

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

In the matter of an application for mandate in the
nature of writ of mandamus, under and in terms of
Article 140 of the Constitution.

CA (Writ) 423/2016

1. Gammeda Liyanage Vijitha Perera

No. 55A, Horana Road,
Horathuduwa,
Polgasowita-10320

**2. Honnantara Arachchilage Gita Kumari
Harischandra now Parakramaweera**

No. 42, Malkekunalandawatta,
Horathuduwa,
Polgasowita-10320

3. Galwadumesteege Milan Perera

No. 42, Malkekunalandawatta,
Horathuduwa,
Polgasowita-10320

PETITIONERS

-Vs-

1. Subasadaka ha Awamangalyadhara Samithiya

No. 11, Wata Mawatha,
Horathuduwa,
Polgasowita-10320

**2. Authority Tasked Implementing Officer,
Kesbewa Urban Council,**

Piliyandala-10300

3. Urban Development Authority

6th and 7th Floors,

Sethsiripaya,

Battaramulla-10130

4. Attorney General

Hulftsdorp,

Colombo 12.

RESPONDENTS

BEFORE : A.H.M.D. Nawaz, J.

COUNSEL : Bimal Rajapaksha with Amrit Rajapaksha and
Nimesha Rodrigo for the Petitioners.

Dulani Werawewa for the 1st Respondents.

Chandrika Morawaka with Kumari Hettige for
the 2nd Respondent.

Maithree Amarasinghe, SC for the 3rd and 4th
Respondents.

Argued on : 21.01.2019

Decided on : 12.02.2019

A.H.M.D. Nawaz, J.

The Petitioners who claim to own distinct and separate lots of a larger land called and known under several aliases such as “*Kekunagaha Kanaththa*”, “*Malkekunalanda*” and “*Halpita Estate*” seek a Writ of Mandamus on the 2nd Respondent to demolish what they call an unauthorized construction erected by the 1st Respondent namely “*Subasadaka ha Awamangalyadara Samithiya*” on another lot of the larger land. The 2nd Respondent who is

sought to be mandated to issue the order of demolition is designated as an Authority Tasked Implementing Officer, Kesbewa Urban Council. The three Petitioners seek a mandate on the aforesaid 2nd Respondent to demolish this building, based on some directions that had been given by the then Director of the Urban Development Authority-the 3rd Respondent to this application, as far back as 09th May 2015 through a document marked "L". These directions issued from the Director-General, Urban Development Authority to the then Secretary, Kesbewa Town Council make reference to an amended Regulation 22 of the Urban Development Authority Planning and Building Regulations published originally in *Gazette Extraordinary* No.392/9 of 10th March 1986. The amendment to Regulation 22 which was published in *Gazette Extraordinary* No.935/6 of 6th August 1996 enacts that when a land whose extent is in excess of 1 hectare is sought to be subdivided, an area of not less than ten per centum of the land or site excluding streets should be reserved for community recreation and open space uses in appropriate locations subject to exceptional instances. The exceptional instances which are given in the amendment to Regulation 22 do not apply to this case but the main rule that an area of not less 10% of the larger land should be set apart for community recreation and user of open space applies to this larger land. The larger land is depicted in a plan bearing No.689, which is usefully appended to the application as A. Regulation 22 mandates that 10% of this larger land has to be earmarked for recreation and open space user.

Regulation 22(2) which was promulgated by the then Minister of Housing, Construction and Public Utilities by virtue of Section 21 of the Urban Development Authority Law, No.41 of 1978 comes into play only when a larger land which exceeds 1 hectare is sought to be subdivided.

Regulation 22(2) provides that such reserved space shall be vested with the Authority free of all charges. Admittedly, the 10% of the entire land that is mandatorily reserved for recreation and open space is depicted as B3, B5, B6 and 67 in the conditions attached to the plan bearing No.689 (A) and in the course of the hearing, it was brought to the notice of this Court that the dispute between the Petitioners and the 1st Respondent is focused on a building that has been erected on B5. The gravamen of the complaint of the

three Petitioners is that the 1st Respondent (*Subasadaka ha Awamangalyadara Samithiya*) has constructed a permanent structure on the area that has been reserved for recreation and open space. As the name of the 1st Respondent suggests, it is engaged in welfare and assisting in the funeral arrangements of residents after their demise. Mr. Bimal Rajapaksha, Counsel for the Petitioners contended that the permanent structure which had been erected without any planning permission pose an impediment to recreational activities of about 30 families which are in occupation of some 61 residential lots altogether.

The Counsel for the Petitioners relied on a letter written by the Director-General, Urban Development Authority (3rd Respondent) to the then Secretary, Kesbewa Town Council on 09th May 2016, wherein the Director-General, UDA has stated that since the Kesbewa Town Council possesses the power to demolish any unauthorized structures that have come up on a reservation for common amenities, no permission need be granted for erection of any structures.

The Petitioners contend that since these directions were given on 09th May 2016, no steps have been taken by the 2nd Respondent (Authority Tasked Implementing Officer, Kesbewa Urban Council) to pull down this building. In short the Petitioner sought a mandamus vis-à-vis the 2nd Respondent to implement what has been stated explicitly in the instructions given in the letter dated 09th May 2016. It is the letter dated 09th May 2016 that is relied upon by the three Petitioners to seek a mandamus to order the removal of the structure that stands but only on B5-a part of the extent ordered to be reserved for communal recreation and open space user.

The 1st Respondent traverses the petition and asserts that they erected the building as far back as 1995 with the permission, given for its construction by the Pradeshiya Sabah, Kesbewa. The documents marked as **R4** and **R5**, and appended to the statement of objections filed by the 1st Respondent show unmistakably that permission to erect this building had been duly given by the then Chairman, Kesbewa Pradeshiya Sabah as far back as 27th June 1994-see **R5** attached to the statement of objections. The Chairman, Kesbewa Pradeshiya Sabah refers to a resolution passed on 29th October 1993 and it

would appear that the permission to build the community hall by the 1st Respondent came about consequent to the decision made on the resolution-see R4.

Therefore it cannot be contended that the 1st Respondent society is an outsider and interloper into the community and its asserts that it has been providing welfare and funeral assistance to four villages that include the residents of the community and this Court observes that though this community building has been in existence since its construction in 1995, it was only on 09th May 2016 that the Director-General, Urban Development Authority has written to the Secretary, Kesbewa Urban Council calling it an unauthorized construction. The Director-General in his letter dated 09th May 2016 refers to a letter written by a society called "*Kapruka Subha Sadaka Samithiya*" and it defies logic as to why this society called *Kapruka Subha Sadaka Samithiya* chose to complain to the Director-General, UDA, about the so-called "unauthorized nature" of the building, 21 years after the building had been put up, provided the complaint was made in 2016.

The letter "L" dated 09th May 2016 directing the demolition is not supported by an affidavit of the writer or a representative of the Urban Development Authority and the learned State Counsel who appeared for the Urban Development Authority confirmed that no objection to the building has been filed supporting the demolition since this building has been used for welfare activities. The letter "L" does not explain as to how the finding has been reached that the building was unauthorized.

The latter (L) seems to have been written on the basis that community recreation and open space must have open space without any buildings thereon and it is indeed conceivable that a community recreation can indeed take place in an enclosed hall and in the circumstances the letter "L" which is unsupported by an affidavit does not create a duty to demolish a building for which a prior permission had been granted as far back as 1995. The letter L does not adduce sufficient reasoning as to how it became unauthorized.

The material filed by way of pleadings and documents reveals that the enclosed building stands only on a portion of the land depicted as B5 and there is sufficient space available for recreation and open space in B3, B6 B7 and 69 as depicted in the plan marked as A.

The Petitioners also aver that almost all the residents of the residential community have formed themselves into a society known as “*Kapruka Subha Sadaka Samithiya*” and incidentally the 1st and 3rd Petitioners happen to be the Vice President and the Chief Organizer of the “*Kapruka Subha Sadaka Samithiya*” but nowhere in the petition do the three Petitioners plead any authorization from the membership to institute this application for mandamus.

Though out Courts have moved away from a restrictive view of *locus standi*, the fact remains that the remedy of mandamus is available on the application of a public spirited citizen who has no other interest than a due regard for the observance of the law-see *Environmental Foundation Ltd., v. Land Commissioner* (1993) 2 Sri.L.R 41.

It would appear that the failure on the part of these three Petitioners to plead a representational standing on behalf of all the members of their society and the undue delay to invoke the jurisdiction of this Court, when the building has stood as large as life since 1995, would go to negate any appearance of genuineness required of a public spirited standing and that would disentitle the Petitioners to the discretionary remedy of mandamus.

Further, the petition does not disclose as to how the 1st Respondent who has not been sued by name owes a duty to perform the statutory duty of demolition of a building that has stood for the benefit of citizens, as conceded by the State Counsel.

In my view, in addition to the reasons I have adumbrated above, it is futile to issue a mandamus on an inanimate office and I proceed to dismiss this application for mandamus.

JUDGE OF THE COURT OF APPEAL