

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

Lilli Upamalika Akurana Senasinghe,  
No.13/B, 16/2,  
Hanthana Housing Scheme,  
Hanthana.

**PETITIONER**

**C.A. Case No. WRT-0052/20**

**Vs**

- 1.Kandy Municipal Council,  
Kandy Municipal Council,  
Kandy.
- 2.Chandana Tennakoon,  
The Municipal Commissioner of  
Kandy Municipal Council.
- 3.Kesara Senanayake,  
Mayor of Kandy,  
The Municipal Council of Kandy,  
Kandy.

4. Ilahi Ibrahim  
Deputy Mayor of Kandy,  
The Municipal Council of Kandy,  
Kandy.
5. Urban Development Authority,  
6<sup>th</sup> and 7<sup>th</sup> Floor, Sethsiripaya  
Baththaramulla.
6. National Housing Development  
Authority.  
Sir Chitampalam A. Gardiner  
Mawatha,  
PO Box 1826,  
Colombo 02.
7. Gangawata Korale  
Pradeshiya Sabha
8. S.A Anura Sathurusinghe,  
Conservator General of Forests,  
Department of Forest  
Conservation,  
Sampathpaya, 82,  
Rajamalwatta Road,  
Sri Jayawardenapura, Kotte.

**RESPONDENTS**

**BEFORE : M. SAMPATH K. B. WIJERATNE, J**  
**WICKUM A. KALUARACHCHI, J**

**COUNSEL :** Farman Cassim, PC instructed by Danukshika Priyadarshani for the Petitioner.  
Kumar Dunusinghe instructed by Manouri Herath for the 1<sup>st</sup> to 4<sup>th</sup> Respondents.  
Shemanthi Dunuwille, SC for the 5<sup>th</sup>, 6<sup>th</sup> and 8<sup>th</sup> Respondents.  
Ranga Dayananda for the 7<sup>th</sup> Respondent.

**ARGUED ON :** 31.05.2023

**DECIDED ON:** 05.07.2023

**WICKUM A. KALUARACHCHI, J.**

The petitioner has filed this writ application seeking a writ of certiorari quashing a decision “if any” of the first respondent Council to place any form of obstruction on the undefined boundary in the surveyor plan marked X3 with the petition. The petitioner has also sought a writ of prohibition on the first respondent and/or its agents and/or its servants from placing any form of obstruction on the undefined boundary in the surveyor plan marked X3.

Briefly, the facts relating to this application are that there is a roadway in front of the petitioner’s property. Across the road way, there is a forest reserve namely ‘Dunumadalawa’. The petitioner stated that she came to know that a fence was about to be erected around the area in the forest reserve that she could see from her property. The instant application for writs has been filed to prevent a fence been erected around the forest reserve. The petitioner complains that the reason for erecting a fence is to ruin the salubrious environment enjoyed by the petitioner and/or to harass the petitioner due to the political affiliations of the petitioner’s son.

The statements of objections have been filed on behalf of 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents, 6<sup>th</sup> respondent, 7<sup>th</sup> respondent and 8<sup>th</sup> respondent. At the hearing of this application, the learned President's Counsel for the petitioner, the Counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents, and the learned Counsel for the 7<sup>th</sup> respondent made oral submissions. The learned State Counsel appeared for the 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> respondents informed the Court that she does not intend to make submissions as no relief has been sought against the 5<sup>th</sup>, 6<sup>th</sup>, and 8<sup>th</sup> respondents.

The learned counsel for the 7<sup>th</sup> respondent raised an objection that this application could not be maintained because there is no decision to quash. In addition, the learned counsel for the 7<sup>th</sup> respondent contended that there is no any form of obstruction although the petitioner sought a writ of certiorari and prohibition to prevent placing any form of obstruction. Accordingly, the learned counsel for the 7<sup>th</sup> respondent contended that the petitioner could not maintain this application.

In ***R v. Paddington Valuation Officer*** - (1966) 1 QB 380, Lord Denning observed that "the Court would not listen, of course to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done." Although the erection of the fence has no effect on petitioner's land, the petitioner states that her interests are affected due to the issue raised in this application.

In perusing the prayer to the petition, it is clear that the petitioner sought to quash the decision, if any, of the 1<sup>st</sup> respondent Council to place any obstruction on the undefined boundary. Therefore, it appears that the petitioner is not certain whether there is a decision to place any form of obstruction on the boundary of the forest reserve. However, the learned President's Counsel for the petitioner stated at the hearing that the petitioner seeks to quash the decision contain in 1R-12. As

correctly pointed out by the learned Counsel for the 7th respondent, 1R-12 contains no decision but only a recommendation of the subcommittee. Now the question arises whether a writ can be issued to quash a recommendation which was indicated only at the stage of arguments, in the absence of a decision to be quashed as prayed for in the petition.

Another matter to be considered is that the petitioner has sought to quash the decision 'if any' to place any obstruction on an undefined boundary and to prohibit placing any obstruction on the boundary. Although the petitioner stated that it is an undefined boundary, it is stated in paragraph 8 of the statement of objections tendered by the 1<sup>st</sup> to 4<sup>th</sup> respondents that the 'Dunumadalawa' forest reservation has a clear boundary as depicted in Preliminary plan No. 6980, dated 26<sup>th</sup> September 1909. However, the said plan has not been produced as a document of this case.

Undisputedly, the petitioner's property does not extend beyond the roadway. Her property extends only up to the road. According to document 1R-12, the security fence would be erected 15 feet from the edge of that road towards forest reserve. Also, it is transpired from documents 1R-6, 1R-7, and 1R-10 that, the said road is expected to be developed as 30 feet wide road by acquiring 15 feet from both sides from the center of the road. However, as per the report marked 1R-12, it has been recommended to erect the security fence 15 feet from the opposite edge (opposite edge to the boundary of the petitioner's property) of the road. Therefore, it is apparent that the area where the security fence is expected to be erected has no connection with the petitioner's property or the boundaries of the petitioner's property. Even if the said boundary is undefined, the said fact is irrelevant to the dispute presented by the petitioner.

In the circumstances, it must be considered the obstruction about which the petitioner complains, because erecting a fence on the boundary of the forest reserve would only be an obstruction to freely entering the forest from anywhere and not an obstruction to petitioner's property or rights attached to the petitioner's property. Therefore, the only obstruction that the petitioner claims can be his right to view the forest reserve without a fence.

Now, it has to be considered whether the right of scenery or right of view is a right recognized in our law. In ***Abraham Silva v. Chandrawimala*** – (1958) 61 N.L.R 348, it has been commented as follows: “Under our law, servitudes which were not known in the times of the Roman-Dutch Law writers can be granted or acquired. The Roman-Dutch Law is not a static system of law.” The petitioner's application is based on the right of view. Therefore, it has to be considered whether the petitioner has the right to see the forest reserve without a fence? Although there are instances where the right to light and the right to air have been granted as servitudal rights in our country, no decision has been found where the right of view or the right to scenery has been granted. Parties have been given the opportunity to file the judicial authorities regarding the matters that arose in the course of the arguments but the petitioner did not submit any judicial authority where the right of view has been granted as a right in our country.

Before dealing with the issue of the right of view of the petitioner, I wish to consider what legal authority the 1<sup>st</sup> respondent has to erect a security fence. The contention of the learned counsel for the 1<sup>st</sup> to 4<sup>th</sup> respondents was that the 1<sup>st</sup> respondent is empowered by law to erect a security fence and he has taken steps to erect the fence after adopting the correct legal procedure.

According to section 58 of the Municipal Councils Ordinance, “*It shall be lawful for the proper officer of any Municipal Council to put up or make*

*fences, hedges, ditches, drains, or banks by the side of any street within the Municipality, whenever to him it shall appear necessary, and the owner or occupier of each land adjoining such fences, hedges, ditches, drains, or banks shall and he is hereby required to keep them in good and substantial repair and order.”* Therefore, if there is a necessity, the 1<sup>st</sup> respondent has the power to erect a fence on the side of any street.

As stated in paragraph 11 of the statement of objections filed by the 1<sup>st</sup> to 4<sup>th</sup> respondents, the Public Petitions Committee of the Parliament made its decision on 31.07.2018 [X-5(b)] to allocate 15 feet from the center of the road to either side of the road to be utilized and developed as the road. It is stated in paragraph 12 of the said statement of objections that the petitioner continued to unlawfully fill the forest reserve by dumping soil and the reservoir officer of the Dunumadalawa water tanks tendered his observations to the water works engineer to take steps to prevent further environmental destruction to be caused by the petitioner and another. In this situation, necessary communications were exchanged between the respondents and subsequently, the 2<sup>nd</sup> respondent issued a letter dated 13.05.2019 marked 1R-9 to the 6<sup>th</sup> respondent to specifically inform the extent of land required from the forest reserve for the 30 feet width of the road to be developed. As per the letter 1R-11, the Central Environmental Authority also had received a complaint against the unlawful and illegal dumping of soil to the forest reserve. It is also stated in the letter 1R-11, that the Central Environmental Authority directed the 1<sup>st</sup> respondent to take necessary action to stop the said unlawful and illegal act of dumping soil. After carrying out a field inspection, considering the decisions of the Public Petitions Committee and the directions of the Central Environment Authority, a recommendation was made to exclude 15 feet from the edge of the road towards the forest reserve for the road and erect a security fence along the border of the forest as reflects from the report 1R-12. Therefore, the decision to erect a fence

between the boundary of the road and the reserve forest has been taken with legal authority after following the correct legal procedure.

It is also vital to be noted that the constitution in Chapter VI under “Directive Principles of State Policy and fundamental Duties” states that the State shall protect, preserve and improve the environment for the benefit of the community (Article 27(14)) and Article 28 refers to the fundamental duty upon every person to protect nature and conserve its riches as it was held in **Watte Gedara Wijebanda v. Conservator General of Forests and Others** – (2009) 1 Sri. L.R 337.

In addition, the petitioner cannot complain that the fence would be erected to harass her due to the political affiliations of the son of the petitioner especially because of the reason that it was decided to erect the fence 15 feet from the edge of the road although it was decided initially to allocate 15 feet from the center of the road to either side of the road when developing the road. According to the initial decision, the 1<sup>st</sup> respondent could erect the fence 15 feet from the center of the road without excluding 15 feet from the edge of the road towards the forest. Erecting the fence 15 feet from the edge of the road would result in the fence being erected further away from the petitioner’s land.

Now, the only issue that remains to be considered is whether the petitioner has a right to obtain a writ to stop erecting a fence on the boundary of the road and forest reserve for the reason of her right of view being obstructed.

In the absence of local decisions, I would like to consider the decisions of two foreign cases in which the right of view has been recognized as a legal right. Those two cases show the limited circumstances where the right of view can be granted.



The case of ***Dennis v Davies*** [2009] EWCA Civ 1081 (22 October 2009) concerned a property dispute regarding a modern development, adjacent to the river Thames, which had been specifically designed, and sold, on the basis that each property had a river view. The owner of one of the riverside houses decided to build an extension that would obstruct the views of the river from neighbouring properties within the development. Under the traditional law, the neighbouring owners had lost their view, not only potentially damaging property values, but also providing a precedent for other properties being developed and thus blocking other river views.

However, all the property owners in the development were subject to and had the benefit of, a specific covenant that they would 'not cause a nuisance or annoyance' to their neighbours. The first part of that covenant was of no help because there was no nuisance, however, the part concerning annoyance was considered to be applicable and, on that basis, the development was blocked.

This is a fairly exceptional circumstance and the Court took into account the fact that this property development had been designed so that each and every property would benefit from the river view. Furthermore, the wide covenant that applied to each property ensured that neighbouring owners should not cause annoyance to each other.

Although the general position relating to the English Law is that there is no right to a view, the aforesaid decision is an exception. Salient aspects in this case are that the blocks of land were sold on the basis that each property had a river view. In addition, all the property owners in the development were subject to a specific covenant that they would not cause a nuisance or annoyance to their neighbours. The court observed that the extension that would obstruct the view of the river would cause an annoyance specified in the covenant among the

property owners. On this ground, it was decided that the right to a view was there.

However, in the case at hand, there was no agreement or covenant whatsoever between the petitioner and the 1<sup>st</sup> respondent or any official or person attached to the duties and functions of the Kandy Municipal Council or the forest reserve. The petitioner states that she purchased the property considering the salubrious surrounding and the natural beauty of the location. However, it was only the petitioner's will and desire. The petitioner has not entered into any agreement or covenant with anyone or any institution in order to enjoy the salubrious surroundings and natural beauty. Especially, the 1<sup>st</sup> respondent had no agreement whatsoever with the petitioner. In the circumstances, the petitioner can never be considered to be entitled to an obligation on the part of the respondents not to erect a fence on the boundary of a public road or a forest reserve.

On the other hand, the petitioner's right of view would not be totally obstructed by erecting a fence. She can see the forest reserve very well from her property even if a fence is erected on the boundary. Therefore, the circumstances of the aforesaid case are different from the case before us and thus, the said decision of the English Court could not be applied to the instant action.

In considering the modern developments in the Roman Dutch Law, following decision of South African Court on the right of a property owner to have a particular view or scenery unobstructed is also worth discussing at this juncture. In ***Baartman v Stubbs and Others*** - (15523/2013) [2015] ZAWCHC 29, the issue relating to the case was obstructing the sea view by a planted olive tree. The court decided that the right to an unrestricted view does not automatically vest in terms of the common law and that the appropriate manner in which to secure such a right is by the registration of a servitude against the title deeds

of the properties in the Deeds Registry. As there was a condition in the title deed that unobstructed view of the sea is to be provided and it was there at the time of the creation of the servitude, the court ordered the servient tenement owner to trim the wild olive tree in line with the servitude.

Therefore, in the above South African case also the right of view was given because that was a condition specified in the title deed and thus servitudal right has been created. In the case at hand, the right of view has not been given to the petitioner by her title deed or by any other legally acceptable document.

It is apparent from the aforementioned two cases that the right of view is recognized only in exceptional circumstances. Furthermore, in those cases, the right of view of the petitioners was granted against respondents who were standing in the capacity of neighbouring property owners. In the said instances, the petitioners had a legitimate claim under specific circumstances that such neighbouring property owners were prohibited from obstructing the scenery or the view of the petitioners. In the case before us, there was no assurance, promise, or at least a representation by the relevant state authorities that they would never put up a fence for the demarcation of the boundary of the road. Unlike the respondents in the aforementioned cases, who were held to be under such an obligation, the petitioner in this case has no justifiable reason or ground to expect such an obligation on the part of respondents who stand in the capacity of state institutions carrying out public functions.

For the reasons stated above, I hold that the petitioner is not entitled to ask for a writ of certiorari or prohibition as prayed for in the petition on the ground that she does not want to see a fence around the reserve forest in front of her property. The petitioner cannot be considered to have a legitimate expectation that the proper authority would never

erect a boundary fence, which it is legally empowered to do for the reasons stated above.

Accordingly, the application for writs of certiorari and prohibition is dismissed with costs fixed at Rs.25,000/-

**JUDGE OF THE COURT OF APPEAL**

M. Sampath K. B. Wijeratne J.

I agree.

**JUDGE OF THE COURT OF APPEAL**