

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

In the matter of an Application for Revision of
Judgment dated 8th December 2009 by the
Provincial High Court of the Western Province
holden in Kalutara

Court of Appeal (PHC) APN
Application No: **94/2011**
PHC Kalutara Case No:
Revision 10/2007
MC Matugama Case No: **90999**

1. N.A.K.L. Wijenayake,
Asst. Commissioner of Agrarian
Development,
Agrarian Development Department,
4th Floor, District Secretariat,
Kalutara.

Applicant-Respondent-Petitioner

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

2nd Respondents-Petitioner

-Vs-

Gamini Liyanage,
"Kanchana",
Alubogahalanda, Wattala,
Matugama.

Respondent-Petitioner-Respondent

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Suranga Wimalasena, SSC for the Applicant-Respondent-Petitioner.

Leslie J. Siriweera with A.H. Seneviratne for the Respondent-Petitioner-Respondent.

Written Submissions: By the Applicant-Respondent-Petitioner and 2nd Respondent-Petitioner on 10/09/2019

By the Respondent-Petitioner-Respondent on 29/08/2018

Argued on : 27/08/2019

Judgment on : 11/10/2019

A.L. Shiran Gooneratne J.

The Applicant-Respondent-Petitioner (Assistant Commissioner of Agrarian Development, hereinafter referred to as the Petitioner) instituted proceedings against the Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) in terms of Section 33(3) of the Agrarian Development Act No. 46 of 2000, as amended (hereinafter referred to as the Act) in the Magistrates Court of Kalutara from filling a paddy land called Koskatimulla (Panwila) alias Koskatimulla landa, in extent of 15.5 perches, out of a larger land of 2 roods, more

fully described in the schedule to the application. The learned Magistrate has made order dated 02/03/2007, against the Respondent, in terms of Section 33(8) of the Act. Aggrieved by the said order the Respondent preferred a Revision Application to the High Court of the Western Province holden in Kalutara. The learned High Court Judge, by order dated 31/10/2013, set aside the order of the learned Magistrate. The Appellant is before this Court to canvas the said order dated 31/10/2013.

At the commencement of the argument the counsel for the Respondent raised the following preliminary issues for consideration.

1. The affidavit filed along with the Petition is not the affidavit of the Applicant-Respondent-Petitioner.
2. Undue delay in filling the revision application.

The affidavit filed along with the Petition of Appeal is supported by an affidavit by Azeez Mohamed Arif, Assistant Commissioner of Agrarian Development. According to paragraph 1 of the said affidavit, the person affirming the affidavit is the Applicant-Respondent-Petitioner. In paragraph 5, the affirmant states that;

"I being the authorized person recognized by law filed an application in the Magistrate Court of Matugama bearing No. 90999 dated on or about 10th November 2005, against the Respondent-Petitioner-Respondent (hereinafter referred to as the Respondent) by virtue of the provisions of the Agrarian Development Act No. 46 of 2000, (hereinafter referred to as the Act) praying inter

alia for an Order restraining the Respondent and his agents from contravening the provisions of Section 33(1) of the said Act."

However, according to the caption of the Petition of Appeal, the Applicant-Respondent-Petitioner is N.A.K.L. Wijenayake, Assistant Commissioner of Agrarian Development, who also filed a supporting affidavit with the application in the Magistrates Court of Matugama. Therefore, no such affidavit is filed of record, as per paragraph 5, as contended by the affirmant.

In *Kumarasinghe Vs. Ratnakumara and others* (1983 2 SLR 393 at page 397 *Sharvananda, A.C.J.* (as he then was), held that;

"While a stranger cannot make an affidavit it need not be made by the party individually, but may be made by any person who is personally aware of the facts. The Court is entitled to have the best evidence before it; where there exists evidence which is first-hand it will be most unsatisfactory to place before court evidence of any other description. Ordinarily a Petitioner is the best person who can speak to the facts and verify the facts averred in the Petition; then, it is he who should file the affidavit in support of the said facts; but if there are other witnesses too who can, to their personal knowledge, depose to those facts there is no bar to their filing affidavits in support of the Petition, in addition to or in substitution for the Petitioner's affidavit. But if the Petitioner does not file his own affidavit verifying the facts, which he is personally conversant with, then the court would be extremely reluctant to grant relief. But the Petitioner may be excused from filing an affidavit, if for some good reason or ground, he is unable to do so."

In the said case His Lordship cited with approval, Raymond Evershed M.R. in *Re. Cohen* (1950) 2 AER 36, 37,

"Affidavit evidence can only be entitled to the same weight as oral evidence, when those who swear the affidavit realize that the obligation of the oath is as serious when making as affidavit as to when making statements in the witness box."

In the impugned affidavit before Court, the Assistant Commissioner of Agrarian Development affirms that he is the Applicant-Respondent-Petitioner and that he has filed an affidavit of the Commissioner of Agrarian Development in the Magistrate's Court of Matugama. They are factually incorrect statements.

In terms of Section 33(4) of the Act, every application filed against any person who contravenes the provisions of Section 33(1) of the Act, *"shall be supported by an affidavit verifying to the matters set forth in the application"*. In terms of Section 33(7) of the Act, the *"court shall not be competent to call for any evidence from the Commissioner General or Additional Commissioner General --- --- in support of the application."*

In the action filed in the Magistrates Court, the Respondent has taken up the position that the land has not been properly identified and denied that the applicant ever conducted a site inspection or identified the disputed land as a paddy land. The Respondent in his testimony to the Magistrates Court has also stated that the action against him was filed by the applicant due to personnel animosity.

The affirmant in the present case does not disclose in the affidavit the reasons as to why the applicant in the Magistrates Court was unable to file an

affidavit, however, the affirmant has filed an affidavit purporting to be the Applicant and placed before this Court evidence which the affirmant was not privy to.

The preliminary objection raised by the Respondent does not contemplate a noncompliance with the rules or an infirmity of an affidavit. Such infirmities and/or irregularities in an affidavit or with a rule have been observed as technical in nature that can be cured. (*Senok Trade Combine v. Pushpadeva* (2015) BLR 40)

In *Senanayake vs. Commissioner of National Housing and Others* (2005) 1 SLR 182, where the validity of an affidavit affirmed outside jurisdiction was in issue, the Court was inclined to grant the Petitioner permission to file a fresh affidavit. The significance of the said decision to the instant case is that the Court while permitting the Petitioner to file a fresh affidavit also stated that the entitlement to depose to a fresh affidavit was “in identical terms”. However, it is to be noted that no such application to file a fresh affidavit was made in this case.

In *Fernando and 18 Others v. Commissioner General of Labour* (2009) BLR 74, the Court held that;

“it is trite law that any person or persons seeking to invoke the discretionary powers of a court whether by way of an application in revision must come to the court with clean hands. Among other things this would mean that such person or persons must not suppress or misrepresent material facts and thereby violate the duty of utmost good faith or uberimae fides owed to court”

As discussed above, material facts contained in the affidavit filed by the Applicant are disputed on identification of the land and the applicant acting in bad faith. In such circumstances, the affirmant has purported to be the applicant to file the instant revision application, wherein the Petitioner has broken the trust of acting in utmost good faith. Therefore, the affidavit tendered in support of this application cannot be admitted as a valid affidavit and should be rejected.

The Petitioner filed this revision application one year and nine months after the date of the impugned judgment. The delay in filing the revision application is admitted by the Petitioner and it is attributed to the delay in obtaining the impugned order from the High Court Registry. However, I find no grounds to substantiate the said allegation in the pleadings filed of record. Therefore, I uphold the preliminary objections and dismiss this application.

Application dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL