

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

CA (Writ) Application No: 161/2016

1. Godellawatte Liyanarachchige
Diyunuhamy Amaradasa.
2. Mallawa Thantrige Gayantha
Senath Kumara.

Both of No: 1303/02, Eksath Mawatha ,
Hokandara Road, Pannipitiya.

PETITIONERS

Vs.

1. R.P.R. Rajapaksha,
Commissioner General of Lands.
2. Deputy Land Commissioner,
Deputy Land Commissioner's Office,
Ampara.
3. Y.Y.N. Perera,
Assistant Land Commissioner (Ranbima).
4. B.R. Senaratne,
Land Commissioner (Legal),

1st, 3rd and 4th Respondents at
Land Commissioner General's Department,
Land Secretariat,
No. 1200/06, Rajamalwatta Road,
Battaramulla.

5. Ms. A.M. Ajantha Kumari,
Divisional Secretary,
Divisional Secretariat, Uhana.

6. M.G. Hendrick,
No. 28/162, Weraneketagoda, Uhana.

6(a) Mahinagodagama Saman Pushpa Kumara,
No. 28/162, Werenketagoda Road, Ampara.

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

RESPONDENTS

Before: Mahinda Samayawardhena, J
Arjuna Obeyesekere, J

Counsel: Hemasiri Withanachchi with Shantha Karunadhara for the Petitioners

Ms. Yuresha Fernando, Senior State Counsel for the 1st – 5th and 7th
Respondents

Charitha Galhena for the 6th and 6A Respondents

Argued on: 23rd July 2020

Written Tendered on behalf of the Petitioners on 8th June 2020 and 28th August 2020

Submissions:

Tendered on behalf of the 1st – 5th Respondents on 8th June 2020

Tendered on behalf of the 6th Respondent on 23rd October 2019

Decided on: 5th October 2020

Arjuna Obeyesekere, J.

The State had issued Hendrick Appuhamy a permit in terms of Section 19(2) of the Land Development Ordinance in respect of a high land in extent of 1A 3R 28P and a paddy land in extent of 3A OR 1.5P. The said permit, marked '**P1**' had been issued on 5th June 1955. While it appears that Hendrick Appuhamy had nominated his eldest daughter Asilin as the successor at the time the permit was issued to him, the said nomination appears to have been cancelled, and his wife, Manamperige Hamina had been nominated as the successor on 20th July 1957. However, according to the 1st – 5th Respondents, none of the said nominations have been registered in terms of the Ordinance.

Hendrick Appuhamy had been issued a Grant in terms of Section 19(4) of the Ordinance in respect of the above mentioned high land on 6th April 1988. It is not in dispute that even though the said Grant, marked '**P9**' had been issued in 1988, it had been issued to the family of Hendrick Appuhamy several years after his death in April 1989.

It is the position of the Petitioners that after the death of Hendrick Appuhamy, Manamperige Hamina had succeeded to the said lands referred to in '**P1**'. In 1993, Manamperige Hamina had executed a last will marked '**P2**' by which she bequeathed the aforementioned paddy land and high land to her younger daughter, the 1st Petitioner. The said last will had been proved in DC Embilipitiya Case No. 65T.

By letter dated 25th February 2015 marked '**P12**', the 3rd Respondent, Assistant Land Commissioner had informed the 2nd Respondent, Deputy Land Commissioner (Ampara) as follows:

“කාලයක් රඳවා තිබූ පැරණි දිමනාපත්‍ර සම්බන්ධයෙනි

උක්ත කරුණ සම්බන්ධයෙන් ඔබේ සමාංක අම/නිඉකො/ඉ/9/අමප්/3625 හා 2015.02.09 දිනැති ලිපිය හා බැඳේ.

02. මේ සම්බන්ධයෙන් වලංගු දිමනාපත්‍රයක් නිකුත් වී ඇතත් එය අවුරුද්දක කාලයක් තිස්සේම දිමනාපත්‍රකරුට ලබා නොදී කාර්යාලයේ රඳවාගෙන සිට ඇත. එබැවින් දිමනාපත්‍රකරු එතෙක්

බලපත්‍රය ඔස්සේ සිදු කල ගනුදෙනු වලංගු ලෙස සැලකීමට සිදු වේ. ඒ අනුව බලපත්‍රයේ පසු උරුමකරුවන කලත්‍රයා හට මුල් උරුමය හිමි වීම නිතහනුකුල වේ. ඒ අනුව කලත්‍රයා විසින් අන්තිම කැමති පත්‍රයකින් ඉල්ලුම්කරු වන අමරදාස දියණිය නමින් අයිතිය ලබා දීම නිවැරදි බැවින් දිමනාපත්‍රයේ මුල් අයිතිය ඇය නමින් සහතික කිරීම සුදුසු බව කාරුණිකව දන්වමි.”

It is noted that ‘**P12**’ refers to the Grant issued in respect of the highland, and that the author of ‘**P12**’ has recognized the nomination made by Hendrick Appuhamy in favour of his wife.

Acting on ‘**P12**’, the 5th Respondent, the Divisional Secretary, Uhana had informed the District Registrar of Lands, by letter dated 30th March 2015 marked ‘**P13**’ to register the name of the 1st Petitioner as the owner in respect of the highland. The 1st Petitioner had thereafter nominated her son, the 2nd Petitioner as her successor under the said Grant.

The dispute that gave rise to this application had arisen as a result of the following letter dated 5th April 2016 marked ‘**P15**’ sent by the 5th Respondent to the 1st Petitioner:

“28/41 පනපද ගොඩ/මඩ ඉඩම සම්බන්ධවයි

28/41 පනපද ගොඩ ඉඩම සඳහා සකස් කර තිබූ අම්/ප්‍ර/3625 දරණ දිමනා පත්‍රය ඉඩම කොමසාරිස් පනරාල්ගේ අංක 4/පී/නැගෙන/අම්/උහන/34 හා 2015.02.25 දිනැති ලිපියේ උපදෙස් අනුව මුල් උරුමය ඔබ නමින් පවරා ඇත.

02. නැවත ඉඩම කොමසාරිස් පනරාල් විසින් ඔහුගේ අංක 4/පී/නැගෙන/අම්/උහන/34 හා 2016.03.15 දිනැති ලිපිය මගින් කලින් ලබා දී ඇති උපදෙස් නිවැරදි කර, අභියාචනා අධිකරණ නඩු තීන්දු අනුව උරුමය සාරෝපණය විය යුතු බව දන්වා ඇත.

03. ඒ අනුව ඔබ භාරයේ ඇති ගොඩ ඉඩම සඳහා වන අම්/ප්‍ර/3625 දරණ දිමනා පත්‍රයත් මඩ ඉඩම සඳහා වන 28/41 දරණ බලපත්‍රයත් කාර්යාලයට භාර දීමට අවශ්‍ය කටයුතු කරන මෙන් කාරුණිකව දන්වා සිටිමි.”

Dissatisfied with the decision of the 5th Respondent to recall the Permit and the Grant issued to her, the 1st Petitioner filed this application, seeking the following relief:

- (a) A Writ of Certiorari to quash the decision said to be contained in the letter dated 15th March 2016;

- (b) A Writ of Certiorari to quash the decision calling upon the 1st Petitioner to surrender the grant;
- (c) A Writ of Mandamus directing the 1st – 5th Respondents to issue a Grant to the 1st Petitioner in respect of the paddy land.

Even though the Respondents have not made available to this Court the letter dated 15th March 2016, the learned Senior State Counsel submitted that the decision in 'P15' recalling the permit and grant issued to the 1st Petitioner was done for two reasons. The first is that the nomination of Manamperige Hamina had not been registered in the Land Ledger, and therefore her nomination as a successor is not valid. The second is that, in these circumstances, Manamperige Hamina was only a lifeholder of the said lands and therefore she had no power to nominate a successor, either through a last will or through a nomination made under the Ordinance.

I shall now consider each of the said grounds urged before this Court by the learned Senior State Counsel, in order to determine if 'P15' is illegal, irrational or arbitrary.

There are three Sections of the Ordinance that are relevant to a consideration of the first ground.

The first is Section 56(1) of the Ordinance, which provides that, "*The nomination of a successor and the cancellation of any such nomination shall be effected by a document substantially in the prescribed form executed and witnessed in triplicate before a Government Agent, or a Registrar of Lands, or a divisional Assistant Government Agent, or a notary, or a Justice of the Peace.*"

The second is Section 58(1) which goes on to state that, "*A document (other than a last will) whereby the nomination of a successor is effected or cancelled shall not be valid unless and until it has been registered by the Registrar of Lands of the district in which the holding or land to which that document refers is situated.*"

The final section is Section 60 of the Ordinance, in terms of which, *“No nomination of a successor shall be valid unless the document (other than a last will) effecting such nomination is duly registered before the date of the death of the owner of the holding or the permit-holder.”*

The cumulative effect of these three Sections is that a nomination carried out in the prescribed manner must be registered by the Registrar of Lands during the life time of the owner or permit holder, for such nomination to be valid.

The Respondents have filed together with their motion dated 7th June 2019 a copy of the permit 'P1' which clearly shows that the name of Manamperige Hamina has been nominated as the successor. However, the Land Ledger pertaining to the said permit, which has also been submitted with the said motion, does not contain the first nomination made in 'P1' of Asilin, or the nomination of Manamperige Hamina.

The validity of the nomination of a successor which has not been registered in conformity with the provisions of the Ordinance was considered by the Supreme Court in **Palate Gedera Gunadasa vs Palate Gedara Marywathy**.¹ In that case, Palate Gedera Jamis had nominated his two children, the appellant and the respondent as his successors by his application made to the Divisional Secretary, Medirigiriya. Their names were accordingly entered as successors of the said Jamis on 17th June 1993. However, by letter dated 05th April 1994, the said Jamis had written to the Divisional Secretary, Medirigiriya requesting to nominate the respondent as his successor to the land in question. On the basis of this document, the said respondent's name had been entered in to the Register of Permits/Grants under the Land Development Ordinance on 22nd November 1994. However, by the time the registration was effected, Jamis had passed away on 25th May 1994.

The Supreme Court, having considered the effect of the registration of a nomination of a successor after the death of the permit holder held that, *“According to section 60 of the Land Development Ordinance, ..., a nomination would become effective, only if such*

¹ SC Appeal No. 82/2008; SC Minutes of 26th October 2010.

nomination or cancellation is duly registered before the date of the death of the owner of the holding or the permit-holder."

The above decision of the Supreme Court supports the argument of the learned Senior State Counsel that not only should the nomination be registered, but that the registration must take place during the lifetime of the permit holder or the owner. In the absence of such registration, and in view of the mandatory nature of Sections 54, 56 and 60 in the overall scheme of the Ordinance, I agree with the submission of the Respondents that the nomination of Manamperige Hamina is not valid.

Where does that leave Manamperige Hamina with regard to the said lands? A determination of that question brings me to the second reason urged by the learned Senior State Counsel for the issuance of '**P15**', which is that Manamperige Hamina only had the rights of a lifeholder.

As I have noted earlier, at the time Hendrick Appuhamy died, he had been issued the Grant '**P9**' in respect of the highland in addition to the Permit '**P1**' in respect of the paddy land.

In terms of Section 48A(1), "*Upon the death of a permit-holder who at the time of his or her death was required to pay any annual installments by virtue of the provisions of subsection (2) of section 19, notwithstanding default in the payment of such installments, the spouse of that permit-holder, whether he or she has or has not been nominated as successor by that permit-holder, shall be entitled to succeed to the land alienated to that permit-holder on the permit and the terms and conditions of that permit shall be applicable to that spouse*". Thus, in the absence of the registration of the nomination, all that Manamperige Hamina was entitled to with regard to the paddy land was to succeed to the said land and occupy the said land by virtue of being the spouse of Hendrick Appuhamy. By virtue of being only a life-holder, Manamperige Hamina did not have the power to nominate a successor, as clearly laid down in Section 48A(2)(b). Thus, the nomination of the 1st Petitioner as her successor by way of her last will marked '**P2**' is not valid in terms of the law.

The position with regard to the high land, although governed by Section 48B of the Ordinance, is no different. In the absence of the registration of the nomination, and upon the death of the owner of the holding Hendrick Appuhamy, his spouse, Manamperige Hamina was only entitled to succeed to that holding, with such right being subject to the conditions specified in paragraph (b) of Section 48B(1), namely that such spouse shall have no power to nominate a successor to that holding. Thus, even with regard to the high land, the nomination of the 1st Petitioner as the successor of Manamperige Hamina by way of her last will marked 'P2' is not valid in terms of the law.

There is one matter that I wish to advert to, prior to concluding. That is to the fact that even if the nomination of Manamperige Hamina as the successor to the lands referred to in the permit and grant had been registered, and therefore she was entitled to nominate a successor, the nomination that has been made by way of the last will has not been registered in terms of the Ordinance, thus depriving the said nomination of any legal validity.

While in terms of Section 63, a nomination may be made in the last will of the owner of that holding or the permit-holder to whom that land has been alienated, Section 64 prescribes that a nomination made in the last will of the owner of a holding or a permit-holder shall not be valid unless it is registered in the prescribed manner within a period of three months reckoned from the date of the death of the owner of that holding, or of the date of the death of that permit-holder, as the case may be.

Furthermore, a nomination or a cancellation of a nomination made in the last will of the owner of a holding or of a permit-holder shall not be registered unless the applicant for registration shall furnish to the registering officer a certified copy of that will together with a certificate in the prescribed form to the effect that probate of that will has been applied for. It is not disputed that the provisions of Sections 64 and 65 have not been complied with, and therefore I am of the view that the nomination of the 1st Petitioner by the last will of Manamperige Hamina is not in conformity with the provisions of the Ordinance.

In the above circumstances, I see no legal basis to grant the Petitioners the relief that has been prayed for. However, considering the fact that Hamina died in 1998, and that Asilin, who would have been entitled to succeed to both the permit and the grant in terms of Section 72 by virtue of being the eldest daughter had died in 2012, I direct the 1st – 5th Respondents to conduct an inquiry, once 'P15' has been complied with, in order to determine the entitlement to the lands referred to in the said permit and grant.

Subject to the above, this application is dismissed, without costs.

Judge of the Court of Appeal

Mahinda Samayawardhena, J

I agree

Judge of the Court of Appeal