

**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 Writs of Certiorari and Mandamus under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dehigaspase Karunawathie,
“Kudawatta”, Ihala Athuraliya.

PETITIONER

C.A. Case No. WRT/0681/23

Vs.

1. Nirosha S. Gamage,
The Divisional Secretary,
Divisional Secretariat office,
Athuraliya.
2. Senaka Palliyaguru,
Provincial Land Commissioner,
Provincial Land Commissioner’s Department
– Southern Province,
No.211, Wakwella Road, Galle.
3. Wanni Arachchige Seelawathie,
No.309,
Kuda Gammana 10,
Weligaththa.
4. Nihal Wanni Arachchi,
Aluthwatta, Ihala Athuraliya.

RESPONDENTS

BEFORE : K.M.G.H. KULATUNGA, J

COUNSEL : Chandima Muthukumarana with Theja Abeywickrama
instructed by Niluka Welgama for the Petitioner.

Shemanthi Dunuwille, SC for the 1st and 2nd Respondents.

ARGUED ON : 20.06.2025

DECIDED ON : 09.07.2025

JUDGEMENT

K.M.G.H. KULATUNGA, J

Introduction

1. According to the journal entry dated 13.02.2025, the respondents were granted time to file their objections and this has been set for argument for 20.06.2025. However, the respondents have failed to file the objections as permitted. The learned State Counsel informed that the 1st and 2nd respondents have not filed written objections but would make legal submissions. The learned Counsel for the petitioner did object to hearing the State Counsel. However, overruling the same, the matter was taken up for argument.
2. The petitioner is seeking a writ of *certiorari* to quash a purported decision, that is said to appear on document A-11, to certify the name of the 3rd respondent as the owner of the permit and to quash the registration of the ownership of the 3rd respondent by prayer (d); a writ of *mandamus* is sought to compel the 1st respondent to cancel the registration of the ownership of the 3rd respondent by prayer (e); and also to compel the holding of an inquiry to determine the lawful successor of the deceased Vidana Pathirana Gimarahamy for the succession rights subject to the land upon summoning the petitioner and the 4th respondent.

Facts

3. The original grantee of the grant issued under Section 19(4) of the Land Development Ordinance (hereinafter referred to as the “LDO”) was Vidana Pathirana Gimarahamy (A-1). The said grantee died on 09.01.1994. There was no successor nominated. The Divisional Secretary upon an inquiry determined the 3rd respondent to be the successor. The petitioner is not person coming within the Third Schedule but claims to be a relative to whom the grantee is alleged to have handed over possession of the corpus in or around 1987. It is the petitioner’s position that Gimarahamy promised to transfer the said land with the sanction of the Divisional Secretary to the petitioner. The petitioner also claims to have developed the land by cultivating cinnamon since then.
4. The 3rd respondent is a daughter of the original owner/grantee. The 4th respondent is the grandson, and his father Piyasena was the eldest son of Gimarahamy. Piyasena died on 10.09.1999. The petitioner alleges that the 3rd respondent began to disturb her possession and then a matter has in fact been instituted under Section 66(1) of the Primary Courts Procedure Act. The learned Primary Court Judge has granted the order in favour of the petitioner who then had continued to be in possession.
5. Then, at some point of time, on an application of the 3rd respondent, the 1st respondent (being the Divisional Secretary) held an inquiry to determine the succession upon the demise of the grantee Gimarahamy. The 1st respondent held the inquiry upon summoning the 3rd respondent and the petitioner. Thereafter, by letter A-11 dated 09.06.2023, the 1st respondent had informed that the said land would devolve to the 3rd respondent on basis of succession in accordance with the Third Schedule, as amended by Act No. 11 of 2022. The petitioner is now challenging the same.

6. When this matter was taken up, the learned State Counsel appearing for the 1st and 2nd respondents took up the legal objections that the petitioner lacks *locus standi*, that necessary parties have not been named, that the alleged decision to be quashed is not annexed or produced and that the document A-11 does not contain a decision.

Applicable law

7. The petitioner's primary argument is that the Divisional Secretary erred in applying the provisions of the LDO as amended by Act No. 11 of 2022 in determining the issue of succession. Assuming that A-11 refers to a decision, it is if at all the finding that the 3rd respondent is the successor to the said holding based on the provisions of the LDO as amended by Act No. 11 of 2022. The learned Counsel for the petitioner argued that the determination of the successor in accordance with the Third Schedule as amended by the Act No. 11 of 2022 is erroneous. This Act amended the original Schedule and the order of succession. Prior to the amendment, the *eldest male son* was the preferred successor. However, upon the amendment, the *eldest child* was considered, whereby the gender bias was rectified. Mr. Muthukumarana for the petitioner argued that as reflected in paragraph 2 of A-11, the determination of the successor had been made on the provisions of the LDO as amended by Act No. 11 of 2022. As the original permit holder died in 1994, he argues that the pre-amended provisions were applicable and the eldest surviving son should be the legitimate successor. The 4th respondent happens to be the son of Piyasena, the eldest son of Gimarahamy. Piyasena was living at the time of Gimarahamy's death but died subsequently without seeking nomination.
8. The 3rd respondent, Seelawathi is the eldest surviving child, but is a daughter Piyasena, being the eldest son of Gimarahamy, though younger to the 3rd respondent, happened to be the eldest surviving male successor at the time of the death of Gimarahamy. As such it is the petitioner's position that determining the 3rd respondent to be the

successor is contrary to the provisions of the LDO read with the Third Schedule as it prevailed at the time of the death of the original owner/grantee in 1994.

9. The primary challenge and the complaint of the petitioner is that the applicable law as considered by the 1st respondent is erroneous. The Divisional Secretary has applied the provisions of the LDO as amended by Act No. 11 of 2022. This was the law as it stood at the point of determining the issue of succession in 2023. What the learned Counsel for the petitioner argues is that the applicable law should be the law as it stood on the date of the death of the owner/grantee.
10. Succession under the LDO is different and distinct from the succession by an heir to a deceased person's estate under the general law. The right to inherit to the inheritance by an heir is governed by the general law, the Roman Dutch law principles. The basic principle is that upon the death of the testator, the right to inherit accrues to the heirs immediately with the death of such testator. Thus, be it testate or intestate succession, the heirs step into the shoes of the testator immediately upon the death of the owner of the property. This had been reiterated in **Wijayawardane vs. Malini Wijayawardane** [1999] 3 SLR 130 and also in **Mohamed v. Public Trustee** [1978-79-80] 1 Sri LR 1.
11. The petitioner, in their written submission, specifically submits that *the law applicable to the entitlement of the heirs should be considered on law as it prevailed as at the date of the death of the testator*. The petitioner appears to base this submission and argument on the general law principles of succession. However, succession under the LDO is governed by the provisions of the LDO and the legal regime applicable to intestate/testate succession by heirs has no application. This is specifically provided for by Section 170, which reads as follows:

“170.(1) No written law (other than this Ordinance) which provides for succession to land upon an intestacy and no other law relating

to succession to land upon an intestacy shall have any application in respect of any land alienated under this Ordinance.

(2) No person shall, by virtue of any appointment in any last will, have or acquire any title to succeed to any land alienated under this Ordinance save and except a successor duly nominated by last will under the provisions of Chapter VII.”

12. The relevant consideration under the LDO is not inheritance, but succession. Succession takes three forms: firstly, the permit holder or grantee/owner may nominate a successor; secondly, the spouse of a permit-holder or owner has a statutory right to succeed on the basis of his/her life interest; and finally, in the absence of any express nomination and the failure of a spouse to succeed, the persons in rule 1 of the Third Schedule of the LDO are entitled to be named as successor. In the present application, no nomination had been made by the owner. Therefore, it will come within the final category. The legal issue for determination in this application is whether provisions of the LDO as amended by Act No. 11 of 2022 is applicable in this instance. According to the petitioner, as the original permit holder died on 09.01.1994, the law of succession as it prevailed then is applicable. As opposed to that, the Divisional Secretary, following the instructions and the Circular of the Land Commissioner General, bearing no. 2022/04 (annexed to A-12) has applied the provisions as amended by Act No. 11 of 2022.

13. In respect of succession under the LDO, especially where no nomination had been made, the Divisional Secretary is required to determine the succession as per the Third Schedule. It is evident that the Divisional Secretary is vested with a discretion to determine and nominate the successor according to the subjoined table to the rules of succession under the Third Schedule of the LDO. It is only upon such nomination that such successor will acquire the right, title, and interest to such land under the permit or the grant. Therefore, the applicable law to determine

the successor should be the law as it prevails at the time of making such determination, and not as at the date of the demise of the original owner or permit holder. When the person entitled to succeed is so determined in view of the provisions of Section 73 the title to the said land will be deemed to have devolved on such person from the date of the death of the permit holder or the owner. Section 73 reads as follows:

73. Title to a land alienated on a permit or to a holding shall be deemed to have devolved on any person entitled to succeed to the land or holding under the provisions of section 72 as from the date of the death of the permit-holder or owner of the holding if such permit-holder or owner died without leaving behind his or her spouse, or, if such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed or from the date of the death of such spouse, as the case may be.

14. A deeming provision imputes an attribute which otherwise is not there.

It is a legal fiction. Section 73 ensures the continuity of title from the date of death of the permit holder/owner up until the succession. This provision further confirms that the successor to an LDO permit or grant acquires and assumes right, title, and interest only upon the nomination being accepted and confirmed by the Divisional Secretary. This puts it beyond doubt that the right to succession under the LDO does not accrue to such successor until and unless it is so determined by the Divisional Secretary and entered upon the relevant land ledger, and accordingly registered. Section 73 had been enacted to provide for the absence of title during the intervening period between the death and the determination of succession. Therefore, Section 73 further confirms that succession by persons referred to in the Third Schedule will be operative only upon the Divisional Secretary accepting and registering the same. In these circumstances, in determining succession under the Third Schedule under Section 72, when a successor has not been nominated or when the nominated successor fails to succeed, the applicable law is the law as it stands on the date of considering such succession by the

Divisional Secretary. Therefore, to my mind, the instructions contained in the said Circular of the Land Commissioner General, bearing no. 2022/04 (annexed to A-12), is in accordance with the aforesaid, and the Divisional Secretary determining the succession in accordance with the amended provisions of the Third Schedule is correct and lawful. Accordingly, the argument advanced on behalf of the petitioner in this regard is misconceived.

Locus standi

15. The next argument advanced is that the 4th respondent being the heir of the eldest son of the owner ought to have been called for an inquiry by the Divisional Secretary. The petitioner submits that the entitlement of the 4th respondent, who is a grandchild of the owner, if at all, would be on the pre-amended provisions of the LDO. Even if that be so, I observe that the 4th respondent appears to have abandoned his right to succession and declined. This is evident by the petitioners' written statements tendered at the said inquiry, where the petitioners specifically state that the 4th respondent declined to succeed. The said statement is annexed to A-12, in which the petitioner has stated as follows: "...අවසානයේ, ඉඩමේ අයිතිය හිමිවන පිළිවෙල අනුව විදානපතිරණගේ ගිමාරහාමි යන අයගේ ලොකු පුතා වන දියෝනිස් වන්නිආරච්චි මියගොස් ඇති අතර (දීමනා පත්‍රකරු...), ඊළඟ පුතා වන පියසේන වන්නිආරච්චි ද මියගොස් ඇත. අයිතිය ලැබෙන පිළිවෙල අනුව, පියසේන වන්නිආරච්චිගේ ලොකු පුතා වන නිහල් වන්නිආරච්චි ට මෙම උරුමය ලැබෙන බව දැනුවත් කරන ලදී. ඉන්පසු ඔහු එම අයිතිය ප්‍රතික්ෂේප කරන ලදී."

16. The said Nihal Wanniarachchi, son of Piyasena Wanniarachchi, is the 4th respondent. For all purposes, if the persons in the line of succession specified in the Third Schedule are unwilling to succeed, the Divisional Secretary is required to name the next in line to be the successor in respect of the said land. This is provided for by rule 04 of the Third Schedule, which is as follows: "*If any relative on whom the title to a holding devolves under the provisions of these rules is unwilling to*

succeed to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1.”

17. As admitted by the petitioner, the 4th respondent has been unwilling to succeed. Accordingly, even if it is assumed that the law as it stood prior to the Amendment is applicable, yet for all, on the own assertion of the petitioner, the 4th respondent had been unwilling to succeed. As such, the Divisional Secretary's determination to nominate the 3rd respondent will thus be in accordance with the rules and provisions of law applicable to succession under the LDO and be lawful and correct.

18. On the other hand, the petitioner does not claim to be a person entitled to succession within the table of the Third Schedule. Her apparent basis of making a claim or interest is being in possession and developing the land, and the alleged promise of the original grantee to transfer the property with the consent of the Divisional Secretary. The prejudice that is caused to the petitioner, as submitted by the learned Counsel, is that the petitioner is now liable to be evicted, unless the 4th respondent is nominated as successor, who according to the petitioner, has intimated his willingness to convey his interest in the corpus to the petitioner. The petitioner by this application is seeking the indulgence of this Court for a *mandamus* directing the 1st respondent to summon the 4th respondent and hold an inquiry and to determine the issue of succession afresh. The petitioner does not claim to be entitled to succession under the Third Schedule. The petitioner claims her entitlement on an alleged promise of the original grantee and the 4th respondent. In these circumstances, the petitioner has no status to participate in proceedings pertaining to the determination of successors.

19. Further, the petitioner is now seeking a fresh inquiry with the participation of the 4th respondent. In effect, the petitioner is attempting to make this application for and on behalf of the 4th respondent as to succession. As the petitioner does not have any right to succession, the petitioner does not have *locus standi* to prefer this application in the

present form and seek the relief in the manner as done. Therefore, I hold that the petitioner lacks *locus standi* and is not entitled to have and maintain this application.

Prejudice

20. It is settled law that if there be no prejudice, no writ would issue. The determination of succession to title under the LDO is a matter, if at all, between the issues of the deceased Gimarahamy. The petitioner, admittedly, is neither an heir nor does she come within the table of the Third Schedule. The tenor, effect, and import of the averments and the relief sought is to obtain a fresh inquiry with the participation of the 4th respondent. The learned Counsel for the petitioner submitted that prejudice would be caused to the petitioner if she is evicted upon an application made by the 3rd respondent at a future point of time. He also did submit that there is an understanding between the petitioner and the 4th respondent to transfer any interest the 4th respondent may receive to the petitioner. The issue for determination and decision is the right of succession under the Third Schedule of the LDO. The petitioner, not being entitled to succeed under the Third Schedule, cannot claim to be prejudiced due to a determination on the issue of succession under the LDO. At this point therefore, in the absence of prejudice, the petitioner is not entitled to a writ as prayed for (***Seneviratne and Others vs. Urban Council of Kegalle and Others*** (2001) 3 Sri L.R. 105).

21. On the perusal of the totality of the pleadings and documents, it is also apparent that the petitioner, in collusion with the 4th respondent, is now attempting to abuse the process of this Court to obtain a relief to which the petitioner is not entitled and has no standing. Writ jurisdiction is an extraordinary discretionary power of this Court. Persons seeking such a remedy should necessarily come with clean hands. As I observe, this is a dubious attempt to abuse the process of this Court. The petitioner in this circumstance has failed to prove legal right and standing to have and maintain this application. Thus, the petitioner is not entitled to the

as relief prayed for and to have and maintain this application. Accordingly this application is refused and is hereby dismissed.

22. As I am of the opinion as there is an attempt by the petitioner to abuse the process of Court, this application is dismissed subject to State costs in a sum of Rs. 5,000/=.

JUDGE OF THE COURT OF APPEAL