

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

In the matter of an Application for a
mandate in the nature of a Writ of
Certiorari under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

CA (Writ) Application No. 410/2011

Jayasundera Mudiyanselage Chandralal
Jayasundera,
Kadaththawa, Hengamuwa.

Petitioner

Vs.

1. Divisional Secretary,
Kobeigane.
2. Provincial Commissioner of Lands,
Provincial Land Commissioner's
Department, (N.W.P.)
Kurunegala.
3. Multi Purpose Co-operative Society
Limited,
Kobeigane.
4. Jayasundera Mudiyanselage
Somaweera Jayasundera,
No. 39, Rajapeella Road,
Kurunegala.

5. Jayasundera Mudiyanselage
Somarathne Jayasundera,
Kadaththawa, Hengamuwa.

6. Jayasundera Mudiyanselage
Seelawathie,
Kadaththawa, Hengamuwa.

7. Jayasundera Mudiyanselage
Nimalka Jayasundera Manike,
Kadaththawa, Hengamuwa.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: Chula Bandara with Anuradha Dias for the Petitioner

Ms. Chaya Sri Nammuni, Senior State Counsel for the 1st and 2nd Respondents

Ms. Faiszar Markar for the 4th Respondent

Written Submissions: Tendered on behalf of the Petitioner on 15th November 2018

Tendered on behalf of the 1st and 2nd Respondents on 5th October 2018

Decided on: 17th July 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 4th October 2018, the learned Counsel appearing for all parties moved that this Court pronounce its judgment on the written submissions that would be tendered by the parties.

When this matter was called on 20th February 2019 for judgment, this Court requested the learned Counsel to provide clarifications on certain matters, which were duly provided by the learned Counsel for the Petitioner and the learned Senior State Counsel for the 1st and 2nd Respondents.

The Petitioner, who is a brother of the 4th Respondent, has filed this application seeking a Writ of Certiorari to quash the decision contained in the letter dated 2nd September 2010, annexed to the petition marked 'P12', by which the 1st Respondent informed the 4th Respondent as follows:

"දිමනාපතුයේ පැවරීම අවලංග කිරීම

අංක කුරු/පු 85585 දුරන දිමනා පත්‍ර ඉඩමේ කිමසරු වූ පයනුත්දර මුදියන්දේලාගේ කිරීමුදියන්දේ යන අය මයයාම තිකා ඔහුගේ ප්‍රතාවන පයනුත්දර මුදියන්දේලාගේ කොමිටර පයනුත්දර යන අය වෙත පහත උප ලේඛනයේ ගැනීම් ඉඩම පවත් ඇත. එම පැවරීම බල රැකිත පැවරීමක් හෙයින් එම පැවරීම අවලංගකර ඇත. එ අනුව මියපදිංචි කරන ලෙස කාරුණිකව ඉල්ලම්."

The explanation offered by the 1st and 2nd Respondents for the issuance of 'P12', is that several errors had been committed in the recognition of the 4th Respondent as the successor to the land that is the subject matter of this application and with regard to the extent of the land, and that 'P12' was issued to rectify the said errors.

The facts of this matter very briefly are as follows.

The Petitioner and the 4th – 7th Respondents are the children of Jayasundera Mudiyanselage Kiri Mudiyanse. The Petitioner has stated in paragraph 5 of the petition that “his father Jayasundera Mudiyanselage Kiri Mudiyanse was allocated a block of land in extent 1A 3R 37.9P” situated at Kobeigane in terms of permit No. 68218 dated 14th March 1973. Even though a copy of the said permit has not been submitted by either party, there is no dispute between the parties that Kiri Mudiyanse had been issued with a permit in 1973. It appears that the extent of the land at the time the permit was issued was as stated in paragraph 5 of the petition, although paragraph 8 of the petition seems to indicate otherwise.¹

According to the Land Ledger relating to the said permit which has been filed by the 1st and 2nd Respondents marked ‘R1’, the land referred to in the said permit has been identified as Lot No. 7 of Final Village Plan No. 1574. The extent of the land specified in ‘R1’ is only 1A 3R 0P. The Petitioner has submitted a copy of Plan No. 1574 dated 16th October 1918 together with his motion dated 30th April 2019. According to the Register of Settlements annexed to the said Plan, the total extent of Lot No. 7 is 10A 1R 2P. The extent of land given to Kiri Mudiyanse by the said permit is therefore only a part of Lot No. 7 of Plan No. 1574.

This Court has examined the Land Ledger ‘R1’ and observes that the following endorsements have been made on ‘R1’:

¹ In paragraph 8, the Petitioner states that ‘in the said permit No. 68218 and the Jayaboomi grant, the extent of the land was indicated as one acre and three roods (1A 3R 00P).’

1. Kiri Mudiyanse had nominated his wife, Dissanayake Mudiyanselage Dingiri Menika as his successor under the Permit.
2. Part of the said land has been given by Kiri Mudiyanse to the 3rd Respondent, the Kobeigane Multi Purpose Co-operative Society (MPCS) - "81.01.30 දින පරීක්ෂණයදී එකත වූ පරිදි 81.12.02 දින දරණ දුවුරටම ප්‍රකාශයෙන් අස්කර ¼ රාෂයට හාර දී ඇත. එම කොටස කො. වි. ඩේ. ඩ. සම්බිජට² ප්‍රදේශීලි ගොඩනැගිලි තැනීම සඳහා භාරදුමට තිරණය කර ඇත."

In terms of the said endorsement, the extent of the land given to Kiri Mudiyanse in terms of the Permit has been reduced by approximately ¼ acre pursuant to an inquiry. This Court must observe at this stage that the State has not issued the MPCS a permit in respect of the said land, although it is the position of the MPCS that it constructed a building on the said land and is in possession of the said ¼ acre of land.

On 17th June 1996, HE the President had issued Kiri Mudiyanse a Grant in terms of Section 19(4) of the Land Development Ordinance. According to this Grant, which has been annexed to the petition marked 'P1', the total extent of the land is 1A 3R 0OP. This Court observes that there is no reference in 'P1' to a survey plan, even though Plan No. 1574 and Supplement No. 1 of Plan No. 1574³ prepared in November 1981, were available in respect of the land. This Court observes further that the extent of land given in 'P1' is 37.9P less than what the Petitioner has claimed in paragraph 5 of the petition as being the extent of land that his father received in terms of the permit. In paragraph 8 of his petition, the Petitioner has admitted that, 'in the said permit No. 68218 and

² This is a reference to the Kobeigane MPCS.

³ Lot No. 7 of Plan No. 1574 was re-surveyed in 1981.

the Jayaboomi grant, the extent of the land was indicated as one acre and three roods (1A 3R 00P).'

Thus, it is safe for this Court to conclude that Kiri Mudiyanse was initially given an extent of 1A 3R 37.9P, out of which he agreed to give $\frac{1}{4}$ acre to the MPCS, leaving him with 1A 3R and that the State issued 'P1' in respect of 1A 3R which is the extent of land that Kiri Mudiyanse was in possession at the time the Grant was issued. This position is in fact confirmed by a statement made by the 4th Respondent on 10th December 2007, a copy of which has been tendered to this Court by the 1st Respondent by way of a motion dated 30th May 2019.⁴

Kiri Mudiyanse had passed away on 8th December 1999 and his spouse, Dingiri Menika, being his nominated successor, was entitled to succeed to the said land. In terms of Section 68(2) of the Land Development Ordinance, a nominated successor fails to succeed to the holding of an owner if he/she refuses to succeed to that holding, or if the nominated successor does not enter into possession of the holding within a period of six months from the death of the owner. It is the position of the Petitioner that Dingiri Menika did not enter into possession at all, either as the nominated successor or as the spouse of Kiri Mudiyanse. Therefore, in terms of Section 72 of the Land Development Ordinance, if the nominated successor fails to succeed, the title to the holding shall devolve as prescribed in Rule 1 of the Third Schedule.

It is perhaps appropriate at this stage to refer to the fact that Lot No. 7 in Plan No. 1574 was re-surveyed in 1981. The Petitioner has submitted with his motion filed on 30th April 2019, a copy of Supplement No. 1 to Plan No. 1574

⁴ This statement forms part of the documents marked 'K' submitted in response to a clarification sought by Court.

dated 4th November 1981. This Court has examined this Plan and the Supplementary Tenement List annexed thereto and observes that Lot No. 7 in Plan No. 1574 has been sub – divided into the following lots:

Lot No.	Extent
174	3A OR 22P
175	2A OR 33P
176	2A 3R 36P
177	1A OR 12P
178	0A 3R 19P
	10A 1R 02P Total

It is observed further that the total extent of the five lots is identical to the extent of Lot No. 7 in Plan No. 1574.

The first of the two mistakes that the 1st Respondent claims led to the issuance of 'P12' had occurred in 2003 with the issuance of a letter dated 29th September 2003 annexed to the petition marked 'P3', by which the then Divisional Secretary of Kobeigane (the 1st Respondent) had informed the Land Registrar as follows:

"ඉහත අංක සඳහන් පයහුම දීමනාපතු හිමිකරගේ ඉඩමේ ප්‍රමාණය අක්. 01 රැඩි. 03 පර් යනුවෙන් සඳහන් කර ඇත්තේ වැරදිමකිනි.

එම හිස හිමිකරගේ ඉඩමේ ප්‍රමාණය අක්. 02 රැඩි. 03 පර 37.9 ලෙස නිවැරදි විය යුතු බවින්, ඔබගේ ලේඛනවල එයේ නිවැරදි කිරීමට කටයුතු කරන ලෙස කරනුවෙන් ඉල්ලම්."

This Court must observe that 'P3' too does not have a reference to a lot number or a Plan. 'P3' does not state the basis on which the Divisional Secretary had come to the conclusion that the extent of the land should be increased from the extent specified in the Grant. The only explanation appears to be that when Supplement No.1 to Plan No. 1574 was prepared in 1981, Lot No. 7 had been divided into five lots. The land that is the subject matter of this application is Lot No. 176 which according to the Supplementary Tenement List is 2A 3R 36P.⁵ Furthermore, 'P3', has failed to take into consideration the endorsement made on 'R1' that $\frac{1}{4}$ acre has been given to the MPCS.

More importantly, the Divisional Secretary, by issuing 'P3', has acted contrary to the provisions of Section 19(2) of the Land Development Ordinance, which provides that a permit shall be issued in the first instance and a Grant is issued *inter alia* only once the land has been developed by the permit holder. This would necessarily mean that the extent of the land given by way of a permit shall be identical to the extent of the land for which a Grant is issued subsequently.

What is most important however is that a Grant for a pre-determined extent of land can only be issued by HE the President⁶ and thus, a Divisional Secretary does not have the power, with or without any basis, to increase the extent of land given by the State.

In these circumstances, this Court is of the view that the increase of the extent of land by 'P3' is *ultra vires* the powers of the Divisional Secretary and is illegal. The entitlement of Kiri Mudiyanse and his successors therefore should be

⁵ The extent specified in 'P3' is 3P more than the extent of Lot No. 176.

⁶ Vide Article 33(2)(f) of the Constitution.

limited to the extent of land specified in the Grant, namely 1A 3R and accordingly, the explanation offered by the present Divisional Secretary that 'P3' had been issued by a mistake is an acceptable explanation.

According to the 1st Respondent, the second mistake that is sought to be rectified by way of 'P12' occurred in 2004. The Petitioner has annexed to the petition marked 'P6' an affidavit dated 25th June 2004 by which the 4th Respondent had stated that he is the eldest son of Kiri Mudiyanse and that he is agreeable to share the land with his four siblings, who are the Petitioner and the 5th – 7th Respondents to this application.

Acting probably on 'P6', the then Divisional Secretary, by a letter dated 8th April 2005, annexed to the petition marked 'P5', had informed the Registrar of Lands as follows:

“ඉහත අංක දුරක්ෂ දීමනාපතු ඉඩමේ හිමකරු වූ පයසුත්දර මුදුයන්සේලාගේ කිරීමුදුයන්සේ මහතා 1999.12.09 වන දින මය ගොස් අැති බැවින් තහුගේ වැඩිමහල් පිටිම දුරුවා වන පයසුත්දර මුදුයන්සේලාගේ කොම්බර් පයසුත්දර හමන් පහත උප ලේඛනයේ සඳහන් ඉඩම පවත් ඇත.”

Having recognized the 4th Respondent, who is the eldest son of Kiri Mudiyanse as the successor, the then Assistant Divisional Secretary, Kobeigane, by a letter dated 8th September 2005 annexed to the petition marked 'P8', had granted the following approval:

“අංක: කුරු/පු 85585 දැරණු දීමනාපත්‍රයට අයිති ඉඩම තොතාරියේ ඔප්පු මගින් පැවරීම

1935 අංක 19 දැරණු ඉඩම සංවර්ධන ආස්ථා පහතේ 42 වගන්තිය යටතේ මා වෙත පැවරී ඇති බලතල අනුව කුරුණෑගල, රජපිළ්ලපාර, අංක: 39 කි පදිංචි, පයසුන්දර මුදියන්දේලාගේ කෝම්බර පයසුන්දර නැමති අය වෙත පහත සඳහන් උප ලේඛනයේ සඳහන් කර ඇති ඉඩම 1935 අංක 19 දැරණු ඉඩම සංවර්ධන ආස්ථා පහත යටතේ කුරුණෑගල දිස්ත්‍රික් ඉඩම ලේකම කාර්යාලයේ අංක: කු/කො/12/238 නා 2005.04.15 දින ලියාපදිංචි කර ඇති අංක: කුරු/පු 85585 දැරණු දීමනාපත්‍ර යටතේ ඇති ආරක්ෂිත ඉඩම හෝ.ගමුව, කදුන්තාව පදිංචි, පහත හම් සඳහන් අය වෙත පැවරීමට මෙයින් බලය දෙමි.

1. පේ. එම්. කෝමරත්න	කැබලි අංක: 1 රු. 03 පර්: 9.6
2. පේ. එම්. වන්දුලාල් පයසුන්දර	කැබලි අංක: 2 රු. 02 පර්: 22.4
3. පේ. එම්. කෝමවිර පයසුන්දර	කැබලි අංක: 3 රු. 02
4. පේ. එම්. සිලවති	කැබලි අංක: 4 රු. 02
5. පේ. එම්. නිමල්කා පයසුන්දර මැණිසේ	කැබලි අංක: 5 රු. 02”

This Court observes that the aggregate of the above allocation together with provision for a road, as depicted in the Plan annexed to the petition marked 'P7' is 2A 3R 37.9P. It is therefore clear to this Court that the mistake committed by 'P3' with regard to the extent of the land continued with 'P8'.

Even though the learned Senior State Counsel has not disputed the right of the Divisional Secretary to issue 'P8', this Court is of the view that the Divisional Secretary had no right in terms of the law to grant approval to dispose of an extent of land which was greater than the extent of land that had been alienated by the Grant 'P1'. To that extent, this Court is of the view that 'P8' is *ultra vires* the powers of the Divisional Secretary, and is therefore illegal.

According to the Petitioner, pursuant to the approval granted by 'P8', the 4th Respondent had executed deeds in favour of the Petitioner and the 5th – 7th Respondents. The land that was alienated to the Petitioner is the land on which the building of the MPCS is situated. The present dispute leading to the issuance of 'P12' appears to have been triggered by steps that the Petitioner took to evict the MPCS from the land that was allocated to the Petitioner pursuant to 'P8'. It is the position of the Petitioner that his father Kiri Mudiyanse had constructed a building on the land allocated to him and that Kiri Mudiyanse, who was on the Board of Directors of the MPCS had allowed the said MPCS to occupy the said building. This is however contrary to the endorsement on the Land Ledger marked 'R1', according to which Kiri Mudiyanse had surrendered an extent of $\frac{1}{4}$ acre to be given to the MPCS to construct a building after an inquiry. This is in fact confirmed by the statement that the 4th Respondent had made on 10th December 2007.⁷ This Court must observe that the southern boundary of the land referred to in 'P1' is the MPCS land, which confirms the entry in the land ledger 'R1' that Kiri Mudiyanse had surrendered part of the land to be given to the MPCS. The position of the Petitioner therefore cannot be accepted.

The Petitioner states that he filed action in the District Court of Kuliyapitiya in February 2009 to evict the MPCS from the land allocated to him and that while the said case was pending, certain officials had attempted to survey the said land. The Petitioner states further that although he requested the 1st Respondent to hold an inquiry, and an inquiry was in fact scheduled for 20th August 2009, the inquiry was not held as the other parties were not present. The Petitioner states that it is only thereafter that 'P12' had been issued on 2nd

⁷ Supra.

September 2010. The result of 'P12' is that the 4th Respondent as well as the Petitioner does not have any right to the land that is the subject matter of the Grant 'P1' and has culminated in this action.

This being the background to this application, this Court would now consider the three grounds on which the learned Counsel for the Petitioner is seeking a Writ of Certiorari to quash 'P12'. Firstly, the Petitioner states that an inquiry was not held prior to 'P12' being issued. Secondly, the Petitioner states that the 1st Respondent had no power to cancel the devolution of ownership to the 4th Respondent. Thirdly, the Petitioner states that in terms of the Land Development Ordinance, the land should devolve on the 4th Respondent by virtue of the 4th Respondent being the eldest son, upon Dingiri Menika relinquishing her rights as nominee.

A consideration of the above grounds requires this Court to re-visit the position of the 1st and 2nd Respondents, which is that the increase in the extent of the land from 1A 3R to 2A 3R 37.9P as borne out by 'P3' is inadvertent and is a mistake. Quite apart from being inadvertent, this Court reiterates its view that the 1st Respondent has no legal authority to increase the extent of the land, over and above what has been allocated by the Grant. Furthermore, by the Petitioner's own admission in paragraph 5 of the petition, Kiri Mudiyanse only had 1A 3R 37.9P, of which $\frac{1}{4}$ acre had been given to the MPCS, resulting in Kiri Mudiyanse only having 1A 3R, for which extent of land he was given the Grant 'P1'. By a written statement made under oath by the 4th Respondent in 2005, produced by the Respondents marked 'R2', the 4th Respondent had in

fact admitted that the extent of the land is only 1A 3R.⁸ The 1st and 2nd Respondents have stated further that the extent of the land was increased on the basis of a private survey done by the parties, which however does not appear to be correct in view of Supplement No. 1 to Plan No. 1574.

Be that as it may, this Court is in agreement with the submission of the learned Senior State Counsel that Kiri Mudiyanse was entitled to hold only 1A 3R and therefore, the extent of land that his successors are entitled to receive is limited to 1A 3R. This Court is of the view that once this discrepancy was discovered, the 1st Respondent was entitled to take steps to rectify the several mistakes committed by his predecessors in office. This Court is of the view that such a course of action does not affect the rights of the 4th Respondent and/or the Petitioner as neither of them could have held any expectation of receiving an extent of land greater than what is specified in the Grant 'P1'. The 1st and 2nd Respondents have stated that for the purpose of rectifying the said mistakes, an inquiry was held on 22nd October 2007, a fact which has not been disclosed to this Court by the Petitioner. In response to the clarifications sought by this Court, the learned Senior State Counsel has filed the statements recorded at the said inquiry, which clearly demonstrates that the Petitioner too made a statement at the said inquiry. Thus, there is no merit in the first ground urged by the learned Counsel for the Petitioner that the 1st and 2nd Respondents failed to conduct an inquiry prior to issuing 'P12'.

⁸ 'R2' dated 30th August 2005 reads as follows: "මායා එක වන J.M කිරීමුදියන්දේ යන අය නම් ඇඟි 85585 දරන දීමනාපතුයේ මූලදරුමය ඇඟි අතර ඔහු 1999.12.08 දින මිය ගෙය ඇත. කොළඹයිගාසේ ප්‍ර. ගේ. කොට්ටිවාසයේ කදුන්තාව ඇ. නි වියම් කදුන්තාව නැවතින් ගම් පිහිටි මෙම ඉඩම ඇත. 01 රංඩි. 03 ප්‍රමාණයක් ඇත. දීමනාපතු කරයෙන් වැඩිමහුල් ප්‍රති වියයෙන් මා ප්‍රකාශ කරන්නේ ඉහත අංක දරන දීමනා පත්‍රය මා නම් පැවරීමට සටහනු කර දෙන ලෙසයි."

The 1st and 2nd Respondents have produced three letters written by the 2nd Respondent to the 1st Respondent marked 'R5'⁹, 'R6'¹⁰ and 'R7'¹¹, the cumulative effect of which are as follows:

- a) The alienation of an extent of land over and above what is in the grant is wrong;
- b) The alienation of the land to the 4th Respondent, prior to it being allocated to Dingiri Menika is wrong;
- c) The granting of approval to sub-divide a land in extent of 2A 3R 37.9P is misconceived as Kiri Mudiyanse never held an extent in excess of 1A 3R;
- d) The boundaries of the land assigned to Kiri Mudiyanse by the Grant should be demarcated on the ground;
- e) Steps must be taken to cancel the registration effected in favour of the 4th Respondent and to register the name of Dingiri Manika as the successor.

This Court observes that even though the decision was to implement all of the above, which fact has been reiterated in the Statement of Objections of the 1st and 2nd Respondents as well, the 1st Respondent had merely issued 'P12' cancelling the entitlement that the 4th Respondent had to the land. This Court is of the view that upon the death of Kiri Mudiyanse in 1999, his spouse Dingiri Manika was entitled to succeed as she was the nominated successor. As she

⁹ Dated 31st July 2007.

¹⁰ Issued in August 2008.

¹¹ Dated 18th September 2008.

failed to succeed to the said land, the Divisional Secretary was entitled to resort to Section 72 of the Land Development Ordinance and take steps to register the 4th Respondent as the successor. However, all this could only be done in respect of the extent of land set out in the Grant, namely, 1A 3R. The 1st and 2nd Respondents have sought to explain 'P12' on the basis that it was issued in order to regularise the mistakes that had been committed, as set out in 'R5', 'R6' and 'R7'. This result has however not been achieved, as 'P12' was limited to the cancellation of the registration of the name of the 4th Respondent.

This Court is in agreement with the submission of the learned Counsel for the Petitioner that the decision in 'P12' to cancel the devolution of ownership to the 4th Respondent is misconceived and illegal as the 4th Respondent, by virtue of being the eldest son of Kiri Mudiyanse, was entitled to succeed to the land specified in the Grant 'P1' once his mother Dingiri Manika failed to succeed to the said land upon the death of Kiri Mudiyanse.¹² In the said circumstances, this Court issues a Writ of Certiorari as prayed for in paragraph (b) of the prayer to the petition, quashing the decision contained in 'P12', subject to the condition that the 4th Respondent shall only be entitled to hold the extent of land specified in the Grant, namely 1A 3R.

The above conclusion of this Court that the 4th Respondent is only entitled to 1A 3R would necessarily mean that the approval granted by 'P8' and the subsequent transfer of part of the land to the Petitioner and to the 5th – 7th Respondents over and above the entitlement of the 4th Respondent in terms of the Grant is bad in law and is a nullity. The 4th Respondent may, if he so

¹² Dingiri Menika has passed away on 6th April 2013, during the pendency of this application.

desires, seek fresh approval from the 1st Respondent to alienate the land among the Petitioner and the 5th – 7th Respondents but subject to the extent specified in the Grant, and the provisions of the Land Development Ordinance. The 1st Respondent shall be entitled to take steps in terms of the Law to demarcate on the ground, the boundaries specified in the Grant and to regularise any unauthorized possession by the Petitioner and the 4th – 7th Respondents. This Court makes no order with regard to costs.

Judge of the Court of Appeal