[ZEKIA, J. and ZANNETIDES, J.]

CHRYSOULLA ELEFTHERIOU of Kythrea

Appellant (Plaintiff)

v.

DORA N. ROUSOU AND ANOTHER of Kythrea

Respondents (Defendants).

(Civil Appeal No. 4253)

1958
May 9, July 4

CHRYSOULLA ELEFTHERIOU v. DORA N. ROUSOU AND ANOTHER

Practice—Costs—The rule "costs following the event"—Discretion of the Courts in awarding costs—The Courts of Justice Law, 1953, Section 47—Civil Procedure Rules, Order 59, r.1—Costs—Appeal—Solely on the question of costs—Leave—Civil Procedure Rules, Order 35, r.20—Principles upon which a Court of Appeal will review an order as to costs.

Held, affirming the judgment of the trial Court : (1) The principle "costs following the event" is not a principle of Law but merely a rule of practice which is subject to the discretion of the Court.

(2) It is settled law both under English Law and under our Law that the unfettered discretion of the Court to award costs is subject to this limitation, namely, that this discretion must be exercised judicially.

Principle laid down by Viscount Cave L.C. in Donald Campbell and Co. Ltd. v. *Pollak* (1927) A.C. 732 at p. 811, *followed.*

Dictum of Jenkins L.J. in *Baylis Baxter Ltd.* v. *Sabath* (1958) 2 All E.R. 209 at p. 214—5, *followed.*

Haji Timothi v. *Haji Timothi* 6 C.L.R. 45,
and *Church Committee of Strovolo* v. *Eleni Georghiou,* Civil Appeal No. 4062 (*unreported*), *followed.*

(3) For the appellant to succeed in this appeal she ought to satisfy this Court that the trial judge did not exercise his discretion judicially or that his order was made on a misconception of fact or that the appellant was ordered to pay costs incurred or occasioned, without sufficient reason, by the other party. But the appellant failed to satisfy us on any of those points.

Appeal dismissed with costs.

Cases referred to :

Donald Campbell and Co. Ltd. v. *Pollak* (1927) A.C. 732;

Baylis Baxter Ltd. v. *Sabath* (1958) 2 All E.R. 209;

Haji Timothi v. *Haji Timothi* 6 C.L.R. 45;

Church Committee of Strovolo v. *Eleni Georghiou*, Civil Appeal No. 4062 (*unreported*).

Appeal by leave solely on the question of costs under the Civil Procedure Rules, Order 35 r.20.

The plaintiff in a *quia timet* action No. 3393/56 brought in the District Court of Nicosia appeals by leave against the judgment of Pierides, D.J. solely on the ground of a wrong direction by the Court in regard to costs.

Phoebus Clerides for the appellant.

A. C. Indianos with *E. Liatsos* for the respondents.

Cur. Adv. Vult.

The facts sufficiently appear in the judgment of the Court delivered by :

ZANNETIDES, J.: This is an appeal by leave under Rule 20 of Order 35 of the Civil Procedure Rules, it being an appeal solely on the ground of a wrong direction by the Court in regard to costs.

The appellant brought a *quia timet* action against the respondent in the District Court of Nicosia for a threatened interference with her ancient lights by certain buildings the respondent intended to build on a site adjoining applicant's property at Kythrea village; the writ of summons was issued on the 17th October, 1956, and on the same day the appellant obtained an interim order restraining the respondent from proceeding with his building operations. The interim order was returnable on the 2nd November, 1956, and on that day the Court inspected the place as well as on the 10th November in the presence of the parties, their counsel and their architects; on the second occasion an improvised provisional structure was made of that part of the respondents' building which would affect appellant's lights, for the benefiit of the judge, and finally on the 16th November, 1956, a plan of the proposed buildings was

produced to the Court as Exhibit No. 1 and the following settlement of the interim order was arrived at by the parties and recorded by the Judge and an order made accordingly:

"By consent a plan of the proposed building put in Exhibit No. 1.

Application settled as follows:

1. Respondents undertake, in consideration of the Interim Order being discharged, to abide by any order the Court may make at the trial of the action for demolition of any part of defendant 1's building which may prejudicially affect (within s. 46 of Cap. 9) the daylight enjoyed by either of the two rooms of plaintiff's house adjoining the said building, it being clearly understood that they shall carry out the proposed work entirely at their own risk and without prejudice to plaintiff's rights.
2. Defendants further undertake to carry out the work in accordance with the plan exhibit 1 and to proceed with it with all reasonable speed. On the basis of the above undertaking:—

(a) Interim Order discharged.

(b) Costs reserved.

Counsel will file and deliver pleadings as follows:

The statement of claim within 7 days; the defence within 7 days of the filing and delivery of the statement of claim.

Plaintiff's counsel will apply for a date for trial as soon as the work has been completed.".

The pleadings were delivered and the case was put down for trial for the 20th March, 1957. By that time the building had been completed and at the request of the parties the Court visited the place a third time on the 17th April, 1957, and an attempt was made to settle the dispute, which failed. The Court vacations intervened and the case was fixed for hearing for the 30th October, 1957; by that time District Judge Stavrinides, who had dealt with the case so far, was promoted and the case was taken by District

Judge Pierides who in his turn, at the request of the parties, visited the place also and the case was finally fixed for hearing for the 6th December, 1957, when the parties at last settled the case and the settlement was recorded by the Judge. The terms of the settlement material to this appeal are :

"Term 1: Plaintiff withdraws her claim in respect of the interference with her ancient right of light and air in connection with the two windows marked with letters 'A' and 'B' in exhibit 1.

Term 5: As regards the question of costs parties agree to leave it to be decided by the Court, after hearing addresses of their Counsel.".

Counsel addressed the Court on the question of costs but as there was a disagreement on certain statements of facts in the addresses the Court, at the request of appellant's counsel, the other party not objecting, allowed the parties to adduce evidence and evidence was adduced by both and counsel addressed the Court anew. The Court then made its decision with regard to costs and gave plaintiff her costs from the institution of the action down to the day the interim order was discharged and gave defendant her costs from the discharge of the interim order down to the conclusion of the trial. As to the costs incurred, in deciding the question, the Court directed that these costs be paid by both parties in equal shares and adjusting the two sets of costs by way of set-off, and considering that they were more or less equal, left each party to bear its costs by deciding that there should be no order as to costs. Apparently this order concerned also the costs of the application for the interim order which had been reserved in the settlement of the 16th November, 1956. The grounds on which the Court made that order were that the plaintiff was at the beginning justified in bringing her action (and apparently the application for the interim order) but when, on the 16th November, 1956, the plan Exhibit No. 1 was produced and the interim order discharged the said plan contained enough details to make it clear and obvious that when the respondents' buildings would be completed there would be no actionable interference with appellant's lights.

The law with regard to the award of costs in Cyprus is to be found in section 47 of the Courts of Justice Law, 1953, and Rule 1 of Order 59 of the Civil Procedure Rules and the right of appeal against an order as to costs solely is Rule 20 of Order 35 of the Rules of Court. Section 47 of the Courts of Justice Law is as follows:

"The costs of, and incident to, all civil proceedings in any Court shall, unless otherwise provided by any Law or public instrument in force for the time being, be in the discretion of the Court and the Court shall have full power to determine by whom, and to what extent such costs are to be paid.".

Rule 1 of Order 59 of the Civil Procedure Rules is as follows:

"Subject to the provisions of any law or rules, the costs of, and incident to, any proceeding shall be in the discretion of the Court or Judge, who may authorize an executor, administrator or trustee who has not unreasonably instituted, or carried on, or resisted any proceeding, to have his costs paid out of a particular estate or fund.".

The corresponding provisions of the English Law are to be found in section 50 of the Supreme Court of Judicature (Consolidation) Act, 1952, and Rule 1 of Order 65 of the Rules of the Supreme Court and the English enactments and the Cyprus enactments being in *pari materia* English decisions on the subject are applicable law.

It is, I think, appropriate to state here that it is settled law both under English Law and under our Law that the unfettered discretion of the Court to award costs is subject to this limitation, namely, that this discretion must be exercised judicially. In the leading case of *Donald Campbell and Co. Ltd.* v. *Pollak* (1927) A.C. 732, where all previous cases were reviewed, Viscount Cave, L.C. had this to say (at p. 811):

"This discretion, like any other discretion, must of course be exercised judicially, and the Judge ought not to exercise it against the successful party except for some reason connected with the case. Thus, if—to put a hypothesis which in our courts would never in fact be realised—a judge were to refuse to give a party his costs on the

ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion or (to quote a familiar illustration) to the colour of his hair, then a Court of Appeal might well feel itself compelled to intervene. But when a judge, deliberately intending to exercise his discretionary powers, has acted on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the progress of the case, then it seems to me that a Court of Appeal, although it may deem his reasons insufficient and may disagree with his conclusion, is prohibited by the statute from entertaining an appeal from it.".

The above case was cited and followed in the recent case of *Baylis Baxter Ltd.* v. *Sabath* (1958) 2 All E.R. 209, decided on the 16th April, 1958, in which a plaintiff for a monetary claim, though successful both on the claim and on the counter-claim, was deprived of his costs because of the unfavourable view the trial Judge had formed about the veracity of the manager of the plaintiff company who was a witness in the case; L.J. Jenkins after citing the above cited dictum of Viscount Cave goes on to say (*loc. cit.* at pp. 214—5) :

"Applying Lord Cave's test in the present case, it seems to me that the present appeal must fail. It cannot be said here that the learned judge's decision as to costs was not based on 'some reason connected with the case'. It was based on the view, unfavourable to the plaintiff company, which the learned judge had formed as regards the evidence of Mr. Popper. That, I have no doubt, was a reason 'connected with the case', and quite clearly not one of those entirely extraneous or irrelevant reasons to which Lord Cave referred. This too was a case in which the judge, 'deliberately intending to exercise his discretionary powers', acted on facts connected with or leading up to the litigation which had been proved before him or which he had himself observed during the progress of the case, observed the unsatisfactory character of Mr. Popper's evidence and considered that this was a matter proper to be taken into account in determining the incidence of costs. If that is right, then the consequence follows that this court is prohibited by the statute from

entertaining an appeal from the learned judge's order, even though this Court might regard his reasons as insufficient and might disagree with his conclusion.".

This so fas as the English Case Law is concerned. With regard to Cyprus Law, where appeals against orders for costs are rather unusual, besides the enactments already mentioned, we were referred to two cases: the case of *Haji Timothi* v. *Haji Timothi* 6 C.L.R. 45, and the case of the *Church Committee of Strovolo* v. *Eleni Georghiou*, Civil Appeal No. 4062 (*unreported*).

The first case is a case in which a successful plaintiff in an action for a declaration of right to be registered by prescription for a house and interference was deprived of his costs on the general ground that in similar cases where the plantiffs were not registered they were deprived of their costs. The Supreme Court held that although the above ground could not be considered as a good ground yet it could not be said that the trial Court had not exercised its discretion fairly and reasonably, in other words judicially, and refused to intervene.

In the second case a successful plaintiff was deprived of his costs on the ground that the defendant was poor. This was held on appeal not to be a judicial exercise of the discretion of the Court. The Supreme Court held that the principle that the discretion must be exercised judicially is settled law and that the trial Court acting on the ground it had acted had not exercised its discretion judicially and therefore contravened the Law, and its discretion as to costs was contrary to the provisions of the Law and came within Rule 20 of Order 35 of the Civil Procedure Rules.

For the appellant to succeed in this appeal she ought to satisfy this Court that the Judge did not exercise his discretion judicially and therefore contravened the Law or that his order was made on a misconception of fact or that the appellant was ordered to pay costs incurred or occasioned, without sufficient reason, by the other party—Rule 20 of Order 35 of the Civil Procedure Rules.

Appellant's complaint as can be gathered from the grounds of appeal are:

(a) That the defendant by her conduct caused unnecessary costs which the appellant was ordered to pay: we fail to see such a conduct. If she fought her case bitterly, as it is alleged, the applicant did not fight her case any less bitterly.

(b) That the refusal to give appellant all her costs is contrary to the principle of Law "costs following the event". This is not a principle of Law; it is only a rule of practice which is subject to the discretion of the Court.

(c) That the Court did not exercise its discretion judicially. With regard to this we may say that the Judge did exercise his discretion judicially and the test of Lord Cave in the case cited above applies on all fours. The trial Judge embarked on the question of costs with the deliberate intention to exercise his discretion; not only he heard Counsel addressing him twice but allowed them to adduce evidence; this clearly proves that he intended to exercise his discretion; he also acted on facts connected with the litigation.

Further, there was no allegation that the Judge misconceived any fact.

For all the above reasons we are of the opinion that the appeal must fail.

Appeal dismissed with costs.

ZEKIA, J.: I concur.

Appeal dismissed with costs.