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

In the matter of an application under Article 140 of the Constitution for Orders in the nature of *writs of certiorari and prohibition.*

1. Organization for Safeguarding People's Rights
   (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
   "Impala", Polonnaruwa Road,
   Mahiyanganaya.

2. Gangewaththe Mulgedara Bandula
   Gunathilaka
   Chairman,

CA/WRIT/571/2021

   Organization for Safeguarding People's
   Rights,
   (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
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   Mahiyanganaye.

3. Abasin Mudiyanselage Sarath Gunasiri
   Vice Chairman,
   Organization for Safeguarding People's Rights,
   (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
   No 91/1, 43 Ala Weragama,
   Weraganthota.

4. Aladuwaththe Gedara Sarath Wijesingha, Joint Secretary,
   Organization for Safeguarding People's Rights,
   (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
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5. Dehiange Koralalage Nimal Karunathilake
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   Organization for Safeguarding People's
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   (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
   No: 126, Bridge Junction, (පාලම හංදිය)

Weragnthota.

6. Ranhoti Gedara Jayananda
Treasurer,
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7. Yapa Mudiyanselage Seetha Kumarihami
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No: 11/2, 45 Ela, Weragama,
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8. Palle Gedara William Banda
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No: 120/E, 44 Ela, Weragama,
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9. Aththanayake Mudiyanselage Sujatha
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No: 120/A, 44 Ela, Weragama,
Weraganthota.

10. Ekanayake Mudiyanselage Jayawardena
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11. Walakumbure Gedara Jayarathne

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No: 61, 44 Ela, Weragama,
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12. Dambakote Waththe Gedara Jayawardena
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No: 283/A, 44 Ela, Weragama,
Weraganthota.

13. Balagaha Thanne Gedara Ranjith
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No: 234/2/2, 43 Ela, Weragama,
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14. Jayasooriya Mudiyanselage Rohini Jayasooriya
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No: 103/2, 43 Ela, Weragama,
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15. Pelawa Madagammadde Gedara Siriyalatha
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No: 75/1/1, 43 Ela, Weragama,
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16. Weerakoon Walauwe Weerasekara
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No: 207/B, 40 Ela, Weraganthota.

17. Hapugas Kumbure Gedara Abhayasingha Mudiyanselage Wijerathna Banda
Committee Member,
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No: 600, 39 Ela, Weraganthota.

18. Hapugas Kumbure Gedara Abhayasingha Mudiyanselage Lasanda Manike,
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No: 600, "Wijaya Niwasa", 39 Ela, Weraganthota.

19. Thalagaha Gedara Ubhayasena Rajapaksha
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No: 259, Bulathwelkandura, Minipe.

20. Rajapaksha Udahene Gedara Chandarasiri
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No: 180/1, 41 Ela,
Bulathwelkandura, Minipe.

21. Batagalle Gedara Sugathapala
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No: 242, 41 Ela, Bulathwelkandura, Minipe.

22. Wahigala Gedara Sugath Weerasingha
Committee Member,
Organization for Safeguarding People's

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No: 42, 45 Ela, Weragama,
Weraganthota.

23. Porambha Liyanage Solaman De Silva
Committee Member,
Organization for Safeguarding People's
Rights,
(ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
No: 35/A, 45 Ela, Weragama, Weraganthota.

24. Samarakoon Mudiyanselage Thilakarathne
Committee Member,
Organization for Safeguarding People's
Rights,
(ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
No: 55/D, 45 Ela, Weragama, Weraganthota.

25. Bandaranayake Weerasekara Mudiyaselage
Kohona Walauwe Weerasekara Banda
Committee Member,
Organization for Safeguarding People's
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No: 225, Gangeyaya, Weragama,
Weraganthota.

26. Yapa Mudiyaselage Chandrarathne
Committee Member,
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Rights,
(ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
No: 105/1, Gangeyaya, Weragama,
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27. Yamanalage Gedara Nandasena
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(ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
No: 425/1, Randenigala Road,
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28. Yapa Mudiyaselage Nimal Priyantha Kumara Yapa
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    No: 497, 34 Ela, Udawela, Morayaye,
    Minipe.

29. Rathnayake Mudiyanselage Surasena
    Committee Member,
    Organization for Safeguarding People's Rights,
    (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
    No: 155/A, Weragama,
    Weraganthota.

30. Yapa Mudiyaselage Rajarathne Banda
    Committee Member,
    Organization for Safeguarding People's Rights,
    (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
    No: 173/C, Weragama,
    Weraganthota.

31. Rathnayake Mudiyaselage Senavirathne Banda
    Committee Member,
    Organization for Safeguarding People's Rights,
    (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
    No: 567/1, Randenigala Road,
    Weraganthota.

32. Amarasingha Mudiyanselage Lalith Susantha Aberathne
    Committee Member,
    Organization for Safeguarding People's Rights,
    (ජනතා අයිතීන් සුරැකීමේ සංවිධානය)
    No: 134/B/4, Gangeyaya, Weragama,
    Weraganthota.

33. Yatidemawaka Rajapaksha Gedara Mahinda Chularathne

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No: 34/ 32, Temple Road, Morayaya, Minipe.

34. Malwatte Gedara Mahesh Chandimal Rathnapala
    No: 09, Sorabora Lake Road, Mahiyanganaya.

35. Limagahakotuwe Malagammana Upul Jayakodi
    "Seetha Mill", Pallewatta, Hasalaka.

36. Jayasundara Mudiyansela Rambukwelle Udawalawe Hector Madiwathe
    Puja City, Willupitiya,
    Mahiyanganaya.

<u>Petitioners</u>

Vs.

1. Ven. Urulewatte Dhammarakkitha Thero
   Viharadhipathi and Trustee of Mahiyangana Raja Maha Viharaya,
   Mahiyanganaya.

2. Commissioner General
   Land Title Settlement Department,
   No: 1200/6/C, Mihikata Medura,
   Rajamalwatte Road, Battaramulla.

3. Divisional Secretary
   Minipe Divisional Secretariat Office,
   Hasalaka.

4. Divisional Secretary
   Mahiyangana Divisional Secretariat Office,
   Mahiyangana.

5. Commissioner General of Buddhist Affairs
   Department of Buddhist Affairs,
   "Dahampaya" No: 135,

Shrimath Anagarika Dharmapala Mawatha,
Colombo 07.

6. Deputy Commissioner of Buddhist Affairs
Regional Office of Buddhist Affairs,
District Secretariat Office, Kandy.

7. Senior Superintendent of Surveys
Office of the senior Superintendent of surveys,
Kandy.

8. Survey General
Survey General's Department,
Kirula Road, Narahenpita, Colombo 5.

9. Officer in Charge
Police Station,
Mahiyanganaya.

10. Officer in Charge
Police Station,
Hasalaka.

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

<u>Respondents</u>

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : Dr. Sunil Cooray for the Petitioner.

Dasun Nagashena with Shihara Ekanayaka Instructed by Jayamuditha Jayasooriya for the 1st Respondent.

A. Gajadeera S. C. for the 2nd to 8th and 11th Respondents.

Supported On : 19.01.2023

Written Submissions :	Petitioner	:	31.03.2023
Tendered On	1st Respondent	:	03.03.2023
	2nd to 8th and 11th Respondent	:	11.04.2023

Decided On : 03.05.2023.

Dhammika Ganepola, J.

The Petitioners state that they initiate this application on the basis that, for several decades, successive holders of the office of the Viharadipathi and Trustee of the Mahiyanganaya Rajamaha Viharaya (1st Respondent) have been claiming ownership of all lands including Paraveni Lands within the Grama Niladari Divisions of Weragama, Bulathwalkadura, Weraganthota, Morayaya, Pallewatte, Pooja Nagaraya and Sorabora. The Petitioners further submit that said claims of the 1st Respondent to the aforesaid lands are based on the,

(a) Settlement notices published in the Gazette No. 1939 and No. 1940 under the Land Settlement Ordinance marked P-6(a), P-6(b), P-6(c),

(b) Settlement Order No. 179 (Kandy) dated 03.12.1967 published in the Gazette dated 03.05.1968 marked P-8,

(c) Settlement Order No. 180 (Kandy) dated 28.01.1968 published in the Gazette No. 14830 dated 29.11.1968 marked P-7,

(d) Settlement Order No. 181 (Kandy) dated 19.07.1968 published in the Gazette dated 06.06.1969 marked P-9.

The Petitioners claim that the said Settlement Orders issued in favour of the Mahiyanganaya Rajamaha Viharaya in respect of said lands have been issued without any acceptable basis and contain errors of law on the face of the records. It is contended that the 1st Respondent has no legal basis to claim the lands to be settled in favour of the temple based on Title Plan No. 99867 as it has not been registered under the Temple Lands (Kandyan) Ordinance No.10 of 1856. The Petitioners primarily seek a Writ of Certiorari to quash the Settlement Orders P-7, P-8 and P-9 mentioned above.

What needs consideration at this threshold stage is whether the facts and the circumstances of this application warrant the Court to issue a formal notice on the Respondents. The Settlement Orders P-8, P-7 and P-9 which the Petitioners seek to quash in the instant application have been published in the Gazettes dated 03.05.1968, 29.11.1968 and 06.06.1969 respectively. It is apparent that the Petitioners are attempting

to dispute the aforesaid Orders only after the lapse of more than five decades. It is the case of the Petitioners that the Sannas, if any, under which 1st Respondent's temple could have claimed title over the respective lands, at the settlement inquiry held before Settlement Commissioners, had not been registered under Ordinance No. 10 of 1856.

It is observed that, Micheal Fordham QC Blackstone Chambers in his article on **'Arguability Principles' [Judicial Review Volume 12, 2007- issue 4, pages 219-220 (published online: 29 April 2015)]** has suggested, *inter alia*, the following principle relating to the question of arguability, which applies at the stage of permission for judicial review:

> *"The permission judge needs to be satisfied that there is a proper basis for claiming judicial review, and it is wrong to grant permission without identifying an appropriate issue on which the case can properly proceed.*[1] *However voluminous the papers, or complex the putative issues, the task remains the same*."[2] **(See Prof. D.G. Harendra de Silva & two others V. Hon Pavithra Wanniarachchi, Minister of Health, Nutrition and Indigenous Medicine & others,CA/Writ/422/2020,** decided on**.01.02.2022)**

In '**Administrative Law' by Wade and Forsyth (Eleventh Edition) at pg. 244**, elucidates the incidence of burden of proof in an application against an administrative act or order. Accordingly, the "burden of proof naturally lies in the first instance upon the plaintiff or complainant, whether he can transfer it to the defendant public authority depends upon the nature of the act."

At this stage, devoid of any such exceptional characteristics that would effectively shift the burden of proof to the Respondents, the burden of proof remains on the Petitioners to substantiate that a proper basis for claiming judicial review exists. In the instant case, the mere statement of the Petitioners, that Title Plan No. 99867 had not been registered under Ordinance No. 10 of 1856 is insufficient to demonstrate and satisfy this court that there is a proper basis for claiming judicial review due to the following reasons.

First, the document produced with the written submissions marked "Z" has no persuasive effect over this court to issue notice on the Respondents in the absence of the source document from which the author of the publication ("Z") has extracted the information relied on by the Petitioners.

Second, the very words '***the sannas, if any'*** averred in the Petition imply the uncertainty of the Petitioners' argument as it appears to this court that even the Petitioners themselves are not aware of the existence or the non-existence of said '*Sannas'.*

Further, the Petitioners state that they have made every effort to obtain inquiry proceedings before the Settlement Commissioner and the reasons for the decision relating

[1] R v. Social Security Commissioner ex p. pattni (1993) 5Admin LR219 at223G
[2] R v. Local Government Commissioner ex p. North Yorks Country Council (Unreported)11 March 1994, per Laws J; R v. London Docklands Development Corporation ex p. Forest (1997) 73P&CR199 at 204, per Keene J.

to the impugned settlement. However, it is claimed that every such effort has failed. Therefore, it seems that the Petitioners have filed this application without even duly considering the reasons for the decision of the Commissioners.

The Settlement Orders issued under Land Settlement Ordinance have been published in the respective Gazettes marked P-7, P-8, and P-9. Therefore, concurrently, there exists a presumption of regularity, that is the due and proper performance of the statutory duties by the administrative authority[3] (*Omnia Praesumuntur Rite Asse Acta*), since the act in question is proved to have been performed duly and properly in accordance with their statutory duties by the Settlement Commissioners. In the absence of any proof to the contrary, credit ought to be given to public officers, who have acted prima facia within the limits of their authority, for having done so with honesty and discretion.[4]

Under such circumstances, it is apparent that the Petitioners' claim on which this application is based, is unfounded and it appears to be a mere attempt at assaying their luck. Therefore, the Petitioners have failed in their duty of satisfying this Court of a prima facie case to issue a notice of the application on the Respondents.

In paragraph 21 of the Petition, the Petitioners state that there is no grant issued by the King of Kandy or from any other lawful authority by which the lands depicted in the said title plans or any other lands had been granted to the said temple. In order to prove the above the Petitioners seek the intervention of this court to obtain all inquiry proceedings including oral and documentary evidence produced before the Settlement Officer. It is apparent that the Petitioners seek intervention of this court to inquire into the question of title which should be appropriately canvassed in another forum.

The Petitioners further aver that the several owners of the Paraveni lands have not performed any service nor paid any money to the temple for several decades and had consequently become the absolute owners of the respective lands. Additionally, the Petitioners further state that even if the absolute ownership of the Paraveni lands had not been transferred to the residents as claimed, the current residents of such land are still the rightful owners subject to liability to render service to the temple. Therefore, either way, the temple is devoid of ownership of the said lands.

Nevertheless, 1st Respondent claims that the Mahiyanganaya Rajamaha Viharaya became entitled to the aforesaid lands by virtue of Grants, Awards, Nindagama and other Donations settled in favour of the Viharaya in terms of the Land Settlement Ordinance and the said Viharaya has been receiving income by way of taxes continuously. Seemingly, there exists a conflict between the facts presented by the Petitioners and the 1st Respondent. Thus, it is clear that the points raised by the Petitioners in respect of the lands

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[3]. *Wilover Nominiees Ltd v. Inland Revenue Commissioners [1973] 1 WLR 1393 at 1399.*

[4]. *Earl of Derby v. Bury improvement Commissioners (1869) LR 4 Exch 222, approved in R v. Inland Revenue Commissioners ex p TC Coombs & Co [1991] 2AC 283.*

settled in favour of the temple through the above-mentioned Settlement Orders can be revisited only upon an investigation of facts which are in dispute.

In the case of **Hong Lam Integration (Pte) Ltd and Another Vs. Mrs. P.S.M. Charles and Others. CA/Writ 147/19, (decided on 16.07.2021)** it was decided that in a Writ Application, if the facts disclosed in the averments of the Petition are in dispute and those facts are going to be investigated by another forum/tribunal, this court is unable to decide the legality of the decisions involved without going into questions of fact involved in the case. Even if the court decides to issue notice the court will have to determine the legality of the relevant decisions only upon the averments contained in the Petition. Accordingly, the Issuance of notice was refused on the basis that the application made by the Petitioners was premature and failed to establish a prima facia case.

The Court of Appeal in **Thajudeen Vs. Sri Lanka Tea Board and Another 1981 2 SLR 471** highlighted that "*where the facts are in dispute and in order to get at the truth, it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining their witnesses….*" referring to the **Law of Writ and Fundamental Rights (2nd Edition)Vol 2 at p.381 by CHOUDRI** and refused to exercise its discretion.

A careful perusal of the averments in the Petition reveals that the Petitioners are trying to demonstrate (without expressly submitting/referring to as a 'delay' or 'laches') that they have come to know about the said Settlement Orders only on or about 06.12.2016 at a discussion held with the 6th Respondent. However, it is noteworthy that in paragraph 09 of the Petition, the Petitioners aver that the successive holders of the office of the 1st Respondent have been claiming ownership of the impugned lands for several decades as the reason to file this application. It implies the awareness of the Petitioners of the interest of the temple in respect of the impugned lands even before the year 2016. The Petitioner's failure to take any effective steps in respect of this issue for a prolonged period gives the impression that they have slept over their right if they had any. In **R. V. Aston University Senate, ex p Roffey, (1969) 2QB 538 Donaldson J** *said, "the prerogative remedies are exceptional in their nature and should not be made available to those who sleep upon their rights."*

In the case of **D. D. Kaluarachchi V. Ceylon Petroleum Corporation (SC Appeal No.43/2013, SC Minute dated 19.06.2019) Her Ladyship Justice Murdu Fernando** agreeing with **His Lordship Justice Vijith Malalgoda and Justice Sisira De Abrew** observed the significance of considering the ground of laches in a judicial review application at the threshold stage. *"… I am inclined to accept the contention of the Appellants that the Court of Appeal should have dismissed this application in limine on the ground of laches which was a threshold issue. The Court of Appeal did not consider the ground of laches, which was raised as a preliminary objection. I observed this omission as a grave error in the Court of Appeal judgement…*"

In the fact and the circumstances of the case, it seems that there is an inordinate delay on the part of the Petitioners to bring this application challenging the impugned Settlement Orders. Accordingly, the Petitioners had all the reasons to anticipate the possibility of a defence of unreasonable delay being raised in the proceedings of this application. Hence the party who seeks remedy by way of judicial review is under a duty to bring such to the notice of the court at the outset and explain such delay. However, the manner in which Petitioners have addressed inordinate delay is unsatisfactory. Nowhere in the Petition have the Petitioners averred that they are not liable for such inordinate delay or that they have a satisfactory explanation in that regard.

In **R. V. Secretary of State for Social Security, ex p. Armstrong, (1996) 8 Admin LR 626**, it was held by Sir Ralph Gibson that the way in which the delay was addressed in the application and supporting documents was not satisfactory. The actual date of the decision as known to the claimant should have been stated at the outset, where it belonged in the papers, and any explanation for the delay thereafter should have been set out.

In **R. V. Lloyd's of London ex p Briggs, (1993) 5 Admin. LR 698 Lord Justice Leggatt** *said that it is an obligation of counsel applying for judicial review to explain for condonation of delay. Even if the court grants permission to entertain an application it is not to be taken by implication that delay has been condoned.* It shows how important the explanation of undue delay is in a judicial review application.

It is essential that all matters relevant to the question of an inordinate delay are set out clearly and fairly where judicial review proceedings raise an issue of delay at the notice stage. Unsatisfactory identification of such a delay at the notice stage may lead to setting aside the permission granted in a judicial review application. (See **R. V. London Borough Council of Bromley ex p. Baker, (2001) Env LR 1**)

In another instance, the Petitioners claim that they were able to find out the basis of their case in SC/FR/Application No.236/2009 filed by the 1st Respondent before the Supreme Court which concluded in 2009. The Petitioners state that they had come to know about the said SC/FR/Application No.236/2009 at the abovementioned meeting held on 06.12.2016 with the 6th Respondent. The Certified Copy of the said case record submitted by the Petitioners as P-3 indicate that it was issued on 27 Apr 2017. Even if this court were to assume that the Petitioners had come to know about the said Settlement Orders through the above referred Supreme Court Case, it is apparent that the Petitioners had all the opportunities to challenge said Settlement Orders at that instance without any further delay. Since the above Settlement Orders were published several decades ago, assuming that there is any substance to the claims raised, the Petitioners must have reasonably confronted those immediately with due diligence.

Nevertheless, it is observed that the Petitioners have submitted a letter dated 21.08.2014 marked as P-13 from their custody written by the 2nd Respondent to one Jayathilaka disclosing the Settlement Orders in respect of the impugned lands, to the temple of the 1st

Petitioner. Under those circumstances the Petitioner's awareness in respect of the said Settlement Orders even before the year 2017 cannot be excluded.

Further, it is pertinent to note that His Lordship Justice Samayawardhane in a similar matter on recalling a Settlement Order in the case of **Rathnayaka Mudiyanselage Unapala Vs. G. Vijitha Nanda Kumara and Others [CA (WRIT) Application 445/2015 decided on 04.09.2018]** observed that such application to recall a Settlement Order published more than 60 years ago is a fatal attempt. It was observed that *"It may be recalled that Settlement Order was published as far back as in 1944, and the Petitioner as the son of the claimant after more than 60 years in 2015 cannot challenge the said Order by way of writ application. The Petitioner's first relief for writ of certiorari shall in my view necessarily fail*."

On the above facts and the circumstances, I am of the view that the Petitioners are guilty of the inordinate delay. Failure to confront said Settlement Orders at a prompt and appropriate stage and absence of satisfactory explanation amount to guilty of laches which warrants a refusal of the application *in limine.*

In the above circumstances, this Court does not see any legal basis to issue a formal notice of this application on the Respondents. I dismiss the application of the Petitioners without cost.

Judge of the Court of Appeal

Sobhitha Rajakaruna J.

I agree.

Judge of the Court of Appeal