to the land or if such spouse does not enter into possession of that land within a period of six months reckoned from the date of the death of the permit holder, it is considered a failure to succeed, under Section 68 of the Land Development Ordinance. According to Section 72, in the event no successor is nominated, and the spouse fails to succeed to the land upon the death of the spouse, the land should devolve as prescribed in Rule 1 of the Third Schedule of the Land Development Ordinance. The Third Schedule of the Land Development Ordinance sets out the order of priority in which the land alienated to a permit holder should devolve. Further, the older are preferred to the younger where there are more relatives than one in any group.

¹¹ Section 48 of the Land Development Ordinance.

As I have stated previously, the Petitioner filed this application on the basis that there was no nomination made by his father Ukkurala. He claims that being the surviving eldest son, he has the right to succeed to his father's land. However, the Respondents submitted the document marked '5 R 11' and/or R 1' which establish the fact that there had been a valid nomination by Ukkurala who nominated Gunarathnabanda as his successor.

In the circumstances, the status of the Petitioner to maintain his claim is at issue.

Be that as it may, I will proceed to consider the other issues raised by the Petitioner in this Court.

Upon the application made by the 5th Respondent to issue the permit in his name, the Divisional Secretary of Medirigiriya proceeded to take steps under the Land Development Ordinance.

At the argument, both parties drew the attention of this Court to Circular No.2007/3 dated 19th September 2007 issued by Land Commissioner General's Department. According to Clause (1) of part IV of the Circular, where a grantee dies before His Excellency places the signature to the grant, such a grant is invalid. In such an event, the Divisional Secretary should take steps to cancel the Grant and upon cancellation, the previously issued permit should be effective and land should be alienated accordingly.

However, in this instance, although the grantee had died prior to the date of the Grants 'P 7(i) and/or '5 R 8' and 'P 7(ii)' and/or 5 R 9', the Divisional Secretary proceeded to issue document 'P 9(i)' and 'P 9(ii)' approving the alienation of title under the aforementioned two Grants in the following manner; 1 A. 0 R. 0 P. to the 5th Respondent Kumburegedara Ajith Kumarasinghe, 0 A. 2 R. 31 P. in the name of Kumburegedara Lokubanda and 0 A. 2 R. 30 P. in the name of Kumburegedara Ranbanda. The two documents 'P 9(i)' and 'P 9(ii)' are registered in the Land Registry. The 5th Respondent submitted an extract from the Register of Permits/Grants under the Land Development Ordinance in which 'P 9(i) and' 'P 9(ii)' are registered in the Land Registry, marked as '5 R 14' and '5 R 15'. It is important to observe that Rambanda, one of the recipients under 'P 9(i)', has nominated the Petitioner as his successor.

According to the document marked 'P 12(i)', the aforementioned Kumburegedara Lokubanda and Kumburegedara Rambanda are children of the late Ukkurala. According to the Petitioner, the Petitioner is the eldest surviving son of Ukkurala. As I have already stated above in this judgment, the succession of the land alienated to the late Gunarathnabanda should be according to the order of priority in the Third Schedule of the Land Development Ordinance. The 1st preference is for the sons and the 2nd is for the daughters. The brothers come below, the 7th preference in the line. However, in this instance, the Divisional Secretary has alienated the land to the 5th Respondent who is the male child of the late Gunarathnabanda, and to the two brothers of Gunarathnabanda, over the two daughters. In my view, the two daughters of the late Gunarathnabanda, Nirosha Damayanthi, and Sandeepa Jayamenike should get preference over the brothers of Gunarathnabanda. Assuming that the brothers are entitled, the Petitioner being the eldest surviving son should get preference over Lokubanda and Rambanda. However, since the late Gunarathnabanda died leaving his widow and three children, the brothers are not entitled to succeed unless the former fails to succeed.

As I mentioned earlier, the late Gunarathnabandas's wife Anulawathie, and the two daughters, Nirosha Damayanthi and Sandeepa Jayamenike have renounced their right to succeed by their letters addressed to the Divisional Secretary, marked '5 R 11'.

Next, I will consider the facts presented to this Court on the entitlement of 5th Respondent Ajith Kumarasingha to succeed to the land. Gunarathnabanda got married to Anulawathie ('P 4') on the 12th July 1982 and the 5th Respondent was born on the 8th June 1977 ('P 8'). On the face of the two documents, it appears that the 5th Respondent Ajith Kumarasinghe is born before the marriage between Gunarathnabanda and Anulawathie. The Petitioner stated that the 5th Respondent Kumburegedara Ajith Kumarasinghe is not a legitimate child of the late Gunarathnabanda and alleged that he tampered with his birth certificate interpolating Gunarathnabanda's name as his father. In reply, the 5th Respondent Ajith Kumarasinghe stated that he was born in an intimacy between Gunarathnabanda and Anulawathie prior to their marriage. Further stated that his parents cohabited and were married by habit

and reputed prior to his birth¹². The Petitioner denied the above contention of the 5th Respondent¹³.

According to 'P 8', the 5th Respondent Ajith Kumarasinghe's birth certificate was amended under Section 27A of the Births and Deaths Registration Act No. 40 of 1975, as amended, by inserting the particulars of his father, Kumburegedara Gunarathnabanda. The amendments had been made on the 7th June 1983. Gunarathnabanda died on the 18th March 1983. The learned Counsel for the Petitioner argued that since the amendment has taken place after the death of Gunarathnabanda it is invalid. However, alterations in a Birth Certificate can be made to bring it in conformity with the legitimate status of a person, where by virtue of operation of the provisions of section 3 of the Legitimacy Act, No. 3 of 1970, that person is rendered legitimate¹⁴. According to Section 3 of the Legitimacy Act No. 3 of 1970, a valid marriage would render legitimate any child procreated by the parties prior to such marriage. Accordingly, it appears that the Registrar General has acted according to law.

On the other hand, the Petitioner has submitted the letter 'P 13' from the Central Record Room of the Registrar General's Department stating that the amendment is not reflected in the copy available to them. May be that the amendment made by the Additional District Secretary upon the powers delegated by the Registrar General in terms of Section 27 (a) of the Act is not reflected in the copy available with the Registrar General.

Be that as it may, the legitimacy of the 5th Respondent, a matter where the facts are in dispute is not a matter to be determined in this writ application.

Above all, Section 114 (d) of the Evidence Ordinance provides that Court may presume that official acts have been regularly performed.

In the above circumstances, I am of the view that the decision of the Divisional Secretary of Medirigiriya alienating the rights of the land of Gunarathnabanda to the 5th Respondent on the basis that he is a child of Gunarathnabanda is not *ultra vires*.

The Divisional Secretary proceeded to issue the two documents 'P 9(i)' and 'P 9(ii)', alienating the rights under the Grant, not only to Kumburegedara

¹² At paragraph 5 of 5th Respondent's objections.

¹³ At paragraph 20 of the Counter affidavit.

¹⁴ Section 27 (a) (e).

Ajith Kumarasinghe but also to Kumburegedara Lokubanda and Kumburegedara Rambanda. As I have already stated above, the permit holder Kumburegedara Gunrathnabanda's heirs are his wife Meragalge Anulawathie, his son Kumburegedara Ajith Kumarasinghe, the 5th Respondent, and his two daughters Kumburegedara Nirosha Damayanthi and Kumburegedara Sandeepa Jayamenike. Late Gunarathnabanda's wife and two daughters consented to the alienation of the land in the name of 5th Respondent Ajith Kumarasinghe. However, the Divisional Secretary alienated the land to Lokubanda and Rambanda as well, in the extents stated above in this judgment. Ajith Kumarasinghe did not resist alienating the land to Lokubanda and Rambanda. The Petitioner himself admits that the 5th Respondent's father late Gunarathnabanda and Ukkurala's two elder sons Lokubanda and Rambanda occupied the land after the demise of Ukkurala¹⁵. The 5th Respondent also admitted that the two male children of Lokubanda reside on the land belonging to Lokubanda¹⁶.

Therefore, it appears that the Divisional Secretary, considering the long-continued possession of Lokubanda and Ram Banda, with the implied acquiescence of the heirs of the late Gunarathnabanda has alienated the aforementioned two portions of land to Lokubanda and Ram Banda.

Hence, I am of the view that the decision of the Divisional Secretary reflected in 'P 9(i)' and 'P 9(ii)' are rational and reasonable.

It appears that late Rambanda who got two portions of the subject matter on 'P 9(i)' and 'P 9(ii)' and Sandeepa Jayamenike, the youngest daughter of the late Gunarathnabanda, along with the Petitioner, has subsequently requested from the Commissioner General of lands to divest the land to the Petitioner¹⁷. However, as I have already analysed in this judgment, there is no legal basis for such an alienation.

Ukkurala died in the year 1978 ('P 2'). As I have already stated above in this judgement Ukkurala's nominated successor was Gunarathnabanda. The Petitioner made this application on the basis that there was no nomination made by Ukkurala. Interestingly, the Petitioner marked time until the death of his two elder brothers and once became the surviving eldest son decided to

¹⁵ At paragraph 12 of the Petition.

¹⁶ At paragraph 31 of 5th Respondent's objections.

¹⁷ 'P 11(i)'

make a claim to the land of Ukkurala. According to the Petitioner himself, his two elder brothers Kumburegedara Abeyrathnabanda died in 2014 and Kumburegedara Kiri Banda died in 2015¹⁸. However, those two brothers did not make a claim to succeed in the land after the death of Ukkurala. Petitioner's application to this Court is after forty-one years after the death of Ukkurala.

Therefore, I am of the view, the Petitioner is guilty of laches and also that he did not come before this Court with clean hands.

Further, the Petitioner has failed to establish that he has a sufficient standing or interest to maintain this application.

Conclusion

The two Grants, 'P 7(i)' and/or '5 R 8' and 'P7(ii)' and/or '5 R 9', issued in terms of Section 19 (4) of the Land Development Ordinance were issued in the name of the permit holder who was dead at the time the Grants were issued. As a result, both these Grants are invalid by operation of law. Consequently, the issue of cancelling the Grants will not arise.

In light of the above analysis, I am of the view that the Petitioner is not entitled to the reliefs prayed for in paragraphs (b) and (c) of the Petition.

I dismissed this application subject to a cost of Rs.30,000/-.

JUDGE OF THE COURT OF APPEAL

Wickum A. Kaluarachchi J.

I Agree.

JUDGE OF THE COURT OF APPEAL

¹⁸ At paragraph 17 of the Petition.