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 under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Meegasdeniya Kankanamge Munidasa
Medical Centre, Imbulgoda, Akuressa.

Petitioner

Case No. C.A. (Writ) 86/2014

Vs.

1. J. H. S. P. Jayamaha
   Divisional Secretary,
   Divisional Secretariat Office, Beliatta.

1(a). Kanchana Thalpawila
   Divisional Secretary,
   Divisional Secretariat Office,Beliatta.

2. Meegasdeniya Kankanamge Sumanadasa
   No. 30, Kurunduwatta, Isadeen Town, Matara.

3. Meegasdeniya Kankanamge Karunaratne
   "Nadeewasa", Ridideniya Road, Ambalantota.

4. Meegasdeniya Kankanamge Thilak
   "Magawatta", Unawa, Palapotha, Beliatta.

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

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Saman Galappatti for the Petitioner

Vikum De Abrew SDSG for 1st and 5th Respondents

Buddhika Alawatta for the 3rd Respondent

P.L. Gunwardena with J.D. Douglas for the 4th Respondent

Argued On: 20.06.2019

Written Submissions Filed On:

Petitioner on 30.07.2018, 06.12.2018 and 16.09.2019

1st and 5th Respondents 07.12.2018 and 16.09.2019

3rd Respondent 30.07.2018 and 16.09.2019

4th Respondent 06.12.2018 and 19.09.2019

Decided On: 15.07.2020

Janak De Silva J.

The land forming the subject matter of this application is state land within the meaning of the Land Development Ordinance (Ordinance). It is depicted as Lot 207 in Final Village Plan No. 306 and is Seven Acres One Rood Fourteen Perches (7A 1R 14P) in extent.

This was alienated to Meegasdeniya Kankanamge Don Andiris, father of the Petitioner and 2nd to 4th Respondents, by grant dated 19th July 1955 issued under the Ordinance (P1) which was registered in terms of the Registration of Documents Ordinance.

The Petitioner claims that his father nominated him as the successor which was registered on the same page in the Tangalle Land Registry (P4). Meegasdeniya Kankanamge Don Andiris died on 12th March 1964 (P5) at which time the Petitioner was a minor of 11 years.

The predecessor of the 1st Respondent had alienated the land in issue to the mother of the Petitioner, Peduru Wickremarathna Ratnayake Sumanawathie in 1969 (P1a and P4a). She died on 13th March 2008 (P6). Prior to her death she had nominated (P7) the following children as the successors:

(i) 2nd Respondent - 4 Acres

(ii) Petitioner - 2A.1R.14P.

(iii) 3rd Respondent - 1/2 Acre

(iv) 4th Respondent - 1/2 Acre

The Petitioner is seeking the following relief:

(a) Writ of Certiorari quashing the decision contained as an endorsement dated 30.01.1969 in the grant marked "P1a" and the entry based on the aforesaid endorsement marked as "P4a".

(b) Writ of Mandamus directing the 1st Respondent to alienate the land in issue to the Petitioner.

The prayer for a Writ of Certiorari must fail on at least two grounds.

Firstly, Section 48B (1) of the Ordinance reads:

> "Upon the death of the owner of a holding, the spouse of that owner shall be entitled to succeed to that holding subject to the following conditions;
>
> a. upon the marriage of such spouse, title to that holding shall devolve on the nominated successor or on the person who was entitled to succeed under Rule 1 of the schedule,
>
> b. such spouse shall have no power to dispose of that property,
>
> c. such spouse shall have no power to nominate a successor to that property."

In terms of section 2 of the Ordinance, a grantee is an owner of a holding. Therefore, after Meegasdeniya Kankanamge Don Andiris died in 1964 his wife Peduru Wickremarathna Ratnayake Sumanawathie was entitled to succeed irrespective of whether the Petitioner was validly nominated as a successor. Hence P1a and P4a are valid.

Secondly, the said nomination P1a and P4a was made in 1969 at which time the Petitioner was 16 years old. He is seeking to challenge P1a and P4a more than 45 years after they were made. The Petitioner is invoking a discretionary remedy which can be refused on grounds of delay. The delay of over 45 years is an insurmountable obstacle for the Petitioner.

The Writ of Mandamus must also fail at least on two grounds.

Firstly, a Writ of Mandamus directing the 1st Respondent to alienate the land in issue to the Petitioner cannot be issued when the nomination made by Peduru Wickremarathna Ratnayake Sumanawathie by P7 exists which the Petitioner has not sought to be quashed. In *Weerasooriya v. The Chairman, National Housing Development Authority and Others* [C.A. Application No. 866/98, C.A.M. 08.03.2004] Sripavan J. (as he was then) held that the Court will not set aside a document unless it is specifically pleaded and identified in express language in the prayer to the petition. Although the Petitioner alleges that P7 is ultra vires, its invalidity must be determined by a court of law.

Clive Lewis, *Judicial Remedies in Public Law*, 5th Ed., South Asia Edition (2017) in discussing the meaning of null and void in Administrative Law states (page 185):

> "The primary concern here is the meaning of nullity or voidness solely in the context of the remedies granted by courts. The concept of nullity has been used to solve other problem arising in administrative law. For remedial purposes, the orthodox view is that an ultra vires act is regarded as void and a nullity. An act by a public authority which lacks legal authority is regarded as incapable of producing legal effects. **Once its illegality is established, and if the courts are prepared to grant a remedy**, the act will be regarded as void from its inception and retrospectively nullified in the sense that it will be regarded as ever incapable of ever producing legal effects." (emphasis added)

Thus, even where an act of a public authority is ultra vires and a nullity, for remedial purposes the illegality must be established before a court. As stated by Wade and Forsyth, *Administrative Law*, 9th Ed., Indian Edition, 281:

> "...the court will treat an administrative act or order invalid only if the right remedy is sought by the right person in the right proceedings"

Prior to *Mcfoy v. United Africa Co. Ltd.* [(1961) 3 All E.R. 1169] this approach was reflected in the statement of Lord Radcliffe in *Smith v. East Elloe Rural District Council* [(1956) A.C. 736, 769-770] where he held:

> "An order, even if not made in good faith is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

Wade and Forsyth, *Administrative Law*, (supra) page 304, after restating the above statement of Lord Radcliffe sets out the correct position as follows:

> "This must be equally true even where the 'brand of invalidity' is plainly visible for there also the order can effectively be resisted in law only by obtaining the decision of the court. **The necessity of recourse to the court has been pointed out repeatedly in the House of Lords and Privy Council, without distinction between patent and latent defects.** Lord Diplock spoke still more clearly [*F Hoffmann-La Roch and C AG v. Secretary for Trade and Industry* (1975) AC 295 at 366], saying that It leads to confusion to use such terms as 'voidable', 'voidable ab initio', 'void' or 'a nullity' as descriptive of the

status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction." (Emphasis added)

This approach is consistent with the 'presumption of validity' according to which administrative action is presumed to be valid unless or until it is set aside by a court [*F Hoffmann-La Roche and Co. AG v. Secretary of State for Trade and Industry* (1975) AC 295]. However, this 'presumption of validity' exists pending a final decision by the court [Lord Hoffmann in *R v. Wicks* (1998) AC 92 at 115, Lords Irvine LC and Steyn in *Boddington v. British Transport Police* (1999) 2 AC 143 at 156 and 161, and 173-4].

Secondly, in any event the Petitioner has come to Court 6 years after the death of his mother. Here again the delay cannot be overlooked. In *Biso Menike v. Cyril De Alwis and Others* [(1982) 1 Sri.L.R. 368 at 379] it was held that an application for a Writ of Certiorari should be filed within a reasonable time from the date of the order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However, the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra legal. One satisfactory way to explain the delay is for the Petitioner to show that he was seeking relief elsewhere in a manner provided by law. The Petitioner in this case has failed to establish any such ground.

For all the foregoing reasons, the application is dismissed with costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal