

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

In the matter of an Application for
Leave to Appeal

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff

SC/HCCA/L.A Case No. 279/2012

HCCA Gampaha Appeal No. 203/07 (F)

DC. Negombo Case No. 4851/L

Vs.

Rankiri Hettiarachchige Freddie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant

AND BETWEEN

Rankiri Hettiarachchige Freddie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant-Appellant

Vs.

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff-Respondent

AND NOW BETWEEN

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff-Respondent-Petitioner

Vs.

Rankiri Hettiarachchige Freddie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant-Appellant-Respondent

Before : Saleem Marsoof, PC J
B. Aluwihare, PC J
Priyantha Jayawardene, PC J

Counsel : Gamini Marapana, PC with Navin Marapona for the
Plaintiff-Respondent-Petitioner
Romesh de Silva, PC with Sugath Caldera for the
Defendant-Appellant-Respondent

Argued on : 24th June, 2014

Decided on : 17th December, 2014

Priyantha Jayawardena, PC., J.

The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) filed a Plaint in the District Court of Negombo stating inter-alia that he is entitled to the right of way more fully described in the third schedule to the Plaint and prayed for a permanent injunction preventing the Defendant-Appellant-Respondent from obstructing that right of way etc.

The Defendant-Appellant-Respondent (hereinafter referred to as the Respondent) filed his Answer and stated inter-alia that Petitioner's action be dismissed and included a counter claim for a declaration that his land described in the schedule to his Answer is owned by him without being subject to any right of way or any other servitude, for a permanent injunction preventing the Petitioner from entering his land and for costs.

The matter was fixed for trial and admissions and issues were recorded. The Petitioner commenced his case and gave evidence and led the evidence of several other witnesses on his behalf. Once the Petitioner's case was closed the Respondent gave evidence and he too called a witness to give evidence on behalf of him. Once the trial was concluded the learned District Judge delivered her judgment in favour of the Petitioner. The Respondent being aggrieved by the said Judgment lodged an Appeal to the High Court of Civil Appeals of the Western Province holden in Gampaha.

The High Court allowed the appeal and dismissed the Petitioner's action. The Petitioner being aggrieved by the said Judgment preferred an application for leave to appeal to this Court. The said application was filed by way of a Petition and supported by an Affidavit as required by the rules of this court.

When this matter was taken up for support a preliminary objection was taken up by the learned President's Counsel for the Respondent on the basis that there is no proper affidavit before court. i.e.,

‘ The affidavit of the Petitioner dated 11/07/2012 states at the commencement of that he being a Christian “do hereby make oath” whereas in the jurat, it is stated that he “affirms”. ’

Thus, the issue in this application is to determine the validity of the affidavit filed by the Petitioner in this application.

The affidavit filed by the Petitioner in the Supreme Court along with his Petition commences as follows;

‘ I, Malnaidelaage Tudor Danister Anthony Fernando of No. 475, Colombo Road, 3rd Kurana, Negombo being a Christian do hereby make oath and state as follows:

1. I am the deponent above named and the Plaintiff-Respondent-Petitioner named herein. I filed plaint in the District Court of Negombo praying, that I be declared entitled to the right of way more fully described in the third schedule to my plaint and for a permanent injunction preventing the Defendant-Appellant-Respondent from obstructing that right of way, for damages and for cost of the case. ’ (emphasis added)

At the end of the said affidavit which consisted of 19 paragraphs, the Petitioner has placed his signature and the said signature has been attested by the Commissioner for Oaths. The jurat is as follows;

Foregoing having being read over by me to the)
within named deponent and he having appeared)
to appeared to understood same, affirmed)
and set his hand unto this on this 11th day of July,)
2012 at Colombo.)
(emphasis added)

Before me

Sgd. /

Attorney-at-Law, Notary Public,
Commissioner for Oaths, Company
Secretary

Supreme Court Rules

It is necessary to consider the need to file an affidavit in this application. Rule 2 of the Supreme Court Rules of 1990 states as follows;

‘ Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits, documents and judgment or order shall also be filed;

Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule. ’

Rule 6 states as follows;

‘ Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations and affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to : provided that statements of such declarant’s belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit. ’

It is pertinent to note though the said Rule refers to an affidavit in support thereof, the Supreme Court Rules have not provided a format of an affidavit that should be filed with the Petition. Therefore, it is necessary to consider the relevant legislation and the law relating to affidavit in order to determine the question involved with the preliminary objection.

Oaths and Affirmation Ordinance

The English rules of evidence were gradually introduced to Sri Lanka and they were generally adhered to within the country. However, they were not expressly established by positive enactment. Thus, the Ordinance No. 6 of 1834 was brought in declaring English Rules of Evidence to be in force in Sri Lanka, unless in cases otherwise expressly provided for by law.

Section 1 of the said Ordinance of No. 6 of 1834 provided that ‘the Rules of Evidence as the same are by law established in that part of the United Kingdom of Great Britain and Ireland called England shall continue to be the Law of Sri Lanka and its dependencies, both in civil and criminal cases, except where the same have been altered or modified by express law.’

Thereafter, the Oaths and Affirmation Ordinance No. 6 of 1841 was brought in to require persons professing other than the Christian Religion to make solemn Affirmations in lieu of Oaths. The said Ordinance states that;

“much inconvenience was caused from peculiar forms of Oath being required to be administered to persons professing other than the Christian Religion, and it is expedient to provide a form of solemn Affirmation which may be applicable to such persons instead of any Oath or Declaration now authorized or required by law, every person not professing the Christian faith shall make Affirmation to the following effect:

“I solemnly affirm, in the presence of Almighty God, that what I shall state be the truth, the whole truth, and nothing but the truth.” ’

The Oaths and Affirmation Ordinance No. 6 of 1841 was repealed by the Oaths and Affirmation Ordinance No. 3 of 1842 which substituted a solemn affirmation in lieu of every oath hitherto required to be taken by persons professing other than the Christian religion, and by Quakers, Moravians and Jews.

The Section 2 of the Oaths and Affirmation Ordinance No. 3 of 1842 provided as follows;

‘ Every individual not professing the Christian faith and every Quaker, Moravian or Jew, shall, on all occasions whatsoever where an oath is required by the existing or by any other law hereafter to be made, make a solemn affirmation or declaration in lieu thereof, and every such affirmation or declaration shall be of the same force and effect as an oath taken in the usual form, anything in the Ordinance No. 6 of 1834, entitled an “Ordinance declaring English rules of evidence to be in force in this island unless in cases otherwise expressly provided for by law; and prescribing the course by which evidence is to be obtained in certain cases,” to the contrary notwithstanding : Provided always that every such affirmation or declaration shall commence with the following words, or words to that effect, “I, A. B. , do solemnly, sincerely, and truly declare and affirm. ’

Later, the Oaths and Affirmations Ordinance No. 9 of 1895 was enacted consolidating the laws relating to oaths and affirmations in judicial proceedings and for other purposes. This Ordinance is in force at present and thus, applicable to the instant application.

Said Ordinance authorizes all courts and persons having by law or consent of parties, the authority to receive evidence to administer by themselves, or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers conferred upon them respectively by law.

Section 5 of the Ordinance states as follows;

‘ Where the person required by law to make an oath –
(a) is a Buddhist, Hindu or Muslim, or of some other religion according to which oaths are not of binding force ; or
(b) has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation. ’

According to the Ordinance, all oaths and affirmations shall be administered according to such

forms and with such formalities as may be from time to time prescribed by rules made by the Supreme Court under Article 136 of the Constitution, and until such rules are made according to the forms and with the formalities now in use. However, no rules have been prescribed by the Supreme Court and therefore it is necessary to consider the forms and the formalities in use at that time.

Further, Section 9 of the said Ordinance provides as follows;

‘ No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth. ’

It also provides that every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

A comparison of the law relating to affidavits in Sri Lanka shows that the legislator has been conscious of the fact that Sri Lanka has a multi - racial and a multi - religious population and amended the law relating to oaths and affirmations to suit the requirements of the society. Therefore, it is necessary to be conscious of the said fact in interpreting the Oaths and Affirmation Ordinance. This approach is reflected in the case of *Rustomjee v. Khan* 18 NLR 120 where Pereira J. held that “under the Oaths Ordinance, 1895, it is open to a non-Christian who believed in God to swear rather than affirm.”

Who is an affirmant?

G.P.S. de Silva C.J. in the case of *De Silva and Others v. L.B. Finance Ltd.* (1993) 1 SLR 371 held that “the word ‘affirmant’ is not infrequently found in affidavits filed in the courts. Its meaning is well known and accepted in this country even though it does not find a place in the Oxford Dictionary (1983 Ed.) Webster’s Collegiate Dictionary (3rd Ed.) and Odhams Dictionary.”

Civil Procedure Code

A format of an affidavit is found in the Civil Procedure Code No. 2 of 1889 as amended. Section 438 of the Civil Procedure Code states as follows;

‘ Every affidavit shall be entitled as in the court and action in which it is to be used, and shall be signed by the declarant in the presence of the court, Justice of the Peace, or Commissioner before whom it is sworn or affirmed. ’

The format of an affidavit that is required to be filed in terms of the said section is found in Form No. 75 of the 1st Schedule to the Civil Procedure Code. i.e.

No. 75
FORMAL PARTS OF AN AFFIDAVIT IN AN ACTION

In the Supreme Court of the Republic of Sri Lanka

(or)

In the { District Court }
 { Primary Court } of Colombo (or as the case may be).
(Title)

I, A. B. (full name and description of deponent, and if a married woman, full name and description of her husband), of (place of residence) (and if a party, say so, and in what capacity), being a Buddhist (or being a Hindu or being a Muslim etc., as the case may be, or having a conscientious objection to making an oath) solemnly, sincerely, and truly affirm and declare (or if the deponent is a Christian, make oath and say) as follows:-

1.
2.

Affirmed (or Sworn), [or if there are more than one deponent, Affirmed (or Sworn) by the deponents A. B.] at, this, day of

Before me (name and office of person administering the affirmation or oath).

G.P.S. de Silva, C.J. in the case of *De Silva and Others v. L.B. Finance Ltd.* (1993) 1 SLR 371 held that “there was no reference to Form 75 in section 438 of the Civil Procedure Code. Only the marginal note in Form 75 makes reference to section 438. Compliance with Form 75 is not essential.”

In the absence of a prescribed format that is required to be filed in a Special Leave to Appeal Application the said format may be used as a guideline for an affidavit.

Validity of the Affidavit

In the affidavit filed by the Petitioner in the instant application he states that;

‘ I, Malnaidelaage Tudor Danister Anthony Fernando of No. 475, Colombo Road, 3rd Kurana, Negombo being a Christian do hereby make oath and state as follows: ’

The above shows that the Petitioner is a Christian and he is stating the facts stated in the affidavit under oath.

What is an oath ?

According to Stroud’s Judicial Dictionary of Words and Phrases, Sixth Edition (Volume 2) oath is defined as follows;

‘An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth (*R. v. White, Leach*, 430, 431)’.

‘Proof made upon oath’ (Solicitors Act 1843 (c. 73), s. 32): “I think that admits proof on affidavit, but is not confined to it” (*per Esher M.R., Osborne v. Milman*, 56 L.J.Q.B. 264).’

The Oxford Dictionary of Law, Seventh Edition defines the word oath as follows;

‘A pronouncement swearing the truth of a statement or promise, usually by an appeal to God to witness its truth. An oath is required by law for various purposes, in particular for *affidavits and giving evidence in court. The usual **witness’s oath** is: “I swear by Almighty God that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth”. Those who object to swearing an oath, on the grounds that to do so is contrary to their religious beliefs or that they have no religious beliefs, may instead *affirm.’

As defined in Wharton's Concise Law Dictionary, Fifteenth Edition:

'Oath is an appeal to God to witness the truth of a statement. It is called a *corporal oath*, where a witness, when he swears, places his right hand on the Holy Evangelists.'

Collins Dictionary of the English Language defines oath as follows;

'a solemn pronouncement to affirm the truth of a statement or to pledge a person to some course of action, often involving a sacred being or object as witness'.

Compact Oxford English Dictionary, Second Edition by Oxford University Press oath is defined as:

'a solemn promise, especially one that calls on a deity as a witness'.

According to Longman Dictionary of Contemporary English an oath is defined as:

'a formal promise to tell the truth in a court of law'.

As stated above in the first paragraph of the affidavit the Petitioner has stated ' I am the deponent above named and ' (emphasis added)

Who is a deponent?

The term 'deponent' as defined in various dictionaries.

According to Oxford Dictionary of Law Seventh Edition, deponent means 'a person who gives testimony under oath, which is reduced to writing for use on the trial of a cause'.

Wharton's Concise Law Dictionary, Fifteenth Edition defines deponent as 'a person who makes an affidavit; a witness; one who gives his testimony in a Court of Justice. The person who made an affidavit used formerly to speak of himself throughout the affidavit as the deponent.'

According to Collins Dictionary of the English Language deponent 'is a person who makes an affidavit; a person esp. a witness, who makes a deposition.'

Compact Oxford English Dictionary, Second Edition by Oxford University Press defines deponent as 'a person who makes a deposition or affidavit under oath'.

First paragraph in the affidavit too shows that the Petitioner has stated the facts in the affidavit under oath. It is pertinent to note that the word 'affirmant' has not been used in this paragraph as normally used in an affidavit of non-Christians or affidavits filed by persons who are not

inclined to take an oath. Up to this point the affidavit filed in this case is in conformity with the law and the accepted practices in this country.

However, the preliminary objection raised in this application is ‘ The affidavit of the Petitioner dated 11/07/2012 states at the commencement of that he being a Christian “do hereby make oath” whereas in the jurat, it is stated that he “affirms” ’. Therefore, it is now necessary to consider the jurat of the affidavit filed in this application.

The jurat is as follows;

Foregoing having being read over by me to the)
within named deponent and he having appeared)
to appeared to understood same, affirmed)
and set his hand unto this on this 11th day of July,)
2012 at Colombo.)
(emphasis added)

The jurat contains the words “ deponent ” and “ affirmed ”. Therefore, it is necessary to consider the meaning of the word affirmed. The word “ affirmed ” is found in the format No. 75 of the 1st Schedule to the Civil Procedure Code. As stated above the word ‘ affirm ’ has been introduced by the legislator in order to facilitate the people who are not willing to make an oath. This position is now reflected in the said format given in the Civil Procedure Code.

The objection taken up in this case is that instead of the word ‘ sworn ’ jurat contains the word ‘ affirmed ’.

In *Kanagasabai v. Kirupamoorthy* 62 NLR 54 it was held that “when affidavits are filed in the course of civil proceedings, it is the duty of Judges, Justices of Peace and Proctors to see that the rules governing affidavits in section 181, 437, &c., of the Civil Procedure Code are complied with.” The court further held that it is the duty if the Justice of the Peace before whom an affidavit is sworn to see that the jurat is properly made.

In *Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally* SC minutes S.C. Appeal No. 4/2004 Marsoof J. analyzed Section 9 of the Oaths and Affirmation Ordinance and stated ‘ This is a salutary provision which was intended to remedy the very malady that has occurred in this case, and clearly covers a situation in which there is a substitution in the jurat of an affirmation for an oath. ’

Edussuriya J. in *Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd* (2000) 2 SLR 136 was of the view ‘ Substitution of an oath for an affirmation (or vice versa) will not

invalidate proceedings or shut out evidence. The fundamental objection of a witness or the deponent is to tell the truth and the purpose of an oath is to enforce that obligation. ‘

However, in the case of *Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd.* (2010) 1 SLR 60 it was held that the Petitioner has clearly averred that he is a Christian in the affidavit and making oath, in the jurat, the Petitioner had affirmed to the averments before the Justice of Peace. It is therefore, clearly evident that since the petitioner does not come within the category of religions referred to in Section 5 of the Oaths and Affirmation Ordinance, the exception would not be applicable to him to make an affirmation instead of the oath he should have made.

I am inclined to agree with the cases of *Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally* and *Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd* and not with the decision in the case of *Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd.*

Further, neither the case of *Clifford Ratwatte v. Thilanga Sumathipala and Others* (2001) 2 SLR 55 nor the case of *Jeganathan v. Safyath* (2003) 2 SLR 372 has an application to the instant application as the main issue in those two cases were that there was no material to show that an oath or affirmation was in fact administered by the Justice of the Peace when the affidavit was signed by the deponent. Therefore, Section 9 of the Oaths and Affirmation Ordinance has no application to those two cases.

Coming back to the instant application, it is pertinent to note that the jurat states that ‘ foregoing having being read over by me to the within named deponent and he having appeared to appeared to understood same, affirmed and set his hand unto this on this 11th day of July, 2012 at Colombo. (emphasis added).

In the affidavit filed along with the instant application, the jurat expressly sets out the place and date on which the affidavit was signed. These are essential requirements of an affidavit. There is no dispute that the affidavit was signed before a Commissioner of Oaths and she had the authority to do so.

What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms to the facts stated in the affidavit did so before a competent authority or a person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat.

There is specific reference in the jurat that the affidavit was “read over to the within named deponent...” The disputed part of the affidavit is the use of the word ‘affirmed’ instead of ‘sworn’ in the remaining portion of the jurat.

Apart from stating that the Petitioner signed the affidavit before a Commissioner for Oaths, Jurat states the place and the date on which the affidavit was signed. Jurat in an affidavit is an integral part of an affidavit and it cannot be considered in isolation. In other words an affidavit should be considered in its totality. In applying this test and considering the totality of the affidavit and applying the relevant law and accepted practices, the fair conclusion that could be arrived is that the Petitioner has stated the facts in the affidavit under oath before the Commissioner for Oaths as demonstrated at the beginning of the affidavit and, the affidavit filed along with the instant Petition fulfills the requirements of the Oaths and Affirmation Ordinance. Thus, the preliminary objection is over-ruled.

I order no costs in this matter.

Judge of the Supreme Court

Saleem Marsoof, PC, J

I agree

Judge of the Supreme Court

B. Aluwihare PC, J

I agree

Judge of the Supreme Court

