



SALIENT FEATURES OF THE RECENT AMENDMENTS TO THE NOTARIES ORDINANCE

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On the 31st of October 2022, Parliament passed the Notaries (Amendment) Act No. 31 of 2022 [**‘the Act’**], which brought significant amendments to Sri Lanka’s principal law governing Notaries; namely, the Notaries Ordinance No. 01 of 1907 [**‘the Ordinance’**], as amended.

Introduction and Rationale for Amending the Notaries Ordinance

The primary rationale for amending the Ordinance was to limit and avoid fraudulent transactions taking place within the country. Even prior to the recent amendment, the Ordinance had detailed provisions as to the processes that need to be followed when executing notarial deeds and instruments. However, these provisions contained several loopholes, through which Notaries could circumvent the processes set out in the Notaries Ordinance. Through these loopholes, Notaries were capable of executing fraudulent deeds and engaging in other deceptive activities/malpractices, such as, illegally obtaining the details and the signature of an owner of property, failing to submit their Duplicates (which is proof of payment of Stamp Duty for any transaction), and paying insufficient Stamp Duty to the detriment of land owners and parties who would gain from the execution of deeds, such as the Inland Revenue Department (which in turn is a statutory offence under our legal system).

A secondary rationale for amending the Ordinance was to align the Notarial practice with modern circumstances. However, the amendments, whilst justifiable in relation to criminal and fraudulent proceedings, appear to be regressive in relation to convenience and ease of transacting, as discussed below.

The legal obligations, processes, and rules for Notaries under the Notaries (Amendment) Act

Section 31 of the Ordinance contains the legal obligations, processes, and rules required to be followed by Notaries in the execution of deeds and notarial documents/instruments. Section 16 of the Act introduced several amendments to Section 31 of the Ordinance. Summarily, these amendments are as follows:

- i. A Notary cannot obtain the signatures of any party on blank or incomplete paper and every page of the deed or instrument needs to be numbered and type written/printed or written on durable parchment paper.
- ii. A Notary must place her/his signature on each such paper (usually on every 2nd page or 4th page), and ensure that every party to or authorised signatory for a party, including Powers of Attorney holders:
 - a. places her/his full and complete signature (usually on every 2nd page or 4th page); and,
 - b. affixes her/his left or right thumb impression, or any other finger or toe impression (in the instance a party to the transaction does not have any fingers), above or beside her/his signature.
- iii. In relation to transfers, deeds of gifts, and deeds of exchange, a Notary has to ensure that the Stamp Duty payable is paid within the stipulated time period and affix a certified copy of the proof of payment of Stamp Duty (the receipt issued by the bank) to the original deed/instrument.
- iv. A Notary must ascertain the identities and the full names of the executants and the witnesses to deeds or instruments by inspecting the National Identity Card, Bio- Date page the Passport, or the Driving License of the executants.
- v. If an executant to any deed or instrument is a corporate body, a Notary must:
 - a. affix the seal of the corporate body (if available), and rubber stamp/seal of the directors, company secretary, authorised signatory, or sign and affix thumb impression as the Power of Attorney holder; and,
 - b. obtain the signatures of the Board of Directors or any person authorised by a Board resolution to sign such a deed or instrument.

- vi. In the event of a discrepancy in the name of an executant or witness and their name as stated in their identification documents, the Notary's attestation to the deed or instrument should describe such executant or witness by such name or alias and by the name written in the signature.
- vii. It is mandatory that a Notary's Attestation describes whether the executants and witnesses are known to the Notary, and whether the Notary has identified the executants by the inspection of their respective identification documents, and whether any of the executants are known to the witnesses.
- viii. A Notary's Attestation must include the details on how any rental, purchase consideration, or any other type of payment is made; that is, whether by cash, bank draft, pay order, payment installments, and any details in relation to same, and the relevant documents should be attached to the Protocol of the Notary.
- ix. It is mandatory for every notarially executed deed and instrument to be submitted for registration at the relevant Land Registry, within 30 days within the jurisdiction of the Notary or within 60 days if the deed or instrument is to be registered outside the jurisdiction of the Notary.
- x. Prior to registration of a deed or instrument, a Notary has to ensure that an independent search is done at the relevant Land Registry and include the last relevant Land Registry reference in the Schedule to the deed or instrument (except for Last Wills). A Notary must also identify if there are any existing encumbrances (mortgages, caveats etc.) over the land.
- xi. If a transferee of a notarial transaction is a minor, the legal guardian or guardian has to be a competent person to act on behalf of the transferee.
- xii. A land description with the relevant metes and bounds must be included in a deed or instrument. In the case of a Condominium, the description of the Condominium

Parcel and other elements should also be included. Such a description is also required to be included in any local or foreign Powers of Attorney.

- xiii. In the case of a deed of transfer, deed of gift, deed of exchange, or a will, a Notary must affix on the original thereof a Passport-sized certified photograph of the parties/executants, on which the Notary has to affix her/his Notary seal, and also attach copies of the National Identity Card, Bio-data page of Passport, or Driving License of the executants to the Notaries Protocol.
- xiv. In the case of a Last Will, a Notary has to state in the Attestation that the Testator “*was in good and sound mind memory and understanding*” and also attach a Passport-sized certified photograph of the testator/testatrix.
- xv. Where a deed or instrument is signed by a Power of Attorney holder, it is mandatory that the Power of Attorney holder (Attorney) submits an Affidavit affirming that the relevant Power of Attorney instrument is genuine and continues to be in force, and that the grantor (Principal) is alive at the time of executing the deed or instrument.
- xvi. A Notary has to annex a certified copy of the Power of Attorney obtained from the Registrar General’s Department to the original deed/instrument, and true copies of the Power of Attorney obtained from the Registrar General’s Department has to be attached to the Notary’s Duplicate and the Protocol.

Issues in relation to the Application of the Notaries (Amendment) Act

- i. Including an Executant’s Finger/Toe Impression

It is understandable that signatures can be forged, and that transfers and transactions can take place without the knowledge of the original owner. Moreover, when questioned, there can be instances where interested parties can deny signing the deed/instrument. While obtaining an executant’s finger/toe impression can appear to be a cumbersome,

old-fashioned practice, this can be justified by the fact that, except where fingers/toes are artificially designed or – gruesomely – amputated, finger/toe impressions are a clear way of identifying a signatory/executant in the event a transaction is questioned in a court of law or by authorities.

However, attention needs to be brought to the fact that it is cumbersome and impractical to include the finger/toe impression of executants **on every 2nd page and 4th page**, especially in Sale and Purchase Agreements, transfers of Condominium Parcels, and certain Mortgages, all of which may comprise several sheets of paper.

It would have been more pragmatic, and less cumbersome, to limit the inclusion of the executant's finger/toe impression only in the last page (jurat) of a deed or instrument, and duly stated by the Notary in the Attestation.

ii. Registration of all Deeds

An issue has also arisen from the mandatory requirement for all notarially executed deeds/instruments to be registered. Some state institutions may not have proper registered legal deeds for the lands they possess. This poses an issue, particularly in relation to state lands for which prospective lessees who occupy such state lands (through public-private partnerships) do not have clear and registered freehold title/leasehold title through a registered grant/lease agreement thus, posing a practical issue of not having a volume folio to register any proposed lease/sub lease. This in turn conflicts with Section 2 of the Prevention of Frauds Ordinance. It is further noted that the Act is also in conflict with Section 7 of the Registration of Documents Ordinance, which does not make registration mandatory.

iii. Independent Searches at the Land Registry

All notarised deeds also have to include the last relevant Registry Volume folio references of the most recent transaction/s in relation to the property. This requirement

ensures that Notaries are compelled to do searches and would, thus, avoid creating issues in relation to the transfers/lease of properties.

However, it is impractical, especially in relation to Condominium properties. When executing agreements/deeds for Condominium properties, several sale agreements are executed simultaneously or continually on consecutive dates. In such an instance, obtaining the last registered Volume/Folio from the land registry can be difficult as the Land registry itself delays the registering of deeds. There are also instances where land registries refuse to provide the relevant volumes/folios in relation to transactions as there may be transactions that have not yet been registered. Land registries will also be unable to provide specific volumes (books) in relation to registered transactions if such land registry volumes are in the custody of statutory authorities such as the Criminal Investigation Authority due to any criminal activity.

All of this, in turn, makes it difficult for notaries to conduct an independent title search or obtain the relevant registration details and there is no recourse for notaries except to delay the transactions until they obtain the relevant registration details.

Conclusion

Amendments to the rules and processes applicable to Notaries under the Notaries Ordinance were necessary to minimise fraud and enable seamless transacting. It is commendable that emphasis and attention has been given to counter criminal and fraudulent activity. However, the amendments are left wanting in respect of making transactions less cumbersome. Further, several other laws that are applicable to Notaries require certain amendments to be aligned with the recent amendments to the Notaries Ordinance, thereby resolving existing conflicts in the laws. Addressing these issues will not only improve the ease of transaction, but also enhance the credibility of notarial documents.