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* in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA (Writ) application No: 482/ 2024

Yattowita Withanage Hersha Shiromani Ralapanawa
No. 56/20, Kumaragewaththa Road,
Pelawatta,
Battaramulla

PETITIONER

-Vs-

1. Officer-In-Charge
   Commercial Crimes Investigation Unit 3,
   Criminal Investigation Department,
   York Street,
   Colombo.

2. The Attorney General
   The Attorney General's Department
   Colombo 12.

3. The Hon. Chief Magistrate
   Colombo Magistrates Court
   Colombo

4. Niranjan Dilshan Hemapala
   67A Asiri Place, Raja Mawatha
   Rathmalana.

5. Liyanage Don. Nihal Mangala Jayasinghe
No. 90 Lakshpathiya,
Moratuwa

6. Madurage Don Anura Dissanayake
"Bandula", Palathota,
Kalutara South

RESPONDENTS

Before: S. U. B. Karalliyadde, J.

Mayadunne Corea, J.

Counsel: Nalin Ladduwahetty, P.C with Hafeel Farisz instructed by Shayamali Athukorala for the Petitioners.

Dilan Ratnayake, P.C. ASG with Wishwa Wijesuriya, SC for the 1st to 3rd Respondents.

Supported on: 28.10.2024

Order Delivered on: 06.02.2025

S. U. B. Karalliyadde, J.

This Order pertains to the issuance of formal notices to the Respondents. In a nutshell, the facts related to this Application are as follows. The Petitioner's father by way of a Deed of Gift bearing number 7788 and dated 09.08.1999 marked as P2 gifted the land named Bogahawatta to the Petitioner and her two sisters. The Petitioner and her elder sister transferred their rights to the land to the Petitioner’s younger sister, known as Achala Abeysinghe and her husband. Thereafter, Petitioner’s younger sister Achala

Abeysinghe and her husband by a Deed of Gift bearing No. 9751 and dated 15.12.2013 marked as P6 gifted the land to the Petitioner making the Petitioner the sole owner. The Petitioner submitted to the Court that her father had signed the said Deed of Gift marked as P6 as a witness. The Petitioner allege that her brother who is the 4th Respondent of this Application has forged the signature of their father and prepared the Deed bearing No. 356 dated 15.11.2012 marked as P3 to revoke the Deed of Gift marked as P2. The Petitioner further states that her father passed away on 27.03.2015 and P3 has been registered in the Land Registry on 05.10.2015 (P5) after the demise of the father. The Petitioner alleged that the 4th Respondent had forged their father's Last Will bearing No. 447 dated 07.02.2014 marked as P4 in which the 4th Respondent has been named as the sole beneficiary of the said Last Will to receive the land hereinbefore-mentioned named Bogahawatta.

On 19.01.2018 the Petitioner made a complaint to the Criminal Investigation Department about the fraudulent acts of the 4th Respondent. After conducting the investigations, the Officer-In-Charge of the Commercial Crimes Investigation Unit 3 (the 1st Respondent) has arrested the 4th Respondent and the 5th Respondent. The 5th Respondent had been a witness to the Revocation of the Deed of Gift marked as P3 and the Last Will marked as P4. The 4th and 5th Respondents had been charged by the Police for forgery, forgery for cheating and using a forged document as a genuine document under Sections 454, 457 and 459 of the Penal Code, respectively. The Petitioner has submitted to the Court that the Notary Public who has executed P3 and P4 was dead by

the time of arrest of the 4th and 5th Respondents and the second witness to the said deeds was never arrested. The Petitioner has drawn the attention of the Court to the fact that the Examiner of Questionable Documents (EQD) Report dated 11.10.2018 marked as X4 reveals that the signature of the Petitioner's father and the signature contained in the Revocation of Deed of Gift marked as P3 were not the same. The Petitioner alleges that, according to the EQD Report dated 06.09.2019 marked as X5A, the signature in the Last Will marked as P4 is not the Petitioner's father's signature and not an act and deed of the father.

After the conclusion of the investigations, the 1st Respondent forwarded the 'extracts' to the Attorney General (the 2nd Respondent) and on 04.01.2024 informed the learned Chief Magistrate of Colombo (the 3rd Respondent) that a decision dated 11.12.2023 marked as X6 had been taken by the 2nd Respondent, not to proceed against the suspects and therefore to discharge them from the proceedings. However, the 3rd Respondent has requested the 2nd Respondent to reconsider the said decision (X7). By the decision dated 06.05.2024 marked as X9, the 2nd Respondent has decided not to reconsider the decision taken in X6. Thereafter by the Order dated 30.05.2024 marked as X10, the 3rd Respondent has discharged the suspects. The position of the Petitioner is that the decisions marked as X6, X9 and X10 are arbitrary, illegal, unreasonable, irrational, capricious and *ultra vires*. Therefore, the Petitioner in the prayer to the Petition seeks to issue, *inter alia*, the Writs of Certiorari quashing X6, X9 and X10 and a Writ of Mandamus compelling the 1st Respondent to arrest the 4th, 5th and 6th Respondents.

It is well established that prerogative writs are discretionary remedies and as held in *P. S. Bus Co., Ltd. v. Members and Secretary of Ceylon Transport Board*[1] prerogative writs will not be issued as a matter of routine, as a matter of course or as a matter of a right. Lord Diplock defining the grounds of judicial review in *Council of Civil Service Unions v. Minister for the Civil Service*[2] listed three grounds for courts to consider when issuing prerogative writs, namely, illegality, irrationality and procedural impropriety.

Referring to the above case, in *Regina v. Hull University Visitor, Ex parte PAGE*[3] the court observed that,

> *"Over the last 40 years, the courts have developed general principles of judicial review. The fundamental principle is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular*

[1] [1958] 61 NLR 491.

[2] (1985) AC 374 (HL).

[3] (1993) AC 682 at page 701.

or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully"

It is clear that for judicial review, those grounds should be established. The Petitioner in the instant Application allege that the decisions marked as X6, X9 and X10 are arbitrary, illegal, unreasonable, irrational, capricious and *ultra vires.* The reason that the Petitioner claims that it is so is based on the fact that the signatures that appear on the documents marked as P3 and P4 were forged as clearly and precisely stated in the EQD Reports. In averment 42 to the Petition, the Petitioner has submitted that the decisions of the 2nd Respondent mentioned on the documents marked as X6 and X9 are illegal. However, the Petitioner has failed to establish in Court that the decisions mentioned on X6 and X9 are illegal and/or unreasonable and/or irrational and/or *ultra vires.*

In terms of Section 135 (1) of the Code of Criminal Procedure Act (the CCPA), certain conditions should be fulfilled to initiate prosecution of certain offences. The Probate mentioned in the Petition to the instant Application has been issued by the District Court to the 4th Respondent in respect of the Last Will marked as P4. In terms of paragraph (d) of Section 135 of the CCPA, to initiate prosecutions against the 4th and 5th Respondents for the offences of forgery and using a forged document as genuine requires the sanction of the Attorney General. Paragraph (d) of sub-section (1) of Section 135 of the CCPA reads thus,

(1) Any court shall not take cognizance of –

(d) any offence described in section 452 or punishable under sections 459, 463 and 464 of the Penal Code when such offence has been committed by a party to any proceeding in any court, in respect of a document given in evidence in such proceeding except with the previous sanction of the Attorney-General or on the complaint of such court;

After the conclusion of the investigations the 'extracts' were submitted to the 2nd Respondent for his opinion on whether the suspects could be charged for the alleged offences. By X6, the 2nd Respondent has decided not to proceed against the suspects and directed the learned Magistrate to discharge them. As per the Advice file of the 2nd Respondent bearing No. CR1/43/20220 submitted to this Court by way of a motion dated 30.10.2024 by the learned State Counsel appeared for the 1st to 3rd Respondents, the Court could observe that the reason for the 2nd Respondent not to proceed against the accused is that, there is no sufficient evidence to establish the offence against them. According to the Advice file, considering all the evidence the 2nd Respondent has concluded that there is no sufficient evidence to implicate the 4th Respondent for a crime other than the conclusion that he is the beneficiary of the two instruments. It could be further observed that the 2nd Respondent is not inclined to charge the two witnesses to the two instruments solely based on the EQD Reports which conclude that the persons who placed the sample signatures have not signed the two instruments in question. Considering the above-stated facts, this Court is of the view that the 2nd Respondent's decision as reflected in the documents marked as X6 and X9 to discharge the accused,

is within the powers of the 2nd Respondent and therefore the 2nd Respondent has acted within the powers vested in him under the CCPA. Furthermore, considering the failure of the Petitioner to establish why she argues that the decisions of the 2nd Respondent (X6 and X9) are illegal, unreasonable, irrational, and *ultra vires*, this Court is not inclined to issue Writs of Certiorari as prayed for in prayers (c) and (d) to quash the decisions marked as X6 and X9.

Moreover, in the prayer (e) to the Petition the Petitioner is seeking to quash the Order of the 3rd Respondent marked as X10. Even though the Petitioner claims that X10 is arbitrary, illegal, unreasonable, irrational, capricious and *ultra vires*, the Petitioner once again has failed to give reasons for that argument. In terms of Section 135(1) (d) of the CCPA, the Court should not take action or initiate persecution without the sanction of the Attorney General in respect of the offences committed under Section 452 and 459 of the Penal Code for the offences of forgery and using as genuine a forged document in respect of a document given in evidence in any court proceeding. Furthermore, in terms of Section 190 of the CCPA, an accused who is tried under Chapter XVII may be discharged by a Magistrate with the sanction of the Attorney General. Section 190 reads as follows,

> *"In any case tried under this Chapter otherwise than upon a complaint under section 136 (1), paragraphs (a), (c) and (d), the Magistrate may with the previous sanction of the Attorney-General, for reasons to be recorded by the Magistrate,*

stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction and may thereupon discharge the accused."

According to X10, the learned Magistrate had discharged the accused acting under the directions issued by the 2nd Respondent. Considering all the above-stated facts and circumstances, I am of the view that the 3rd Respondent has functioned within the four corners of the law in discharging the accused. Therefore, this Court refuses to grant the Writ of Certiorari as prayed for in the prayer (e) to the Petition.

Arjuna Obeyesekere, J., P/CA (as he then was) in the case of *L.P.I.M. Hissalle v. Sri Lanka Telecom PLC and Others*[4] referring to the cases *Associated Provincial Picture Houses Limited v. Wednesbury Corporation*[5], *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*[6] and *Council of Civil Service Unions v. Minister for the Civil Service* (supra) observed that,

'A common feature in the above cases is that they invite a very low level of judicial scrutiny, where a decision is within the purported "four corners of the law". As Lord Bingham has noted, this threshold is "notoriously high" and a claimant has a "mountain to climb." This reaffirms the limited role that Courts can play in exercising judicial review, and the deference shown to the view of the public authority.'

[4] CA (Writ) Application No: 400/2020 CA Minutes of 10.03.2021.

[5] [1948] 1 KB 223.

[6] [1977] AC 1014.

Therefore, since the 2nd Respondent and the 3rd Respondent have acted within the powers vested on them and not exceeded the powers, this Court is not inclined to grant any reliefs prayed for in the Petition.

When considering the facts of the matter at hand, my view is that this is a fit case for the parties to invoke civil jurisdiction of a competent court which means that there are alternative remedies available for the Petitioner to pursue. Moreover, in the Petition the Petitioner has stated that she had instituted an action in the Kalutara Magistrate's court in terms of Section 66 of the Primary Courts' Procedure Act, No. 44 of 1979 and the court upheld her rights to possess the subject land by the Order dated 16.03.2018 marked as Y1. The Petitioner also instituted an action in the District Court of Kaluthara regarding the revocation of the deed of gift marked as P3. Furthermore, the Petitioner and her two sisters had intervened in the testamentary proceedings instituted by the 4th Respondent in the year 2016 before the District Court of Mount Lavinia to prove the last will marked as P4. Therefore, under the above-stated circumstances, it is evident that the Petitioner had already resorted to the alternative remedies available to her to secure her rights to the property in question. When such alternative remedies are available, the Writ Courts would not exercise its Writ jurisdiction. It was held in the case of *Linus Silva v. The University Council of the Vidyodaya University*[7] that,

[7] 64 NLR 104.

"The remedy by way of certiorari is not available where an alternative remedy is open to the petitioner subject to the limitation that the alternative remedy must be an adequate remedy"

Considering all the above-stated facts and circumstances, this Court decides that this is not a fit case to issue formal notices on the Respondents. Therefore, this Court refuses to issue formal notices on the Respondents and decides to dismiss this Application. Application dismissed. No costs ordered.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Mayadunne Corea, J.

I agree.

JUDGE OF THE COURT OF APPEAL