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

In the matter of an application in the nature of Writ of Mandamus under and in terms of Article 140 of the Constitution.

Weerasekara Mudiyanselage Sugathadasa
No. 119, Paddy Land, Sewagama,
Polonnaruwa.

Petitioner

Case No. CA (Writ) 144/2014

Vs.

1. Land Commissioner
   Department of the Commissioner of Land,
   North Central Province, Anuradhapura.

2. Deputy Land Commissioner
   New Town, Polonnaruwa.

3. Divisional Secretary
   Office of the Divisional Secretary,
   Thamankaduwa, New Town,
   Polonnaruwa.

4. W. M. Sumanawathie
   No. 119, Sewagama, Polonnaruwa.

5. W. M. Gunawathie
   No. 116/4, Sewagama, Polonnaruwa.

Website Copy

6. W. M. Siriyawathie
   Illukgoda, Mawanella.

7. W. M. Kusumawathie
   No. 336/6, Malamulla-East, Panadura.

8. W. M. Somawathie
   No. 123, "Prarthana", Hathare Ela,
   Kaduruwela, Polonnaruwa.

9. W. M. Sumanasiri
   No. 120/6, Sewagama, Polonnaruwa.

10. W. M. Upali
    No. 69/1, Palugasdamana-North,
    Polonnaruwa.

11. W. M. Pathmawathie
    Illukgoda, Mawanella.

12. W. M. Chandrawathie
    No. 464, Aswattha-North,
    Puwakpitiya, Avissawella.

13. W. M. Nishantha Priyankara
    No. 1027, Maddya Panthika Niwasa,
    New Town, Polonnaruwa.

14. W. M. Ajantha Bandupriya
    No. 119, Sewagama, Polonnaruwa.

15. W. M. Nilmini
Near the Temple, Gondiwela,
Mawanella.

Respondents

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Asthika Devendra with Kaneel Maddumage and Kanchana De Silva for the Petitioner

Manohara Jayasinghe SSC for 1st to 3rd Respondents

Ananda Kasthuriarachchi for the 4th to 12th, 14th and 15th Respondents

Argued on: 04.11.2019

Written Submissions tendered on:

Petitioner on 22.05.2017 and 30.08.2018

1st to 3rd Respondents on 11.02.2019

4th to 12th, 14th and 15th Respondents on 05.06.2017 and 21.09.2018

Decided on: 17.01.2020

Janak De Silva J.

The Petitioner is the eldest son of Weerasekera Mudiyanselage Banda who was the recipient of a grant (P2-A) issued under section 19(4) read with section 19(6) of the Land Development Ordinance (Ordinance) to the state land called "Baduelidamana" more fully depicted as No. 907 in the Final Colony Plan (Po) 13 Supplement 1. The 4th to 14th Respondents are his brothers and sisters.

The said Weerasekera Mudiyanselage Banda died on 24.02.2007 (P3-A) and his wife M. Luwinona predeceased him on 28.06.2004 (P3-B). The dispute between the Petitioner and the 4th to 14th Respondents is as to who is entitled to succeed to the land forming the subject matter of the grant (P2-A) in terms of the Ordinance.

The 4th to the 14th Respondents claims that their father Weerasekera Mudiyanselage Banda had informed the family that the 14th Respondent had been nominated to succeed to the rights of the grant (P2-A) subject to the life interest of the 4th Respondent. However, no evidence of such nomination is before Court. The 1st to 3rd Respondents did not file any objections. In any event, in terms of section 58(1) of the Ordinance a document (other than a last will) whereby the nomination of a successor is effected or cancelled is not 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 Petitioner seeks two writs of mandamus, firstly directing the 1st, 2nd and 3rd Respondents to name him as the successor to Weerasekera Mudiyanselage Banda to the land depicted as No. 907 of the Final Colony Plan (Po) 13 Supplement 1 granted by land grant P2-A and to transfer/vest the title to such land to the Petitioner and secondly directing the 1st, 2nd and 3rd Respondents to issue a land

grant to the Petitioner under section 19(4) of the Ordinance as amended to the land depicted as No. 907 of the Final Colony Plan (Po) 13 Supplement 1.

The Petitioner claims that he is, as the eldest son of Weerasekera Mudiyanselage Banda, entitled to be the successor in terms of the Ordinance in the absence of a nomination. Reliance is placed on section 72 of the Ordinance read with Rule 1 of the Third Schedule to the Ordinance which sets out a list of relatives according to priority in terms of which the eldest son gets preference. The 4th to 14th Respondents did not dispute this legal position but submitted several grounds on which they invited Court to refuse the relief prayed for by the Petitioner.

A Petitioner who is seeking relief in an application for the issue of a Writ of Mandamus is not entitled to relief as a matter of course, as a matter of right or as a matter of routine. Even if he is entitled to relief, still the Court has discretion to deny him relief having regard to his unmeritorious conduct, suppression or misrepresentation of material facts, delay, administrative inconvenience, waiver and submission to jurisdiction. I wish to add that this is not an exhaustive list and the Courts have from time to time developed other grounds on which this discretionary relief can be refused.

The 4th to 14th Respondents state that the Petitioner consented in writing to the 3rd Respondent that the rights to the grant P2-A can be divided between all the sons of the deceased Weerasekera Mudiyanselage Banda. The Petitioner, at paragraph 11 of the petition, admits signing several documents on 02.01.2013 but claims that it was done with the aim of transferring the land in dispute to him and that later he realised it was for a different purpose. The Petitioner thereafter submitted an affidavit dated 09.12.2013 (P-8) wherein he states that his consent to divide the

land in dispute between all the sons of Weerasekera Mudiyanselage Banda was given due to ignorance and claimed that he is withdrawing the said consent.

The Petitioner in the petition, at paragraph 11, states that he signed the document at the request of the 3rd Respondent and was under the impression that it was to facilitate the transfer of the land to the Petitioner based on his request to the 3rd Respondent. He further states that he signed it without perusing the document. This averment made presumably after receiving legal advice is different to the averments in the previous affidavit P-8 and therefore I am reluctant to give full credence to it.

The Petitioner sought in effect to place reliance on the defence *non est factum* which can be invoked by a person who does not understand a document that he has signed. This defence operates within narrow limits since if not it will be detrimental to third parties who may rely to their detriment on the validity of a signature contained in a document. A person who wishes to invoke the defence must establish the following two points:

(1) He must establish that he was permanently or temporarily unable through no fault of his own to have without explanation any real understanding of the document he signed.

(2) He must show that there was a real or substantial difference between the document which he signed and the document which he believed he was signing.

The Petitioner in the affidavit P-8 does not make out a case in relation to either of the above two points. All what he says is that he signed the document in ignorance.

Even if any credence is given to the contents of paragraph 11 of the petition it is noted that the Petitioner states that he signed it without perusing the document. The plea cannot be available to anyone who was content to sign without taking the trouble to try to find out at least the general effect of the document [Lord Reid in *Saunders (executrix of the Will of Rose Maud Gallie, dec'd) v. Anglia Building Society* (1971) AC 1004]. A person will not be able to invoke the defence of *non est factum* when he has been careless in signing the document or has simply failed to read the document properly [*United Dominions Trust Ltd. v. Western B.S. Romanau* (1976) QB 513]. In such a case the party signing the document is bound by his signature.

Accordingly, I hold that the Petitioner has consented to the land been divided between the sons of the deceased grantee and therefore is not entitled to any relief from this Court.

The learned counsel for the Petitioner sought to argue that since section 72 of the Ordinance specifies the order of succession in the absence of a nomination, a settlement/agreement in the form entered into by the Petitioner cannot stand in law. I disagree since there is no statutory prohibition on a person who is entitled in terms of the rules of succession in the absence of a nomination from agreeing to divide the land in dispute between his siblings.

The learned counsel for the Petitioner further sought to argue that the Petitioner has a legitimate expectation of being recognised as the successor since the 3rd Respondent promised the Petitioner that he would proceed to transfer the entire land to the Petitioner.

This representation was made after the Petitioner sought to withdraw from the earlier consent, he had given to divide the land between the five sons of the deceased grantee by tendering the affidavit P-8.

I have explained earlier that in law it is not possible for the Petitioner to have withdrawn from the consent he had given on the grounds urged by him. The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental [*Attorney-General of Hong Kong v. Ng Yuen Shiu* [1983] 2 AC 629 at 638; *R. v. North and East Devon Health Authority, Ex parte Coughlan* (2000) 2 WLR 622 at 647, 651, 656; *R v. Secretary of State for Education and Employment, Ex parte Begbie* (2000) 1 WLR 1115 at 1125, 1132)].

In *Tokyo Cement Company (Lanka) Ltd. vs. Director General of Customs* [(2005) BLR 24] the Supreme Court held that the representation must be intra vires for there to be a legitimate expectation.

Therefore, I hold that the Petitioner did not have a legitimate expectation of being recognised as the successor to the deceased grantee.

There is also a further point which prevents the Petitioner from obtaining writs of mandamus as prayed for in the petition against the 1st to 3rd Respondents as they have been sued *nominee officii* or in other words are not legal persons.

In *Haniffa v. The Chairman, Urban Council, Nawalapitiya* (66 N.L.R. 48) Thambiah J. stated that mandamus can only issue against a natural person, who holds a public office. In *Samarasinghe v. De Mel and Another* [(1982) 1 Sri.L.R. 123 at 128] this Court quoted with approval *Haniffa's* judgment as follows:

> "The petitioner's application is beset with other difficulties as well. The petitioner has made W. L. P. de Mel, Commissioner of Labour, the respondent to his application. It is common ground that he has now ceased to hold this post and is presently the Secretary, Ministry of Trade. The petitioner has not sought to substitute the present holder of the office. A Mandamus can only issue against a natural person, who holds a public office. If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court. (*See, Haniffa v. The Chairman, U. C. Nawalapitiya, 66 NLR 48*). **Before this Court issues a Mandamus, it must be satisfied that the respondent will in fact be able to comply with the order and that in the event of non-compliance, the Court is in a position to enforce obedience to its order.** Mandamus will not, in general, issue to compel a respondent to do what is impossible in law or in fact. Thus, it will not issue ..... to require one who is functus officio to do what he was formally obliged to do." (*de Smith, 2nd Edn. 581*). So, it seems to me, that even if the petitioner's application succeeded, the issue of a Mandamus would be futile." (emphasis added)

Haniffa's judgment was again quoted with approval by this Court in *Abayadeera and 162 Others v. Dr. Stanely Wijesundera, Vice Chancellor, University of Colombo and Another* [(1983) 2 Sri.L.R. 267]. In *Dayaratne v. Rajitha Senaratne, Minister of Lands and Others* [(2006) 1 Sri.L.R. 7] the Petitioner sought to rely on the Court of Appeal (Appellate Procedure) Rules 1990 to support his argument that an application for writ of mandamus can be maintained against a public office without naming the holder of the office. Marsoof J. (at page 17) disagreed with this contention and said that "...**this being an application for mandamus, relief can only be obtained against a natural person who holds a public office as was decided by the Supreme Court in Haniffa v. Chairman, Urban Council, Nawalapitiya**" (emphasis added).

The learned counsel for the Petitioner relied on Rule 5(2) in part IV of the Court of Appeal (Appellate Procedure) Rules 1990 which states that a public officer may be made a respondent to any application made in terms of Article 140 of the Constitution by reference to his official designation only and not by name. However, it is to be noted that the Court of Appeal (Appellate Procedure) Rules 1990 applies to **all** applications under Articles 140 and 141 of the Constitution and therefore is general in nature. The rule that in an application for a writ of mandamus the Respondent should be either a natural or a legal person is specific in nature. The difference between the remedies of certiorari and mandamus was adverted to in *Shums v. People's Bank and others* [(1985) 1 Sri.L.R. 197 at 204] by this Court as follows:

> "The other cases relied on by learned State Counsel were all cases where writs of Mandamus had been applied for. In A. C. M. Haniffa v. Chairman, Urban Council, Nawalapitiya (8), it was held that "A Mandamus can only issue

against a natural person who holds a public office: Accordingly in an application for a writ of Mandamus against the Chairman, Urban Council, the petitioner must name the individual person against whom the writ can issue". The judgment in that case gives a reason why a Mandamus can only issue against a natural person, who holds a public office when it says that "If such a person fails to perform a duty after he has been ordered by Court, he can be punished for contempt of Court". On, the other hand in the case of a writ of Certiorari, what this court does is to bring up a decision or determination of a statutory Tribunal or a functionary and quash it. Once such a decision or determination is quashed, it ceases to exist and a fresh decision or determination would have to be made if the matter is again proceeded with. The tribunal or functionary is not enjoined to do anything or desist from doing anything, the question of non-compliance with such Orders resulting in contempt of court does not arise. Therefore, it would be seen that the remedy by way of writ of Certiorari could not be equated to one of Mandamus as far as the effect on the parties is concerned."

In *Chandana v. Commissioner General of Examinations and Others* [C.A. (Writ) Application No. 1/2008, C.A.M. 06.06.2014] Nalin Perera J. (as he was then) held that a writ of mandamus will not issue against a person sued nominee officii.

The Supreme Court in *Gnanasambanthan v. Rear Admiral Perera and Others* [(1998) 3 Sri.L.R. 169] was called upon to consider the necessary parties to an application for writs of certiorari and mandamus and Amerasinghe J. held (at page 171):

"In any event the question before us is not whether the Chairman of REPIA could be cited nominee officii, which perhaps was possible in respect of the application for Certiorari **but not in respect of the application of Mandamus**..." (emphasis added)

A Writ of Mandamus could only issue against a natural person, who holds public office [*Mahanayake v. Chairman, Ceylon Petroleum Corporation and Others* (2005) 2 Sri.L.R. 193].

There is also the issue of delay on the part of the Petitioner. The father of the Petitioner died in 2007 whereas this application was filed in 2014. It is true that the Petitioner made an application on 21.06.2012 (P-4) to the 3rd Respondent seeking a transfer of the land in dispute to him. However, this was more than five years after the death of his father. The Petitioner has failed to explain this delay.

For all the foregoing reasons, the application is dismissed without costs.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal