1973 July 9

[STAVRINIDES, L. LOIZOU, AND MALACHTOS, JJ.]

KYPRIAKI ETERIA METAFORON (K.E.M.) LTD.,
*Appellants-Defendants,*

*v.*

GEO. PAVLIDES & ARAOUZOS LTD.,
*Respondents-Plaintiffs.*

(*Civil Appeal No.* 5196).

*Civil Procedure—Execution—Writ of delivery—Consent order for delivery of vehicles, described in the writ of summons, in execution of judgment debt—Made in an application for stay of execution—Is an order on the basis of which an order for the issue of a writ of delivery could be made—Defendants bound by such order which constituted an estoppel—And it could only be set aside by a fresh action brought for the purpose.*

*Constitutional Law—Human rights—Right to a fair and public hearing—Article* 30. 2 *of the Constitution—Order for a writ of delivery—Given on an* ex parte *application in accordance with the provisions of Order* 43B *of the Civil Procedure Rules—No infringement of the said Article* 30. 2.

*Civil Procedure—Practice—Execution—Writ of delivery—Made on an* ex parte *application under Order* 43B *of the Civil Procedure Rules—No infringement of Article* 30. 2 *of the Constitution.*

The respondents-plaintiffs sued the appellants-defendants and claimed a declaration of the Court for the revocation of a hire-purchase agreement between the parties in respect of a number of motor-vehicles, a sum of £ 48,175.-, an order for the delivery of the vehicles the subject of the hire-purchase agreement, and damages and costs. On February 26, 1972, the appellants

*Editor's note*: The Presiding Judge of the Court dismissed the appeal on the ground that no appeal lies because of the provisions of Order 48, rule 8(4) of the Civil Procedure Rules; the other two members of the Court dealt with the appeal on its merits as the question whether an appeal lies was neither raised by counsel nor properly argued.

submitted to judgment for the sum of £ 43,785 payable by specified monthly instalments. It was a condition of the consent judgment that failure to pay any one instalment for a period of forty days after it became payable would render the whole balance then due payable forthwith with interest at 7%.

On February 28, 1973, presumably as a result of the issue by the respondents of a writ of movables, the appellants filed an application for stay of execution which was settled on April 14, 1973. Under the terms of the settlement it was agreed: that the appellants would deliver to the respondents forthwith all the vehicles described in the writ of summons in execution of the judgment debt and costs, the respondents would allow the appellants to have possession of the vehicles on condition that as from the 19th April, 1973, they would start delivering same to the respondents at the rate of eight vehicles per month, two of which should be lorries and in default the appellants would be liable to deliver all vehicles forthwith; that the vehicles so delivered or so many of them as was necessary would be sold by public auction unless the parties otherwise agreed, in satisfaction of the judgment debt and costs; and that the exact amount of the judgment debt would be ascertained by the accountants of the parties and failing that by the advocates of the parties. The Court made an order as per the terms of the settlement.

On June 27, 1973, the respondents applied for a writ of delivery. The application was made *ex parte* under Order 43B* of the Civil Procedure Rules. In the affidavit in support of the application, which was sworn by an employee of the respondents, there were set out the relative terms of the consent order made by the Court pursuant to the above settlement and it further stated: that contrary to the order for the delivery of eight vehicles per month including two lorries the appellants had, up to the 27th June, 1973, delivered only five vehicles; that up to the 19th June, 1973, the appellants' debt was £ 44,823.185 mils plus interest and that a statement of account was delivered by counsel for the respondents to counsel for the appellants and the latter made no comment on the said account; that under the terms of the consent order the appellants were liable to deliver all vehicles and that same were in their possession.

* Rule 1 of Order 43B is quoted at pp. 274–5 *post*.

The application was granted on the same day and an order for the issue of a writ of delivery was made; and hence the present appeal.

Counsel for the appellant contended:

(a) That the order made by the Court on the 14th April, 1973 was not an order within the scope of Order 43B; and that if it was such an order the terms thereof had not been complied with.

(b) That the trial Judge should not have granted the writ on an *ex parte* application and that if Order 43B does empower the Court to make an order on an *ex parte* application in a case of this nature it is unconstitutional, being contrary to the provisions of Article 30. 2 of the Constitution.

*Held*, (*L. Loizou J., Malachtos J. concurring*) (1) that the order made by the Court with the consent of the parties on the 14th April, 1973, is an order on the basis of which an order for the issue of a writ of delivery could be made; that the appellants were bound by the order in question; that it constituted an estoppel; and that it could only be set aside by a fresh action brought for this purpose (see *Georghiades* v. *Theodoulou*, 1962 C.L.R. 115).

(2) That though there was no strict compliance with the terms of paragraph 5 of the settlement, which was to the effect that the exact amount of the judgment debt owed by the appellants to the respondents should be ascertained by the accountants of the parties or in the event of their failure to agree by the advocates of both parties, counsel for the respondents delivered detailed accounts of the judgment debt then standing due to the credit of the respondents, which balance up to the 19th June, 1973 was £ 44,823.185 mils plus interest, and appellants made no comment with regard to the accounts so submitted; that this was substantial compliance with the requirement of paragraph 5 of the judgment and in any case, having regard to the terms of the judgment and order, this was a sum readily ascertainable; and that, accordingly, contention (b) must fail.

(3) That there is no merit in contention (c) above, in that all through these protracted proceedings the appellants were present and represented and consented to the judgment given a-

gainst them; that the fact that the order for a writ of delivery, which is a mode of execution, was given in accordance with the provision of Order 43B, on an *ex parte* application does not constitute an infringement of the provisions of Article 30.2; that apart from everything else it was open to the appellants to take steps under Order 48, rule 8(4) to have the order set aside or varied which they failed to do; and that, accordingly, the appeal must fail.

*Appeal dismissed.*

Cases referred to:

*Georghiades* v. *Theodoulou*, 1962 C.L.R. 115.

**Appeal.**

Appeal by defendants against the order of the District Court of Nicosia (Demetriades, P.D.C.) dated the 27th June, 1973, (Action No. 7530/71) whereby a writ of delivery of certain vehicles of the defendants was issued to the plaintiffs.

*M. Christofides*, for the appellants.

*T. Papadopoullos*, for the respondents.

The following judgments were given:

STAVRINIDES J.: The appellants appeal from an order of the District Court of Nicosia for the issue of a writ of delivery of certain vehicles to the respondents. The writ was issued on an *ex parte* application of the respondents.

By Order 48, rule 8(4), of the Civil Procedure Rules –

> " Any person (other than the applicant) affected by an order made *ex parte* may apply by summons to have it set aside or varied and the Court or Judge may set aside or vary such order on such terms as may seem just."

In my view the effect of this provision is to preclude an appeal to this Court until an application by the party affected to the Court that made the order has been made and determined. From this it follows that the appeal must be dismissed. Accordingly, I refrain from dealing with any of the points raised by Mr. Christophides in support of the appeal, which I would dismiss with costs.

L. LOIZOU J.: I agree that the appeal should be dismissed. But as the question of whether an appeal lies was neither raised

by counsel nor properly argued I consider it pertinent to deal briefly with the merits of the appeal.

This, as has aready been said, is an appeal against the order of the District Court of Nicosia for the issue of a writ of delivery. The facts, in so far as they are relevant for the purposes of this appeal, are shortly as follows:

By action No. 7530/71 of the District Court of Nicosia the respondents-plaintiffs in the action—claimed a declaration of the Court for the revocation of a hire-purchase agreement between the parties in respect of a number of motor-vehicles, a sum of £ 48,175.- plus interest at 9 % to final payment, an order for the delivery of the vehicles the subject of the hire-purchase agreement, and damages and costs.

On the 26th February, 1972, the defendants—appellants in this Court—submitted to judgment for the sum of £ 43,785.- payable by specified monthly instalments. It was a condition of the consent judgment that failure to pay anyone instalment for a period of forty days after it became payable would render the whole balance then due payable forthwith with interest at 7 %.

On the 28th February, 1973, presumably as a result of the issue by the respondents of a writ of movables, the appellants filed an application for stay of execution. After several appearances in Court this application was settled on the 14th April, 1973. Under the terms of the settlement it was agreed: that the appellants would deliver to the respondents forthwith all the vehicles described in the writ of summons in execution of the judgment debt and costs, the respondents would allow the appellants to have possession of the vehicles on condition that as from the 19th April, 1973, they would start delivering same to the respondents at the rate of eight vehicles per month, two of which should be lorries and in default the appellants would be liable to deliver all vehicles forthwith; that the vehicles so delivered or so many of them as was necessary would be sold by public auction unless the parties otherwise agreed, in satisfaction of the judgment debt and costs; and that the exact amount of the judgment debt would be ascertained by the accountants of the parties and failing that by the advocates of the parties. The Court made an order as per the terms of the settlement.

On the 27th June, 1973, the respondents applied for a writ of

delivery—the subject-matter of this appeal. The application was made *ex parte* under Order 43 B of the Civil Procedure Rules. In the affidavit in support of the application, which was sworn by an employee of the respondents, are set out the relative terms of the consent order made by the Court pursuant to the settlement of the application for an order for stay of execution and it was further stated: that contrary to the order for the delivery of eight vehicles per month including two lorries the appellants had, up to the 27th June, 1973, delivered only five vehicles; that up to the 19th June, 1973, appellants' debt was £ 44,823.185 mils plus interest and that a statement of account was delivered by counsel for the respondents to counsel for the appellants and the latter made no comment on the said account; that under the terms of the consent order the appellants were now liable to deliver all vehicles and that same were in their possession. On the same day the application was granted and an order for the issue of a writ of delivery was made.

Against that order the appellants now appeal. The appeal was argued mainly on three grounds, i.e. that the order made by the Court on the 14th April, 1973, was not an order within the scope of Order 43 B of the Rules of Court; secondly that if it was such an order the terms thereof had not been complied with; and lastly that the trial Judge should not have granted the writ on an *ex parte* application and that if Order 43 B does empower the Court to make an order on an *ex parte* application in a case of this nature it is unconstitutional, being contrary to the provisions of Article 30. 2 of the Constitution.

I propose to deal very briefly with the grounds in the same order.

Rule 1 of Order 43 B on which the application for a writ of delivery was, *inter alia*, based reads as follows:

> " 1. Where it is sought to enforce a judgment or order for the recovery or delivery of any movable property by writ of delivery, the Court or a Judge may, upon the *ex parte* application of the plaintiff, order that execution shall issue for the delivery of the property, without giving the defendant the option of retaining the property upon paying its assessed value, if any, and that if the property cannot be found, and unless the Court or a Judge shall otherwise

order, the deputy sheriff shall distrain all the movable and immovable property of the defendant till the defendant deliver the property; or, at the option of the plaintiff, that the deputy sheriff cause to be levied, by seizure and sale of the defendant's movable property, the assessed value, if any, of the property which cannot be found. The application for the writ of delivery shall be accompanied by a copy of the judgment or order sought to be enforced."

I am clearly of the opinion that the order made by the Court with the consent of the parties on the 14th April, 1973, is an order on the basis of which an order for the issue of a writ of delivery could be made. The appellants were bound by the order in question; it constituted an estoppel; and it could only be set aside by a fresh action brought for this purpose (see *Georghiades* v. *Theodoulou*, 1962 C.L.R. p. 115).

With regard to the second ground it was argued that paragraph 5 of the order to the effect that the exact amount of the judgment debt owed by the appellants to the respondents should be ascertained by the accountants of the parties or in the event of their failure to agree by the advocates of both parties has not been complied with. It may well be that there was not strict compliance with the terms of this paragraph but it should be pointed out that, as clearly stated in the affidavit in support of the application, counsel for the respondents delivered detailed accounts of the judgment debt then standing due to the credit of the respondents, which balance up to the 19th June, 1973 was £ 44,823.185 mils plus interest, and appellants made no comment with regard to the accounts so submitted. In my view this was substantial compliance with the requirement of paragraph 5 of the judgment and in any case it seems to me that, having regard to the terms of the judgment and order, this was a sum readily ascertainable.

The last ground is that if the order could be given *ex parte* then rule 1 of Order 43 B is unconstitutional as offending the provisions of Article 30. 2 of the Constitution in that the appellants did not have the opportunity to be present and state their case. In my view there is no merit in this ground either, in that all through these protracted proceedings the appellants were present and represented and, as stated earlier on, consented to the judgment given against them. I do not think that the fact

that the order for a writ of delivery, which is a mode of execution, was given in accordance with the provision of Order 43 B, on an *ex parte* application constitutes an infringement of the provisions of Article 30. 2. Apart from everything else it was open to the appellants to take steps under Order 48, rule 8(4) to have the order set aside or varied which they failed to do.

For all the above reasons I agree that this appeal should be dismissed with costs.

MALACHTOS J.: I also agree that the appeal should be dismissed.

As, however, the point on which this appeal was determined by the presiding Judge of this Court, was not raised on behalf of the parties or properly argued by counsel before us and in view of the fact that both counsel expressed the view that an appeal lies, in determining this appeal I am inclined to proceed on this assumption and say, straight away, that I find no merit in the submissions put forward before us by counsel for the appellants for the reasons given in the judgment just delivered by my brother Judge Loizou.

STAVRINIDES J.: The appeal is dismissed with costs.

*Appeal dismissed with costs.*