[JOSEPHIDES, LOIZOU, HADJIANASTASSIOU JJ.]

SOCRATES SOFOCLI HADJIDEMOSTHENOUS,

Appellant – Plaintiff,

v.

ALEXANDROS GEORGHIOU,

Respondent – Defendant.

(*Civil Appeal No.* 4702).

Immovable Property—Easement—Right of way—Acquisition of right of way by thirty years' user—Computation of the period of thirty years—Length of user of appellant's predecessor in title may be added to that of the appellant himself—The appellant in the present case being the owner of the dominant tenement—The Immovable Property (Tenure Registration and Valuation) Law, Cap. 224, *section* 11(1)(b)*—See also herebelow.*

Immovable Property—Right of way—Acquisition by thirty years' user—Proof—Evidence—Onus on the person claiming such right to satisfy the trial Court—Test applicable—There must be positive evidence of open and peaceable enjoyment for the full period of thirty years.

Right of way—Acquisition of by thirty years' user—See above.

Easement—Right of way—See above.

Appeal—Appeals turning on findings of fact, especially findings based on credibility of witnesses—Principles upon which they are decided by the Court of Appeal.

Credibility of witnesses—Appeal—Findings of fact based on credibility of witnesses—Approach by Court of Appeal—See also above.

Witnesses—Credibility of—See above.

Findings of fact—Appeals turning on findings of fact—Principles applicable—See above.

This is an appeal by the plaintiff against the judgment of the District Court of Paphos dismissing his claim for a right of way, by over thirty years' user, over the defendant's (respondent's) field. The trial Judge rejected the evidence of

user called on behalf of the plaintiff (now appellant) and accepting the evidence called on behalf of the defendant (now respondent) dismissed the action. It was common ground throughout that in computing the period of thirty years required by section 11(1)(b) of the Immovable Property etc. etc. Law, Cap. 224 (*infra*), the length of user of appellant's predecessor in title may be added to that of the appellant.

The main complaint of the appellant was that the trial Judge was prepared to accept only the evidence of one A.K. (called on behalf of the respondent – defendant) who was the widow of the predecessor of the appellant-plaintiff, and he wrongly disbelieved all the other evidence adduced on behalf of the appellant.

The appellant's case is based on the provisions of section 11(1)(b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 where it is provided that:

> "No right of way or any privilege, liberty or easement, or any other right or advantage whatsoever shall be acquired over the immovable property of another except
>
> (a) .....
>
> (b) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption....."

Dismissing the appeal the Supreme Court:

Held, (1). Section 11(1)(b) of Cap. 224 (*supra*) was construed in the case of *Voskou* v. *HadjiPetrou*, 1964 C.L.R. 21, where it was held that the length of user, irrespective of any change in the owner or possessor of the dominant tenement, is what is material in the acquisition of a right of passage; and that consequently the length of user of the plaintiff's predecessor in title may be added to that of the plaintiff in determining whether the right has been exercised for the full period of 30 years without interruption.

(2) The onus was on the appellant to satisfy the trial Court. Now, what is the test to be applied in cases of long user? There must be positive evidence of open and peaceable enjoyment of the right for the full period of thirty years. Was the evidence put before the trial Court such a positive evidence

as to satisfy him that the appellant (plaintiff) or those under whom he claimed the right in question, had enjoyed it without any interruption for such a period? To our mind, the answer is unhesitatingly in the negative.

(3) The principles upon which this Court hears appeals from findings of fact are well settled and we need not reiterate them here: They were recently summarized in the case of *Moustafa Imam* v. *Papacosta* (1968) 1 C.L.R. 207 at p. 208-9. The present case turned mainly on matters of credibility of the witnesses which were within the province of the trial Court and we are of the view that, on the evidence before him, it was reasonably open to him to make the findings which he made in the case.

Appeal dismissed with costs.

Cases referred to:

Christodoulos (alias Tooulis) Yianni Voskou v. *Michael Hadji-Petrou* 1964 C.L.R. 21;

Moustafa Imam v. *Costas Papacostas* (1968) 1 C.L.R. 207 at pp. 208-9.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Papadopoulos D.J.) dated the 22nd January, 1968 (Action No. 329/66) dismissing his claim for a right of way over the defendant's property.

L. Clerides, for the appellant.

N. Mavronicolas, for the respondent.

The judgment of the Court was delivered by:

JOSEPHIDES, J.: This is an appeal by the plaintiff against the judgment of the District Court of Paphos dismissing his claim for a right of way over the defendant's (respondent's) property.

The appellant's case is based on the provisions of section 11(1)(b) of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, where it is provided that "No right of way or any privilege, liberty, easement, or any other right

or advantage whatsoever shall be acquired over the immovable property of another except–

"(a).....

(b) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption:....."

This section was construed by the High Court of Justice in 1964, in the case of *Christodoulos (alias Tooulis) Yianni Voskou* v. *Michael Hji Petrou*, 1964 C.L.R. 21, where it was held that the length of user, irrespective of any change in the owner or possessor of the dominant tenement, is what is material in the acquisition of a right of passage; and that consequently the length of user of the plaintiff's predecessor in title may be added to that of the plaintiff in determining whether the right has been exercised for the full period of 30 years without interruption.

The appellant's property in the present case is plot 16 in sheet XXXV, plan 55, of Lassa village (Paphos District). The respondent's property is plot 20 in the same survey sheet and plan. The passage in dispute is about 400 feet and is marked "A–B" from east to west on the south side of the respondent's property. The appellant acquired his property (plot 16) in 1942, from his father and he has possessed it ever since. The respondent acquired his plot (plot 20) in 1953.

It was the appellant's case before the trial Court that he and his predecessors-in-title had used the pathway in dispute for a period exceeding thirty years without interruption prior to the institution of the action in March 1966.

The trial Judge heard seven witnesses called on behalf of the appellant, including the Land Registry clerk, and one witness called on behalf of the respondent. After hearing counsel addressing the Court, he reserved judgment which he delivered some time later, giving his reasons for dismissing the appellant's claim. In fact, he rejected the evidence of user called on behalf of the appellant and accepted the evidence called on behalf of the respondent and he gave his reasons for doing so.

Learned counsel for the appellant, who argued very ably a difficult case, presented the appellant's case before us today

on two main grounds: Firstly, that the reasoning behind the judgment of the trial Court was unsatisfactory and, secondly, that the conclusions of the learned Judge were not warranted by the evidence as a whole.

With regard to the *first ground*, learned counsel for the appellant went thoroughly through the judgment of the trial Court and compared the evidence given in support of the appellant's case.

The main complaint was that the trial Judge was prepared to accept only the evidence of one Angeliki Kyprianou (called on behalf of the respondent), who was the widow of the predecessor of the appellant, and that he (the trial Judge) disbelieved all the other evidence. While, to some extent, agreeing with counsel for the appellant that the learned trial Judge went too far in his criticism of one or two of the appellant's witnesses, we do not think that, on the whole, his reasoning was unsatisfactory. We need not refer to all the witnesses called by the appellant, but we think that if we quoted a few extracts from the evidence this would show that it was open to the trial Judge to make the findings which he did make in the case before him.

One of the witnesses called in support of the appellant's case was Pavlos Petrides, the mukhtar of Lassa village, aged 58. While in his examination-in-chief this witness said that the owner of plot 16 passed along the pathway in dispute ("A–B"), in his re-examination, he said that he did not remember to have seen the previous owner of plot 16 using the said pathway. The previous owner was Demetris Savva (the deceased husband of Angeliki Kyprianou) who, according to his widow's evidence, died in or about the year 1930. We shall be giving a summary of the widow's evidence at a later stage of this judgment.

Another witness called by the appellant was one Nearchos Nicolas. In the beginning of his examination-in-chief he said that "in order to go to my field I pass through plot 20 from A to B. I pass through A–B for the last 42–43 years". Later on in his evidence, he said: "It was usually sown and when I wanted to pass I told the owner of plot 20 to harvest it so as to make room for me and he did". But what is significant, before the end of his examination-in-chief he said: "I do not know from where the owner of plot 16 passed to go into

it". And in his re-examination he said: "I never saw a pathway at A–B. ..... I never saw him" (the plaintiff's appellant's father) "passing through A–B. I never saw the plaintiff passing through A–B".

The next witness was Georghios Charalambous, a man aged 42 at the time of the hearing of the action which was in 1967. This means that he was born in or about the year 1925. In his evidence he says that he knows the field since he was eight years old. He said that plot 16 was possessed by Theophanis Savva, the brother of Demetris Savva. Demetris and Theophanis lived at Lassa but when Demetris married he went to live at Symou. And he added, "I saw them pass by A–B to go to their field". When one checks the veracity of this statement, he will find that when Demetris Savva the predecessor of plot 16, died, this witness was five years old. How could a child of five remember seeing the deceased Demetris using the pathway is beyond anyone's imagination.

Then there is the evidence of the appellant. He said that he used to pass along this pathway on foot and on animals, both loaded and unloaded. In cross-examination he conceded that he never had any oxen. Personally he never cultivated his plot except once. He did not give any particulars as to how this field was cultivated, who cultivated it, how many times did he go there, what time of the year, what time of the day, and for what purpose.

Finally, there is the evidence of Demetris Serghi and Demos Sofocli. Demetris Serghi says that he cultivated plot 16 in 1958–9 in common with the appellant. He leased the field of the church, the church being the predecessor of the respondent, in 1942. He did not cultivate the pathway and he let it for people to pass. In his cross-examination he admits that he did not know if Demetris Savva had plot 16 before 1942.

The evidence of Demetris Sofocli, appellant's brother, does not help the appellant's case one way or the other.

This was the evidence put before the trial Judge by the appellant. Considering that the onus was on the appellant to satisfy the trial Court, we have to see whether the trial Judge went wrong in any way. Now, what is the test to be applied in cases of long user? There must be positive evidence of

open and peaceable enjoyment of the right for the full period of thirty years. Was the evidence put before the trial Judge such a positive evidence as to satisfy him that the appellant, or those under whom he claimed the right, had enjoyed it without any interruption for such a period? To our mind, the answer is unhesitatingly in the negative.

As against the evidence of the witnesses called on behalf of the appellant, there was the positive evidence of Angeliki Kyprianou, who was the widow of the appellant's predecessor-in-title. That witness, who is aged 67, stated that she married Demetris Savva of Lassa in the year 1924; that they lived together for six or six-and-a-half years, when the husband died; that the husband cultivated plot 16 and that she accompanied him to the field which they cultivated regularly; that they did not pass through the respondent's plot; that after the death of her husband, in 1930, she continued cultivating plot 16 until 1942 when she sold it to the appellant's father, Sofoclis. This is briefly the evidence of Angeliki as given in examination-in-chief. In cross-examination, she more or less confirmed this except in one respect, which counsel for the appellant criticized and submitted that this was sufficient reason why the trial Court should not have relied on her evidence. The passage in question is the following: "I do not know where the passage of this field is. I know which fields we crossed but I do not know the owners". And then she goes on to say: "I have not been that way since I sold plot 16. Theophanis never cultivated plot 16. We sowed vicos, rovi or wheat".

It is true that if that particular sentence (i.e. "I do not know where the passage of this field is") is taken by itself, it might lead one to assume that this witness was too vague. But, reading the evidence of this witness in examination-in-chief and cross-examination as a whole, the conclusion that may be drawn is that her evidence was positive and reliable, to the effect that between the years 1924 and 1942, when the plot in question (plot 16) was in the family's possession, they never used the pathway across the respondent's land (plot 20).

This disposes also of the second ground of appeal that the conclusions of the trial Judge were not warranted by the evidence as a whole. The principles upon which this Court hears appeals from findings of trial Courts are well settled and

1969
Mar. 27
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SOCRATIS
SOFOCLI
HADJI-
DEMOSTHENOUS
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we need not reiterate them here: they were recently summarized in the case of *Moustafa Imam* v. *Costas S. Papacostas* (1968) 1 C.L.R. 207 at pp. 208–9. The present case turned mainly on matters of credibility of the witnesses which were within the province of the trial Judge and we are of the view that, on the evidence before him, it was reasonably open to him to make the findings which he made in the case.

For these reasons the appeal is dismissed with costs.

Appeal dismissed with costs.