

1963
April 26

ELENI G.
PROTOPAPA
v.
PAVLIS K.
DJORDJIS
AND OTHERS

[WILSON, P., ZEKIA, VASSILIADES AND JOSEPHIDES, JJ.]

ELENI G. PROTOPAPA,

Appellant,

v.

PAVLIS K. DJORDJIS AND OTHERS,

Respondents.

(Civil Appeal No. 4404).

Practice—Rights of parties under an agreement in the form of a settlement of an action—Subsequent dispute regarding that settlement between the original plaintiffs themselves not involving the original defendant—Declaration of rights under that settlement sought by certain plaintiffs in the original action against the remaining others—Proper procedure to be followed is not by way of an application in the original action—The question left open whether in the circumstances the proper procedure to be followed was by originating summons or an independent action—The Courts of Justice Law, 1960 (Law of the Republic No. 14/60) section 41—The Civil Procedure Rules, Order 27, r. 4.

Judgments—Declaratory judgments—Powers of the Courts to make binding declarations of right, under section 41 of the Courts of Justice Law, 1960, (supra)—But that can be done when the correct procedure is followed.

The appellant (respondent in the application under appeal) was one of the eight plaintiffs in action No. 74/1948 before the District Court of Kyrenia, the remaining seven being the respondents (applicants in the application under appeal), brought against a certain Serghios Hji Savva as sole defendant. The claim of the plaintiffs in that action was for an order of the Court restraining the defendant from interfering with the water known as " Mouthounas Spring ". Eventually a settlement was reached whereby it was agreed, *inter alia*, that one half of the said water should belong to the eight plaintiffs and the other half should belong to the defendant, Serghios Hji Savva.

Some eleven years after the said settlement the seven plaintiffs filed in the District Court of Kyrenia an application in the original action against the eighth plaintiff as respondent without making the original defendant *i.e.* Serghios Hji Savva, a party

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to the application or to the present appeal, applying : (a) for a declaration that the aforesaid seven plaintiffs are entitled under the aforesaid settlement to registration in their names of the 7/16 shares of the said water, locality " Mouthounas " Ayios Amvrosios village, and (b) for a declaration of the Court authorizing the registration in their names. Their application was based on Order 27, rule 4, of the Civil Procedure Rules and section 41 of the Courts of Justice Law, 1960 (Law of the Republic No. 14/60).

The appellant (respondent in the Court below) opposed the application on the ground, *inter alia*, that the procedure followed was not the proper one in the circumstances ; but the trial Judge after hearing the parties granted the application.

The respondent in the application now appealed against this order and, in allowing the appeal, the High Court :—

Held, (1) (a) in this proceeding we are not really concerned with the execution of a judgment but with the settlement as between the eight plaintiffs and the defendant.

(b) Now, in this case there is no dispute between the original defendant and the eight plaintiffs, but the actual dispute is a dispute between the eight plaintiffs themselves.

(2) In the circumstances, was it proper to apply in the action ? Obviously, the present dispute has nothing to do with the original dispute between the opposing parties in Action No. 74/1948 or with the execution of a judgment as regards the opposing parties, and consequently the proper procedure was not followed in applying in the original action itself.

(3) It is true that the Court has power to make in proper cases binding declarations of right, but that can be done when the correct procedure is followed. While deciding that in the circumstances of this case it was wrong to apply in the original action, we leave the matter open whether the proper procedure to be followed is by originating summons or an independent action.

(4) For these reasons, the appeal is allowed with costs here, and in the Court below, and the Order of the District Court is set aside.

Appeal allowed with costs.

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Appeal.

Appeal against the Judgment of the District Court of Kyrenia (Evangelides D.J.) dated the 24.9.62 (Action No. 74/48) declaring that the seven applicants are entitled to the registration in their names of the 7/16th shares, *i.e.* 1/16th share of the "Avkolia" Water at locality "Mouthounas" of Ayios Amvrosios, and authorizing the District Lands Officer Kyrenia to effect registration accordingly.

C. S. Constantinides for the appellant.

A. Protopapas for the respondents.

The facts sufficiently appear in the judgment of the High Court.

WILSON, P. : Mr. Justice Josephides will deliver the judgment of the Court.

JOSEPHIDES, J. : This is an appeal by the respondent against the order of the District Judge of Kyrenia, declaring that the seven applicants are entitled to the registration in their names of the 7/16th shares, *i.e.* 1/16th share of the "Avkolia" water at locality "Mouthounas" of Ay. Amvrosios, and authorising the District Lands Officer of Kyrenia to effect registration accordingly.

The present appellant was one of the eight plaintiffs in Action No. 74/1948 ; the seven respondents (applicants in the Court below) being the other seven plaintiffs in the same case brought against one Serghios Hji Savva, as defendant.

The claim of all the plaintiffs was for an order restraining the defendant from interfering with the water known as Mouthounas Spring, and other orders of the Court. A defence and counterclaim were filed, but eventually the case was settled on the 19th April, 1950, and the part of the learned Judge's note with which we are concerned reads as follows :—

" (A) By consent judgment for plaintiffs as per clauses 3 and 5 of para. 5 of the statement of claim with £5 costs. Works and payment within 14 days. Other claims and counter claims withdrawn and dismissed without costs.

(B) It has been agreed that $\frac{1}{2}$ of the 'Avkolia' water should belong to plaintiffs and $\frac{1}{2}$ to the defendant ; and that the mode of use should be determined by the L.R.O. or on failing such determination, by Messrs. Demetriades and Christis."

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There is another term with which we are not concerned in this appeal.

The judgment given by consent in accordance with clauses 3 and 5 reads as follows :—

"(3) Order of the Court ordering the defendant to restore the source of 'Mouthouna' water, situate on the West bank of the river, to its former condition.

(5) Order of the Court ordering the defendant to restore the river bed to its former condition."

Some eleven years later, on the 24th February, 1961, the application under appeal was filed with the District Court of Kyrenia by the seven plaintiffs-applicants against the eighth plaintiff as respondent. The original defendant was not made a party to the application before the District Court nor on this appeal.

The application sought (a) a declaration of the Court that the aforesaid seven plaintiffs are entitled to registration in their names of 7/16th shares of Avkolia water, locality Mouthounas, Ay. Amvrosios village ; and (b) a declaration of the Court authorising the registration thereof in their names.

The application is based on Order 27, rule 4, of the Civil Procedure Rules, and section 41 of the Courts of Justice Law, 1960 which confer power on the District Court to make declaratory judgments. The present appellant opposed the application, *inter alia*, on the ground that the procedure followed was not the proper one in the circumstances, but the learned District Judge, after hearing the parties granted the application.

Mr. Protopapas for the respondents in this appeal, contended that the application was rightly based on Order 27, rule 4, and that the proper procedure was followed in making an application in the original Action No. 74/1948. Mr. Constantinides for the appellant submitted that the proper procedure was to take out an originating summons or proceed by an independent action.

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In this proceeding we are not really concerned with the execution of the judgment given by consent on the 19th April, 1950, against the defendant (part (A)), but with the settlement as between the eight plaintiffs and the defendant (part B of the Judge's note of 19.4.1950). Now, in this case there is no dispute between the original defendant and the eight plaintiffs, but the actual dispute is a dispute between the eight plaintiffs themselves. In the circumstances, was it proper to apply in the action? Obviously, the present dispute has nothing to do with the original dispute between the opposing parties in Action No. 74/1948 or with the execution of the judgment as regards the opposing parties, and consequently the proper procedure was not followed in applying in the original action itself.

It is true that the Court has power to make in proper cases binding declarations of right, but that can be done when the correct procedure is followed. While deciding that in the circumstances of this case it was wrong to apply in the original action, we leave the matter open whether the proper procedure to be followed is by originating summons or an independent action.

For these reasons, the appeal is allowed with costs here, and in the Court below, and the order of the District Court is set aside.

Appeal allowed with costs.