

**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, Mandamus and  
Prohibition under Article 140 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka.*

**CA/WRIT/137/2022**

Nagananda Kodithuwakku  
General Secretary,  
Vinivida Foundation,  
No.99, Subadrarama Road,  
Nugegoda.

**PETITIONER**

Vs.

1. Chandana Sooriyabandara  
Director General,  
Department of Wildlife Conservation,  
811A, Jayanthipura,  
Battaramulla.
2. Chandana Wickramarathne  
Inspector General of Police,

Police Headquarters,  
Colombo 01.

3. Thilak Premarathne  
Director General,  
National Zoological Park,  
Anagarikha Dharmapala Road,  
Dehiwala.
4. Bellanwila Dharmarathna Thero  
Viharadhipathi,  
Bellanwila Raja Maha Viharaya,  
Dehiwala Road,  
Bellanwila.
5. Wimalaweera Dissanayake  
Former Minister of State for Wildlife  
and Forest Conservation,  
and now  
C.B. Rathnayake  
Minister of Wildlife and Forest  
Conservation,  
No. 1090,  
Sri Jayawardhanapura,  
Rajagiriya.
6. Hon. Attorney General  
Attorney General's Department,  
Colombo 12.

**RESPONDENTS**

**Before** : Sobhitha Rajakaruna J.  
Dhammika Ganepola J.

**Counsel** : Petitioner appeared in person.

Parinda Ranasinghe PC, ASG with Shemanthi Dunuwile, SC for 1<sup>st</sup> to 3<sup>rd</sup> and  
5<sup>th</sup> to 6<sup>th</sup> Respondents.

Rasika Dissanayake with Nilantha Kumarage for the 4<sup>th</sup> Respondent.

**Argued on:** 19.05.2023

**Written submissions:** Petitioner - 20.06.2023  
1<sup>st</sup> to 3<sup>rd</sup> and 5<sup>th</sup> to 6<sup>th</sup> Respondents - -  
4<sup>th</sup> Respondent. - 20.06.2023

**Decided on:** 07.08.2023

**Sobhitha Rajakaruna J.**

The Petitioner claims that the instant Application has been filed for the best interest of public. It appears in the body of the Petition that there is a purported preamble just before commencing the common averments, which is unusual. As per the said portion in the Petition, the instant Application appears to have been filed on behalf of the Petitioner and the overall community who follow pure Buddhist philosophy although, the body of the Petition does not divulge any type a proxy from such community.

The Petitioner based on the same cause of action or same course of dealings between the same parties had filed an Application in this Court bearing case No. CA/WRIT/77/2021. Both the said Application and the instant Application revolves around the tusker by the name 'Myan

Kumara' ('tusker'), who has been gifted to Sri Lanka perhaps in the year 2013 from Myanmar. The said tusker is currently in the custody of the Ven. Bellanwila Dhammarathana Thero (4<sup>th</sup> Respondent). The Petitioner in the instant Application seeks a mandate in the nature of writs of mandamus and prohibition similar to what he had prayed for in the said Application No. CA/WRIT/77/2021. In addition to such reliefs, a writ of certiorari is also sought in the instant Application quashing the Gazette Extraordinary No. 2241/41 dated 19.08.2021, marked 'X9'.

Permission has been sought by the Petitioner on 12.01.2021 to withdraw the said Application No. CA/WRIT/77/2021 and as a result this Court has pro forma dismissed the said Application, allowing the withdrawal. I need to take into consideration the following array of dates displayed in respective Petitions and affidavits;

Date of the Petition of the Application No. CA/WRIT/77/2021 - 09.02.2021

Date of the affidavit of the Application No. CA/WRIT/77/2021 - 08.02.2021

The date of the Petition of the instant Application - 01.04.2022

Date of the Affidavit of the instant Application - 01.04.2021

It is important to note the date of the affidavit submitted to this Court together with the Petition dated 01.04.2022. The said affidavit has been purportedly affirmed on 01.04.2021 and that is exactly a year prior to the date of the Petition. It is paramount that every writ application made to the Court of Appeal should be by way of a petition together with an affidavit in view of Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990. It is significant to note according to the said Rules that such an affidavit should be submitted in support of the averments of the petition.

The Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rule 1990:

'Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly

certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero motu or at the instance of any party, dismiss such application'.

(Emphasis Added)

The purported supporting affidavit of the Petitioner submitted along with the Petition dated 01.04.2022 seems to have been affirmed on 01.04.2021 in Colombo and it has been attested by a Notary Public/ Commissioner for Oaths. This clearly demonstrates that the Petition of the Petitioner in the instant Application was not in existence when the said affidavit was affirmed on 01.04.2021. Superior Courts have persistently decided that the place and the date on which an affidavit is signed are essential elements of an affidavit. The vital requirement according to the above Rules is to submit an affidavit in support of the averments of the Petition and as such, the said affidavit dated 01.04.2021 cannot be considered as an affidavit submitted in support of the Petition dated 01.04.2022. The Supreme Court considered an identical issue in *Roylin Fernando v. W.A. Christian Gamini Fernando and others SC/APPEAL No.18A/09 decided on 04.03.2016* and decided that the affidavit in question cannot be considered as an affidavit supporting the respective petition. Similarly, a reference has been made in the said case to the decision in *Thiyagarasa v. Arunodayam [1987] 2 Sri L.R. 184* in which the court has concluded that 'unlike a notarially executed deed, an affidavit is sworn evidence and the wrong date may not vitiate a deed but it affects the validity of an affidavit.'

No material evidence has been tendered to Court by the Petitioner to consider this defect as a clerical error effected either by the Petitioner or the Notary. It is the duty of the Notary/ Justice of Peace/ Commissioner for Oaths to read over and explain the contents of the affidavit to the affirmant before signing it. Had it been properly read over and explained to the Petitioner by the relevant Notary/ Commissioner for Oaths, the Petitioner sometimes would have identified this issue. Thus, there is no option other than to assume that the Notary/ Commissioner for Oaths has not duly read over and explained the contents to the Petitioner before signing the affidavit.

Hence, I am compelled to conclude that the Petitioner has violated the provisions of the said Rule 3(1)(a) of the Court of Appeal Rules by not submitting a duly affirmed affidavit in support of the averments of the Petition dated 01.04.2021. Superior Courts have constantly held that the Supreme Court or Court of Appeal Rules are imperative.

Dr. Shirani A. Bandaranayake J (as she was then) in ***L.A. Sudath Rohana and another v. Mohamed Cassim Mohamed Zeena and another S.C. H.C. C.A. L.A. No. 111/2010 decided on 17.03.2011*** stated;

*"I had stated in Samantha Niroshana v Senarath Abeyruwan (S.C. (Spl.) L.A. No. 145/2006 – S.C. Minutes of 02.08.2007) and A.H.M. Fowzie v Vehicles Lanka (Pvt. Ltd. (supra), I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice and accordingly I am in respectful agreement with the observations made by Bonser, C.J., in Wickramatillake v Marikar ((1895) 2 N.L.R. 9) referring to Jessel, M.R. in Re Chenwell (8 ch. D 2506) that,*

*"It is not the duty of a Judge to throw technical difficulties in the way of the administration of justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."*

*Be that as it may, it is also of importance to bear in mind that the procedure laid down by way of Rules, made under and in terms of the provisions of the Constitution, cannot be easily disregarded. Such Rules have been made with purpose and that purpose is to ensure the smooth functioning of the legal machinery through the accepted procedural guidelines. In such circumstances, when there are mandatory Rules that should be followed and objections raised on non-compliance with such Rules such objections, cannot be taken as mere technical objections. When such objections are considered favourably, it is not that a judge would use the Rules as a juggernaut car which throws the petitioner out and then runs over him leaving him maimed and broken on the road (per Abraham C.J., in Dulfer Umma v U.D.C., Matale (supra)). As correctly pointed out by Dr. Amerasinghe, J. in Fernando v Sybil Fernando and others (supra), 'Judges, do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly"*

On perusal of the language spelt out in said Rule 3(1)(a), it clearly implies that submitting an affidavit together with the petition in an application made to the Court of Appeal for the exercise of powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution, is mandatory. Further, it is a vital and mandatory requirement that such affidavit should be in support of the averments of the petition. In view of the said Rule, where a petitioner fails to comply with the provisions of such Rule, the Court has the discretion **ex mero motu**, to dismiss such application. In light of the above, I hold that the instant Application deserves to be dismissed since the Petitioner has failed to comply with the aforesaid vital Rules.

Despite such defect in the affidavit, I shall now consider whether this Court should exercise its' inherent powers to assay the matters placed before Court by the Petitioner and that is for the interest of an animal whose feelings cannot be expressed by way of words. In other words, I must consider whether the Petitioner has satisfied this Court with sufficient material in order to establish any grounds of judicial review.

Upon an inquiry made by Court, the Petitioner has categorically informed Court on 19.05.2023 that his claim in the instant Application is based on the documents marked 'X12' to 'X18' (See-journal entry dated 19.05.2023). The document marked 'X12' is an unsigned and undated statement of one Chandani Perera. The document marked 'X13' appears to be an affidavit affirmed by the same person on 15.03.2021. Then again, the document marked 'X14' is another unsigned and undated document by one Samantha Gunasekara whilst the document marked 'X15' is an affidavit affirmed by the said Samantha Gunasekara on 16.03.2022. The affidavits marked as 'X16', 'X17' and 'X18' are dated 20.03.2021, 20.02.2022 and 25.03.2022 respectively. Significantly, the affidavits 'X15' to 'X18' are affirmed after the date of the affidavit which is annexed to the Petition of the Petitioner. This clearly shows that the affidavit submitted along with the Petition of the Petitioner cannot be considered as evidence or is in support of the averments of the Petition.

Moreover, the Venerable Monks and other persons have made statements in the documents marked 'X12' to 'X18' based on purported media (or social media) reports, telecasted or published, alleging some kind of ill treatment to the tusker Myan Kumara by the 4<sup>th</sup> Respondent whilst none of them are eye witnesses. As opposed to the contents alleged in such documents, the Respondents have drawn the attention of this Court to the report dated

28.03.2021 issued by Dr. Ashoka Dangolla, Professor in Veterinary Clinical Science at the Faculty of Veterinary Medicine and Animal Science of the University of Peradeniya, by which he has certified the well-being of the tusker Myan Kumara after seeing the tusker. He has issued another letter on 10.09.2022 to the same effect. Those documents are part and parcel of the document marked '4@1' annexed to the statement of objections of the 4<sup>th</sup> Respondent. Upon a direction by this Court, the Director General of the Department of Wildlife Conservation has tendered a Report by way of a motion filed by the Attorney General on 09.05.2023. In the said Report Dr. G.A. Tharaka Prasad (Director- Health, Department of Wildlife Conservation), Dr. B.A.D.S. Jayawardana (Wildlife Rehabilitation Center) and Dr. Madusha Perera (Department of National Zoological Gardens) after visiting the premises where the tusker Myan Kumara is currently kept emphasize inter alia, that the tusker has been well looked after by maintaining its' health condition at a satisfactory level. The identity of the tusker has been duly verified by the doctors referring to the microchip implanted in the said tusker. The Petitioner has not challenged the eminence or competency of the aforesaid Professor of the University of Peradeniya and the other Veterinarians mentioned above.

In this backdrop, the evidence tendered to Court by the Respondents in view of establishing the well-being and good health condition of the tusker outweigh the purported evidence submitted by the Petitioner through the documents marked 'X12' to 'X18' which speak about personal opinions of the respective authors of those documents merely based on purported media reports. This kind of insufficient material, although overflowed with personal opinions and recommendations cannot be considered as adequate material for this Court to arrive at a reasonable determination upon the matters referred to Court by the Petitioner. Submitting an affidavit which was affirmed one year before the date of the Petition is a cardinal error committed by the Petitioner and it vitiates the entitlement of the Petitioner to seek relief from this Court based on the circumstances of this case.

The Petitioner sought permission to display a video of an unsupported media report in open court through an electronic device in addition to a compact disc annexed to the pleadings of the Petitioner. The genesis of the said Rule 3(1)(a) tends to give prominence to the contents of the petition; in other words, it is essential to elaborate the whole claim clearly in writing,



in addition to whatever the annexures to the petition. I do not doubt the power of a review court to make an order merely based on a media report in a public interest litigation but, that should be only on exceptional circumstances. Displaying a video recording from the bar table in the courtroom as of convenience may erode the purity of this noble institution and that may affect the smooth functioning of this Court, especially when the Petitioner has not adequately complied the imperative Rules made under Article 136 of the Constitution. It is not sufficient only to annex a media report to the petition when a litigant, including a 'busy body', makes a claim in a writ application on a media report. It is essential that such claims should be averred specifically and precisely with adequate evidence. Similarly, a writ court exercising judicial review should be extra cautious when claims are made in public interest litigations on religious beliefs, fellow feelings and emotions as the duty of the court is to adjudicate all matters before it only according to law.

At this stage, in addition to the above, I must advert to the contention of the 4<sup>th</sup> Respondent on whose behalf it was strenuously argued that:

- i. "The Petitioner is guilty of laches
- ii. The Petitioner has intentionally misrepresented the material facts with ulterior motives;
- iii. The Petitioner has suppressed and has failed to disclose the fact that there was a Writ application bearing No. CA/WRIT Application 77/2021 filed by the Petitioner himself in relation to the same matter;
- iv. The Petitioner has preferred this application with the intention of achieving his personal gains and/ or agendas by falsely implicating that he is an animal activist;
- v. The Petitioner has not come to court with clean hands and has deliberately suppressed material facts."

Based on the overall circumstances of this Application, I have no valid reason to possibly overlook the objections raised on behalf of the 4<sup>th</sup> Respondent. It is important to note that the

Petitioner has not adequately and efficaciously met the submissions made in this respect on behalf of the 4<sup>th</sup> Respondent. No lawful defence has been taken up by the Petitioner against the assertions of the 4<sup>th</sup> Respondents on laches, misrepresentations and unclean hands.

The Petitioner sought in argument to make numerous allegations against the 4<sup>th</sup> Respondent on the alleged ground that the tusker Myan Kumara has not been properly looked after and the tusker was subjected to cruelty. I am afraid this Court cannot evaluate the strength of such allegations. This is because such allegations could even amount to defamatory as alleged by the 4<sup>th</sup> Respondent. The standard of proof required in a defamatory proceeding is very high and in such an event, the disputed facts should be canvassed in a suit where parties would have ample opportunity of examining their witnesses.

Now I need to advert to consider as to how the alleged conduct of the 4<sup>th</sup> Respondent in respect of the tusker would warrant the Petitioner to seek reliefs against the 1<sup>st</sup> Respondent as prayed for in the prayer of the instant Judicial Review Application.

Firstly, a writ of mandamus is sought against the 1<sup>st</sup> Respondent, directing him to hand over the tusker to the safari park in Ridiyagama or any other suitable place. Having considered the principles governing the scope of a writ of mandamus, I cannot gather an appropriate ground of review at this stage to issue a writ of mandamus against the 1<sup>st</sup> Respondent as prayed for in the prayer of the Petition of the Petitioner. This Court has noted in *Ven. K. Wacheeswara Thero and others vs. Dharmasena Dissanayaka, Chairman - The Public Service Commission and others CA/WRIT/45/2019 decided on 30.03.2023* that;

*'It is observed that in order to issue a writ of Mandamus, the court must be satisfied of the existence of a public duty owed and an existing legal right in the petitioner to have it performed. Therefore, it will not be available conditionally or for the performance of merely moral duties. The court must take cognisance of the distinction of a duty and a privilege or discretion as a Mandamus exists only where a duty lies. A duty and privilege found in a statute may be distinguished to a large extent by examining the language of the statute'.*

The Petitioner is seeking a writ of prohibition as well, prohibiting the 1<sup>st</sup> Respondent issuing license to the 4<sup>th</sup> Respondents enabling him to have elephants in his custody. This Court cannot consider this relief as the Petition does not divulge any instance or an attempt by the

1<sup>st</sup> Respondent to issue further licenses in favour of the 4<sup>th</sup> Respondent. Anyhow, the Petitioner is not challenging the legal authority of the 4<sup>th</sup> Respondent to keep the tusker Myan Kumara in his custody and it is observed that the registration and licensing of elephants is a tedious process under the relevant provisions of the law.

The final relief sought by the Petitioner is to issue a writ of certiorari quashing the Gazette Extraordinary No.2241/41. Surprisingly, the Petitioner has failed to highlight any ground of review in order to quash the provisions of the said Extraordinary Gazette Notification except for the assertions made in the Petition in respect of the knife and the goad, which are the traditional tools used by the mahouts. The Petitioner has not provided any reasons as to why the standards and specifications of the said traditional tools stipulated in the said Gazette should be changed. Instead, the Petitioner has made various comments on animal cruelty which is certainly condemned by any reasonable person.

Marshall CJ in *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) has stated;

*"The judicial department "has no will in any case.... Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law. "... "*

In the modern day the courts have developed this concept in a more realistic manner. The pronouncements made by Jayasuriya J. in *Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and others [1998] 1 Sri L.R. 235* are apt here and accordingly, relief by way of certiorari will be forthcoming to quash a decision only if the relevant authority 'wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an award which is eminently irrational or unreasonable or is guilty of an illegality.' The Petitioner has failed to establish any of such grounds in respect of the decision-making process of the 1<sup>st</sup> Respondent. There is no evidence before us that the 1<sup>st</sup> Respondent had fettered his discretion or taken a decision illegally or irrationally. In a conspectus I must emphasize that this Court cannot act on sympathy and fellow feelings but always needs to act and make determinations according to law unless, there are ample grounds to exercise the inherent powers of this Court to consider sympathy and empathy.

In the circumstances, I hold that the Petitioner is not entitled to any of the reliefs prayed for in the prayer of the Petition and thus, I proceed to dismiss this Application.

*Application is dismissed.*

**Judge of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**