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COSTAS KTENAS AND ANOTHER (No. 1) *and* THE REPUBLIC OF CYPRUS THROUGH THE DIRECTOR OF LANDS AND SURVEYS DEPARTMENT

[TRIANTAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COSTAS KTENAS AND ANOTHER (No. 1),

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH THE DIRECTOR OF LANDS AND SURVEYS DEPARTMENT,

Respondent.

(Case No. 244/63).

Administrative Law—"Act" in the sense of Article 146, paragraph 1 of the Constitution—Confirmatory act—A mere confirmatory act is not an "act" within the aforesaid Article—And, therefore, it cannot be made the subject of a recourse under the provisions of that Article—What is a confirmatory act—And in what circumstances and on what conditions an apparently confirmatory act is in reality a new executory decision which can be challenged by a recourse on its own—New inquiry, change of legislation etc. etc.

Administrative Law—Compulsory acquisition—Effected prior to the coming into operation of the Constitution — Return of the property so acquired for non-attainment of the purpose of acquisition—Section 13 of the Land Acquisition Law, Cap. 226 - Refusal of the respondent Director to recommend such return—No omission by the Director to deal with applicants' request—Nor a case of any ommission on his part of a continuing nature—In fact the Director's said refusal of the 2nd October, 1963, is merely a confirmatory act of a previous original one dated the 25th November, 1960, and, consequently cannot become subject of a recourse under Article 146 of the Constitution (supra)—Previous case Pikis and The Republic (1965) 3 C.L.R. 131 and at p. 139, distinguished—Recourse in the present case is in effect aimed at the said previous decision of the respondent Director of the 25th November, 1960—It must be, therefore, dismissed as not being within the time prescribed by Article 146, paragraph 3 of the Constitution.

Constitutional and Administrative Law—Compulsory acquisition—Return for non-attainment of the purpose of the acquisition—Article 23, paragraph 5 of the Constitution—Applicable, if at all, to acquisitions effected before Independence (16th August, 1960), in case the non-attainment of the purpose of the acquisition has taken place after Independence—But in the instant case, the event relied upon by the applicants as constituting evidence of non-attainment, clearly relates to the period preceding Independence—Therefore Article 23, paragraph 5 of the Constitution is not relevant at all to applicants' request for the return of the property, as such has been framed to-date—Nor does the Compulsory Acquisition Law, 1962, (Law No. 15/62) carries the applicants' case any further—because the Director's refusal of the 2nd October, 1963, was not related at all to any difference between the provisions in force on the date of his first said refusal in November, 1960, (supra) and the provisions in force in October 1963—And it held good under both such provisions.

By an Order of the 16th April, 1937, the then Colonial Government of the Island acquired compulsorily land of the applicants, in the vicinity of Nicosia. The public undertaking for which the land was acquired was stated to be "the future building requirements of Government, the subsequent lay out of such land and the erection thereon of Government buildings for use as offices and otherwise". By the said Order the Director of Land Registration and Surveys—now Director of Lands and Surveys—was entrusted with "the supervision and effectuation of the said undertaking".

It is not disputed that since then the above property has not been actually utilised by Government for building purposes.

On the 13th October, 1960, the applicants addressed a letter to the Lands and Surveys Department referring to the compulsory acquisition of their property, as above, and alleging that the purpose of such acquisition was the building of the English School, Nicosia; they claimed that their property should be returned to them, under section 13 of the Land Acquisition Law, Cap. 226, on the ground that it had not been used for the purpose of the English School and had remained an uncultivated and not built upon field.

On the 25th November, 1960, a reply was given to the applicants, stating that it was not correct that the property in question had been acquired for the purposes of the English School and quoting the relevant public undertaking as described in the said Order of the 16th April, 1937, *(supra)*. It was added that there was no indication whatsoever that the said undertaking of public utility for which the property had been acquired had been abandoned or that the whole or part of the property was no longer required for such undertaking. In conclusion it was stated that in the circumstances no recommendation could be made for the return of the property to the applicants.

On the 19th September, 1963, three years later counsel for applicants wrote again to the Lands and Surveys Department in practically identical terms as the aforesaid previous request of the 13th October, 1960; and on the 2nd October, 1963, the Director of the Lands and Surveys replied in exactly the same terms as his previous said reply of the 25th November, 1960. He again concluded by saying that he could not recommend the return of the property to the applicants.

Article 146.1 of the Constitution provides:

"The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person".

Article 146.3 provides:

"Such a recourse shall be made within seventy-five days of the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse".

Article 23.5 of the Constitution provides:

"Any immovable property or any right over or interest in any such property compulsorily acquired shall only be used for the purpose for which it has been acquired. If within three years of the acquisition such purpose has not been attained, the acquiring authority shall, immediately

after the expiration of the said period of three years, offer the property at the price it has been acquired to the person from whom it has been acquired. Such person shall be entitled within three months of the receipt of such offer to signify his acceptance or non-acceptance of the offer, and if he signifies acceptance, such property shall be returned to him immediately after his returning such price within a further period of three months from such acceptance".

In dismissing the recourse, the learned Justice:-

Held, (1) there can be no question of an omission on the part of the respondent Director of Lands and Surveys. In this respect this case differs from that of *Pikis and The Republic* (1965) 3 C.L.R. 131, where a request for the return of property compulsorily acquired was found not to have been properly examined.

(2) Nor do I think that there exists any omission of a continuing nature—on the part of the Director—to return the property in question, because such continuing omission could only arise on the part of the organ of the Republic empowered or duty bound to decide to return the property, *i.e.* in this case the Council of Ministers.

(3)(*a*) The decision complained of, contained in the said letter of the 2nd October, 1963, is merely a confirmatory act of the previous letter of the 25th November, 1960. It simply repeats the contents of the previous letter and signifies adherence of the respondent Director to the course already adopted. There is nothing at all to show, either, that a new inquiry into the matter has taken place in 1963. Nor did the applicants refer by their said last letter of the 19th September, 1963, to any different legislative provisions.

(*b*) Therefore, the said letter of the respondent Director dated the 2nd October, 1963, is merely a confirmatory act and not an executory act *i.e.* not an "act" in the sense of Article 146, paragraph 1 of the Constitution; consequently it cannot be made the subject of a recourse under Article 146 of the Constitution (vide *Kolokassides and the Republic,* (1965) 3 C.L.R. 542). And this recourse cannot proceed as challenging, in effect, the previous act of the 25th November, *(supra)* because it would then be out of time as against such earlier act under Article 146.3 of the

Constitution.

(4)(*a*) As already indicated, in their second request of the 19th September, 1963, for the return of the property, the applicants did not specifically rely on the new Compulsory Acquisition Law, 1962 (Law No. 15/62); nor did they bring up the issue of the operation of Article 25, paragraph 5 of the Constitution. The Director in his said reply of the 2nd October, 1963, did not, either, rely on such constitutional provisions. So, in this respect, this case is different from that of *Pikis and The Republic (supra)* in which it was held that a second request for the return of property compulsorily acquired had resulted in a new decision which could be challenged by a recourse on its own (vide, supra, at p. 139).

(*b*) In this connection it is also useful to mention that from the relevant decided cases in Greece it appears clearly that a new executory decision has been held to have arisen, on the basis of different legislation, only where on reverting to the particular matter the administration had dealt with the matter afresh under such legislation—*(vide Decisions of the Greek Council of State* Nos. 724/1930, 80/1931, 964/1935 and 858/1938). But in the present case not only the respondent Director does not appear to have based himself in writing his said second reply of the 2nd October, 1963, on any different provisions than when writing his said first reply of the 25th November, 1960, but, in fact, the provisions of the aforementioned Law No. 15/62, enacted in the meantime, could not have made any difference at all as far as his stand in this Case is concerned. The reason for the refusal of the respondent Director to recommend the return of the property was not related at all to any difference between the provisions in force in November 1960 and the provisions in force in October, 1963, and it held good equally good under both such provisions; it was the fact that, in his view, the purpose of the acquisition of the property was not, as alleged by the applicants, the building of the English School at all and, so, no question arose of the purpose of the acquisition having been abandoned.

(*c*) Concerning Article 23, paragraph 5, of the Constitution, it came into effect together with the Constitution (i.e. on the 16th August, 1960), but if it is at all applicable

to an acquisition effected before then, it would only be so applicable in case the non-attainment of the purpose of the acquisition has taken place after the 16th August, 1960 *(vide* in this respect also *Kaniklides and the Republic,* 2 R.S.C.C.49). But in this case the event relied upon by the applicants as constituting evidence of non-attainment clearly relates to the period before the aforesaid date.

(5) For all the above reasons I find that the letter of the respondent Director of the 2nd October, 1963, is merely confirmatory of his previous letter of the 25th November, 1960, and that, therefore, it cannot become the subject of a recourse; that, thus, in effect this recourse is made against the previous original refusal of the Director contained in his letter of the 25th November, 1960, and in respect of this act it is not within the time under Article 146, paragraph 3 of the Constitution.

Application dismissed.
No order as to costs.

Per curiam: Whether or not the applicants are entitled to the return of the property in question, under any of the constitutional or statutory provisions properly applicable to it, could not and has not been determined by means of this recourse. Applicants are free to pursue the matter further by appropriate steps, this judgment not being a *res judicata* in any sense in this respect.

Cases referred to:

Pikis and The Republic, (1965) 3 C.L.R. 131, and at p. 139, *distinguished;*

Kolokassides and The Republic, (1965) 3 C.L.R. 542, *followed;*

Kaniklides and The Republic, 2 R.S.C.C. 49, *followed;*

Decisions of the Greek Council of State: Nos. 724/1930, 80/1931, 964/1935 and 858/1938, *distinguished.*

Recourse.

Recourse against the decision of the Respondent refusing to offer back to applicant a plot of land compulsorily acquired

from him and not utilized for the purpose for which it was acquired.

G. Platritis with *A. Triantafyllides*, for the Applicants.

K. Talarides, Counsel of the Republic, for the Respondent.

Cur. adv. vult.

The following judgment was delivered by:—

TRIANTAFYLLIDES, J.: When this Case came up for hearing the Court raised the question of whether or not this recourse is out of time, in view of Article 146(3) of the Constitution. Such issue has been raised because, though the latest relevant act of the Respondent Director of Lands and Surveys is his letter dated the 2nd October, 1963, *(vide exhibit 4)*—and *prima facie* this recourse, which has been filed on the 16th December, 1963, in relation to the said letter, appears to be within time—it seemed necessary to examine whether or not *exhibit 4* was a mere repetition and confirmation of a previous letter of the Director, in the same matter, dated 25th November, 1960, (*vide exhibit 2*).

It is well settled that a confirmatory act or decision is not executory and cannot, therefore, be made the subject of a recourse under Article 146. Should, thus, *exhibit 4* be found to be an act merely confirmatory of *exhibit 2* then this recourse would be bound to fail because—not being possible to base it on *exhibit 4*—it would be out of time, under Article 146(3), as against *exhibit 2* itself.

Counsel appearing in this Case addressed the Court on this matter. Counsel for Applicant submitted that *exhibit 4* is not a confirmatory act or decision but one which could be challenged on its own; counsel for Respondent took the opposite view and submitted that the recourse is out of time.

In support of his argument counsel for Applicant has alleged also that, in this Case, apart from any specific act or decision, there exists also a continuing omission to return to Applicants their compulsorily acquired property.

In order to decide the *sub judice* issue it is necessary to examine shortly the history of events in this Case:

By Order published in Supplement No. 3 to the official Gazette, on the 16th April, 1937, (Not. 76) the then Colonial

Government of the Island acquired compulsorily land of the Applicants, in the vicinity of Nicosia. The public undertaking for which the land was acquired was stated to be "the future building requirements of Government, the subsequent lay out of such land and the erection thereon of Government buildings for use as offices and otherwise".

By the said Order the Director of Land Registration and Surveys—now Director of Lands and Surveys—was entrusted with "the supervision and effectuation of the said undertaking".

It is not disputed that since then the above property has not been actually utilized by Government for building purposes.

On the 13th October, 1960, the Applicants addressed a letter to the Lands and Surveys Department *(exhibit 1)* referring to the compulsory acquisition of their property, as above, and alleging that the purpose of such acquisition was the building of the English School, Nicosia; they claimed that their property should be returned to them, under section 13 of the Land Acquisition Law, Cap. 226, on the ground that it had not been used for the purposes of the English School and had remained an uncultivated and not built upon field.

On the 25th November, 1960, a reply was given to Applicants *(exhibit 2)* stating that it was not correct that the property in question had been acquired for the purposes of the English School and quoting the relevant public undertaking as described in the Order published on the 16th April, 1937, as aforesaid. It was added that there was no indication whatsoever that the undertaking of public utility for which the property had been acquired had been abandoned or that the whole or part of the property was no longer required for such undertaking. In conclusion it was stated that in the circumstances no recommendation could be made for the return of the property to the Applicants.

On the 19th September, 1963—three years later—counsel for Applicants wrote again to the Lands and Surveys Department *(exhibit 3)*, in practically identical terms as the aforesaid previous communication of the 13th October, 1960 *(exhibit 1)*, and on the 2nd October, 1963, the Director of the Lands and Surveys Department replied *(exhibit 4)* in exactly the same terms as his previous reply of the 25th November,

1960, *(exhibit 2)*. He again concluded by saying that he could not recommend the return of the property to Applicants.

It is convenient at this stage to deal first with the question of whether or not there exists any omission on the part of the Respondent Director of Lands and Surveys.

In my opinion, in 1960, when he was first called upon to deal with the matter, he appears to have examined it and given a reasoned reply *(exhibit 2)*. In 1963 he confirmed such reply by writing a letter in identical terms *(exhibit 4)*. Therefore, there can be no question of an omission on his part *to deal* with the request of Applicants. In this respect this Case differs from that of *Pikis and The Republic* (1965) 3 C.L.R. p. 131 where a request for the return of property compulsorily acquired was found not to have been properly examined.

Nor do I think that there exists any omission of a continuing nature—on the part of the Director—to return the property in question, because a continuing omission to return the property could only arise on the part of the organ of the Republic empowered or duty-bound to decide to return the property. Such organ is in this Case, and on the basis of all relevant provisions, constitutional and statutory, the Council of Ministers.

Had this been a Case where there had been alleged a continuing omission on the part of the Republic, but where, through a drafting error, the Council of Ministers had not been included in the description of Respondent, I might have decided to order the amendment of the title of the proceedings accordingly, so that it would conform with the substance of the recourse. But the motion for relief shows most clearly that what is complained of is only the action of the Respondent Director as per the letter of the 2nd October, 1963 *(exhibit 4)*, and nothing more; so, such an amendment, as aforesaid, is not possible. The said letter of the Respondent Director amounts, in my opinion, to a definite act on his part and cannot properly be regarded as an omission at all, on his part as an organ or on the part of the Republic in general.

As the Respondent Director had in this Case decided that in the circumstances he could not recommend the return of

the property concerned no question arises, either, of any omission on his part to place Applicants' request before the Council of Ministers. Being the authority entrusted orginally with the supervision and the effectuation of the public undertaking involved in the compulsory acquisition of Applicants' property, the Director informed Applicants that he could not recommend, for the reasons given, the return of their property; it was up to Applicants, if they so chose, to apply to the Council of Ministers accordingly, a thing which they have not done yet but which they may still do, if they so wish. It is, perhaps, hardly necessary to stress that I am not pronouncing at all in this recourse whether or not any omission does exist, under the relevant provisions, on the part of the Council of Ministers. This is not a matter to be determined by this judgment.

We come next to the question of whether or not the letter of the Director *(exhibit 4)* is an executory act which can be challenged on its own or whether it is confirmatory of the previous act of the Director of the 25th November, 1960, *(exhibit 2)* in which case it cannot be made the subject of a recourse; and this recourse cannot proceed as challenging, in effect, the said act of the 25th November, 1960, because it would then be out of time as against such earlier act, under Article 146(3).

Confirmatory acts or decisions are dealt with, *inter alia*, in the "Conclusions from the Jurisprudence of the Greek Council of State 1929-1959", p. 240 and by Stasinopoulos in "The Law of Administrative Disputes", 4th edition, p. 175. It is clear that a confirmatory act is not executory; therefore, it cannot be the subject of administrative recourse in Greece. That a non-executory act cannot be the subject of a similar administrative recourse in Cyprus, under Article 146, has been laid down by this Court in the case of *Kolokassides and The Republic* (1965) 3 C.L.R. 542.

According to Stasinopoulos, *supra*, a confirmatory act is one which repeats the contents of a previous executory act and signifies the adherence of the Administration to a course already adopted; but where the Administration confirms a previous executory act after a new inquiry, then the resulting new act or decision is itself executory too.

That *exhibit 4* repeats the contents of *exhibit 2* and signifies adherence of the Respondent Director to the course already

adopted in the matter is apparent on the face of the said two exhibits. There is nothing at all to show, either, that a new inquiry into the matter has taken place in 1963; in this respect it is to be noted that there was really nothing further to be inquired into, as no new facts were alleged by Applicants in their second request for the return of the property on the 19th September, 1963, *(exhibit 3)*. They relied again on the same solitary ground put forward earlier on the 13th October, 1960, *(exhibit 1)* viz. that the acquisition was made for the building of the English School and that their property so acquired had not in fact been used for that purpose. Nor did Applicants refer by means of *exhibit 3* to any different legislative provisions. They still insisted that the purpose of the acquisition had been abandoned "long ago" and that the property had not been offered back according to law; there was no allegation that any supervening legislation had rendered, in the meantime between *exhibits 1 and 2*, the property returnable—otherwise than in 1960.

The Director of Lands and Surveys gave the *same* reply to *exhibits 1 and 3*—by means of *exhibits 2 and 4*—viz. that it was not correct that the building of the English School was the purpose of the acquisition and that the real purpose was the one which had been published in the Gazette, in 1937, at the time of the acquisition, and it had not been abandoned.

Counsel for Applicant has argued that the second reply of the Director, dated 2nd October, 1963 *(exhibit 4)* is not confirmatory because, *inter alia*, in the meantime there had been a change in the legislation applicable to the matter, through the enactment of the Compulsory Acquisition Law 1962 (Law 15/62) and also because in the meantime three years had elapsed since the coming into operation of the Constitution and, therefore, Article 23(5) became applicable to the property concerned.

As already indicated, in their second request for the return of the property, the Applicants did not specifically rely on Law 15/62; nor did they bring up the issue of the operation of Article 23(5). The Respondent Director in his letter of the 2nd October, 1963, *(exhibit 4)* did not rely on such constitutional or legislative provisions.

So, in this respect, this Case is different from that of *Pikis and The Republic* (*supra*) in which it was held that a second

request for the return of property compulsorily acquired had resulted in a new decision which could be challenged by a recourse on its own (*vide supra*, p. 139).

In this connection it is also useful to mention that from relevant decided cases in Greece it appears clearly that a new executory decision has been held to have arisen, on the basis of different legislation, only where on reverting to the particular matter the Administration had dealt with the matter afresh under such legislation—(*vide* Decisions 724/1930, 80/1931, 964/1935 and 858/1938 of the Greek Council of State).

In the present Case not only the Respondent Director does not appear to have based himself, in writing *exhibit 4*, on any different provisions than when writing *exhibit 2*, but also, in fact, the provisions of Law 15/62, which was enacted in the meantime, could not have made any difference at all as far as his stand in this Case is concerned: Applicant had alleged that the purpose of the acquisition had been abandoned through the non-user of the property for the purposes of the English School; such non-user was an event which had shaped itself even before their first letter of the 13th October, 1960, *(exhibit 1)*; the reason for the refusal of the Respondent Director to recommend the return of the property was not related at all to any difference between the provisions in force in November 1960, and the provisions in force in October, 1963, and it held equally good under both such provisions; it was the fact that, in his view, the purpose of the acquisition of the property was not the building of the English School at all and no question arose, in the circumstances, of the purpose of the acquisition having been abandoned, or the whole or any part of the property not being required any longer for the true purpose of the acquisition as published at the time in the official Gazette; whether Cap. 226 or Law 15/62 were to be relied upon his decision would be exactly the same.

Concerning Article 23(5) of the Constitution it is not correct to say that such Article did come into effect, as regards the property in question, only three years after the coming into operation of the Constitution. Such Article came into effect together with the Constitution, but if it is at all applicable to an acquisition effected before then, it would only be so applicable in case the non-attainment of the pur-

pose of the acquisition has taken place after the 16th August, 1960 *(vide* in this respect also *Kaniklides and The Republic*, 2 R.S.C.C. p. 49). In the circumstances of this Case the event relied upon by Applicants as constituting evidence of non-attainment clearly relates to the period before the aforesaid date; so I fail, really, to see how Article 23(5) could be relevant at all to the request of Applicants for the return of the property,—as such request has been framed to-date.

For all the above reasons I find that the letter of the Respondent Director of the 2nd October, 1963, *(exhibit 4)* was merely confirmatory of his previous letter of the 25th November, 1960, *(exhibit 2)* and that, therefore, it cannot become the subject of a recourse; that, thus, in effect this recourse is made against the previous original refusal of the Director contained in his letter of the 25th November, 1960 *(exhibit 2)* and in respect of this act it is not within time under Article 146(3).

The recourse has, in the circumstances, to be dismissed.

Whether or not the Applicants are entitled to the return of the property in question, under any of the constitutional or statutory provisions properly applicable to it, could not and has not been determined by means of this recourse. Applicants are free to pursue the matter further by appropriate steps, this judgment not being a *res judicata*, in any sense, in this respect.

Regarding costs, as the recourse has not failed on the substance thereof, I have decided not to make an order of costs against the Applicants.

Application dismissed.
No order as to costs.