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

In the matter of an Application for Orders in the nature of *Writ of Certiorari and Prohibition* under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) Application No: 431/2019

Divithotawela Konara Mudiyanselage
Dammika Nayanakantha,
No 20/10, 1st Lane,
Gangabada Road,
Wewala,
Piliyandala.

PETITIONER

Vs.

1. National Housing Development Authority,
   P.O. BOX 1826,
   Chithtappalam A Gardiner Mawatha,
   Colombo 2.

2. Divisional Secretariat,
   Divisional Secretariat Office-Kesebewa,
   School Lane,
   Piliyandala.

3. Urban Development Authority,
   6th and 7th Floors,
   Sethsiripaya,
   Baththaramulla.

4. Hon. Attorney-General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Charitha Jayawickrama with Nilusha Silva for the Petitioner.

S. Wimalasena, DSG for the State.

Argued on: 08.08.2023.

Decided on: 11.01.2024.

S.U.B. Karalliyadde, J.

The Petitioner is the owner of Lot 3B in the Surveyor plan bearing No. 9840 (marked as C). Lot 3B is a subdivision of Lot 3 in Surveyor General's plan bearing No. 6518 (2nd page in plan marked as B). The land consisting of 27 Lots shown in that plan is a part and partial of Brook Side Estate owned by the 1st Respondent, the National Housing Development Authority (the NHDA). The NHDA sub-divided it into 27 blocks and sold some blocks reserving certain blocks to utilize for public purposes. Lot 3 in plan B had been transferred by the NHDA to the predecessor in title of the Petitioner, and the predecessor had sub-divided Lot 3 into Lots 3A and 3B as depicted in the Surveyor plan marked as C and transferred Lot 3B to the Petitioner. After the land was divided into 27 lots, the NHDA decided not to alienate Lot 2 which is in extent of 0.0049 Hectares and reserved it to utilize for public purposes. The Petitioner attempted to buy Lot 2 as it is situated adjacent to Lot 3B which is owned by him, but his attempts were not successful. Later the 2nd Respondent, the Divisional Secretary of Kesbewa constructed a building on Lot 2 for a Community Centre.

The substantive reliefs sought by the Petitioner in the Petition to this Application are, *inter alia*,

b) Grant and issue a mandate in the nature of a Writ of *Certiorari* against the 1st and 2nd Respondents quashing the decision to construct the structure in Lot No. 2.

c) Grant and issue a mandate in the nature of a Writ *Prohibition* against the 1st and 2nd Respondents prohibiting the execution of the decision to construct the said structure in said Lot No: 2.

d) Grant and issue a demolishing order directing the 1st and/or 2nd and/or 3rd Respondents to demolish the said unlawful and illegal construction/building.

Even though in prayer (b) the Petitioner has sought a Writ of *Certiorari* to quash the decision of the 1st and 2nd Respondents to construct a building, and in prayer (c) a Writ of *Prohibition* to prohibit the execution of the said decision, a specific decision has not been mentioned which the Petitioner has sought to quash.

In *Weerasooriya v. The Chairman, National Housing Development Authority and Others*[1], Sripavan J. (as he then was) held that the court will not set aside a document unless it is specifically pleaded and identified in the express language in the prayer to the petition.

At the argument, the learned Counsel appearing for the Petitioner submitted to Court that the prayer (b) is based on the document marked as P3. The document marked as P3 is a letter dated 27.11.2017 sent by the NHDA to the Divisional Secretary, Kesbewa, the 2nd Respondent. By that letter, the NHDA has instructed the 2nd Respondent to complete the remaining construction work of the building for the Community Centre.

[1] C.A. Application No. 866/98, CA Minutes on 08.03.2004

Therefore, it is evident that even to the date of P3 the building which the Petitioner is referring to has existed on Lot 2. In addition to that, at the argument, the learned Counsel appearing for the Petitioner admitted that the construction work of the building was commenced long before the date of the institution of this Writ Application, and the 1st floor was completed before the institution of this action.

Under the above-stated circumstances, the Petitioner is not entitled to a writ to quash a decision which was taken and implemented long ago, and it will be futile. This Court repeatedly held that writs would not be issued where it would be vexatious or futile. See, *RS. Bus Co. Ltd. v Members and Secretary of the Ceylon Transport Board* [2]and *Credit Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt) Ltd.* [3]In *Samastha Lanka Nidahas Grama Niladhari Sangamaya Vs Dissanayake*[4] Saleem Marsoof J. held that

> *"It is trite law that no court will issue a mandate in the nature of writ of certiorari or mandamus where to do so would be vexatious or futile."*

Marsoof, PC. J (P/CA) in the case of *Ratnasiri and others Vs Ellawala and others*[5] held that;

> *"This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ... will not issue where it would be vexatious or futile."*

[2] 61 NLR 491
[3] 2005 (1) Sri LR 89.
[4] [2013] BLR 68.
[5] (2004) SLR 180.

In prayer (d) to the instant Application the Petitioner seeks a demolishing order to demolish the building which this Court cannot be issued in exercising writ jurisdiction. The writ jurisdiction is conferred to the Court of Appeal under Article 140 of the Constitution of the Republic which reads as follows:

> *'Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:*

The learned DSG appearing for the 1st and 2nd Respondents drew the attention of Court to the fact that still Lot 2 in the plan marked as B is State land and therefore the State could utilize it for any public purpose. The learned DSG further argued that the Petitioner did not cite any law that the Respondents had violated. This Court fully agrees with the said argument of the learned DSG as Lot 2 is utilized for the benefit of the local community directly[6].

In paragraph 44 of the Petition, the Petitioner has stated that he had sought every possible alternative remedy which was not successful and is compelled to invoke the Writ jurisdiction of this Court. Therefore, it is clear that since the Petitioner was not successful in getting any relief through alternative remedies now attempting to get relief by invoking Writ jurisdiction of this Court which cannot be entertained by this Court. The Writ jurisdiction of this Court has its characteristics and the party who invokes Writ jurisdiction must necessarily satisfy the Court that all equally efficacious remedies

[6] Mendis et al. v. Perera et al. [Supreme Court] S.C. (FR) No. 352/2007

available have been exhausted [7]. It is trite law that if there are alternative remedies, the court would not exercise its writ jurisdiction. In *SC Appeal 52/2021*[8], it was held that;

> *"With regard to the powers vested with the Court of Appeal under Article 140 in issuing orders in the nature of writs, it is well settled that when an alternative and equally efficacious remedy is available to a party, the party should be required to pursue that remedy before invoking the Writ jurisdiction."*

This position was considered in the case of *Ishak V. Lakshman Perera, Director of Customs and Others*[9] as follows;

> *"Where there is an alternative procedure which will provide the applicant with a satisfactory remedy the Courts will usually insist on an applicant exhausting that remedy before seeking judicial review. In doing so the Court is coming to a discretionary decision." Where there is a choice of another separate process outside the Courts, a true question for the exercise of discretion exists. For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with the* ***judicial review being properly regarded as being a remedy of last resort****. It is important that the process should not be clogged with unnecessary cases, which are perfectly capable of being dealt with in another tribunal. It can also be the situation that Parliament, by establishing an alternative procedure, indicated either expressly or by implication that it intends that procedure to be used, in exercising its discretion the Court will attach importance to the indication of Parliament intention."* (emphasis added)

[7] SC Appeal 52/2021, SC Minutes on 14.07.2023 at Page 12.
[8] SC Minutes on 14.07.2023 at Page 8.
[9] (2003) 3 Sri LR 18

Therefore, even on his admission, the Petitioner to the instant Writ Application is not entitled to the reliefs sought in the Petition.

Considering all the above-stated facts and circumstances, I hold that the Petitioner is not entitled to the reliefs sought in the Petition. Therefore, I dismiss the Writ Application. No costs ordered.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL