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CONSTANTINOS NICOLAOU GEORGHIOU v. EVANGELIA HJIGEORGHIOU HJIPHESA

[JOSEPHIDES, STAVRINIDES, LOIZOU, JJ.]

CONSTANTINOS NICOLAOU GEORGHIOU,

Appellant-Applicant,

v.

EVANGELIA HJIGEORGHIOU HJIPHESA,

Respondent— Respondent.

(*Civil Appeal No.* 4820).

Immovable Property—Access—Right of way compulsorily created over one's land for the purpose of securing access to the land of another—Determination of the route of such access by the Director of the Land Registration and Survey Department—Principles applicable—Section 11*A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224, *as amended by section* 3 *of Law No.* 10 *of* 1966*—And rule* 6 (2) *of the Immovable Property (Granting of Access) Rules* 1967 *made under that section* 11*A.*

Immovable Property—Access—Route—Determination of—The question of alternative route—Rule 6 (2) (supra) *and the machinery provided thereunder—Duty of the Director under the provisions of said rule* 6 (2)*—When and under what circumstances said provisions come into play—Duty of the Director to set into motion the relevant provisions of rule* 6 (2)*—When and how it has to be exercised—Due consideration given in the present case to the alternative route suggested by the appellant—And the Director acted properly in abstaining from resorting to the machinery provided by said rule* 6 (2)*—No contravention of the said rule.*

Access—Right of way—Right of way compulsorily created over one's land with a view to securing access to the land of another—Section 11*A of Cap.* 224 (supra) *and rule* 6 (2) *of the Rules made under that section*—Supra.

Right of way—Access—Supra.

This is the first appeal of its kind against the decision of the Director of the Land Registration and Survey Department determining the route of access over the appellant's land, under the provisions of section 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 as amended by section 3 of Law No. 10 of 1966 (The material part of section 11A is set out post in the judgment of the Court).

In the present case both the appellant and the respondent are owners of separate orange groves in the Syrianochori area. The respondent applied to the Director under the provisions of section 11A (*supra*) for a right of way to her plot 41, and the Director by his decision dated May 29, 1968 determined the route over the appellant's plots 29 and 260. The Director acting always under the powers vested in him under the aforesaid section 11A, determined also the compensation payable to the appellant for such access granted to the respondent which in effect is a right of way or easement in the nature of a right of way, compulsorily created over the appellant's servient tenements plots 29 and 260 (*supra*) for the benefit of the respondent's dominant tenement plot 41 (*supra*).

The only complaint of the appellant is that the Director failed to comply with rule 6 (2) of the Immovable Property (Granting of Access) Rules 1967 made by the Council of Ministers under the said section 11A of Cap. 224 (*supra*). Rule 6 (2) is set out in full post in the judgment of the Court. Suffice now to say that the gist of that rule 6 (2) is to the following effect : If there are other plots of land which " in the opinion of the Director are suitable for the creation of access over them ", then he may ask the acquiring party (in the present case, the respondent) to give notice to the owners of such plots of land which may be affected by an alternative route. After the giving of such notice, the Director will have to hold a fresh local inquiry and, after considering all relevant facts and circumstances, he shall determine the route of the access in such a way as to cause the least possible damage, inconvenience or hardship.

In the present case the appellant suggested to the Director alternative routes over plots owned by other persons but the Director apparently, holding the opinion that such plots were not suitable for the creation of access over them, did not set in motion the machinery provided under rule 6 (2) (*supra*).

Dismissing the appeal, the Court :—

Held, (1). We are of the view that, before the provisions of rule 6 (2) (*supra*) with regard to the giving of notice to the owners of other properties, may come into play, the Director must be of opinion that there are such other properties which are " suitable " for the creation of access over them ; he therefore, has a duty to carry out an enquiry to

satisfy himself that *prima facie*, such other property or properties are " suitable " for the purpose aforesaid. It is not in every case that an alternative route is suggested, any impossible alternative route, that the Director has a duty to set into motion the provisions of rule 6 (2).

(2) In the present case we are satisfied that, on the findings of the trial Court, the Land Registry Clerk, acting on behalf of the Director, gave due consideration to the alternative route suggested by the appellant that he considered whether he should proceed under rule 6 (2) or not, and that, after considering all the facts and circumstances, he formed the opinion that there was no other property which was " suitable " for the creation of access over it.

(3) Consequently, we are of the view that the Director did not act in contravention of the provisions of rule 6 (2) (*supra*) and the appellant's complaint cannot succeed.

(4) With regard to the trial Court's findings of fact we are of opinion that they are warranted by the evidence on record.

Appeal dismissed with costs.

Appeal.

Appeal by applicant against the judgment of the District Court of Nicosia (Stavrinakis and Stylianides, D.JJ.) dated the 25th April, 1969 (Application 10/68) determining the route of access over the appellant's land under the provisions of section 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (as amended by section 3 of Law 10 of 1966).

L. Papaphilippou, for the appellant.

G. Constantinides, for the respondent.

The judgment of the Court was delivered by :—

JOSEPHIDES, J.: This is the first appeal of its kind against the decision of the Director of the Land Registration and Survey Department determining the route of access over the appellant's land, under the provisions of section 11A of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, as amended by section 3 of Law 10 of 1966.

The material part of that section reads as follows :—

" Obligation to provide access.

11A.—(1) Notwithstanding the provisions of this Law, if any immovable property is for any

reason, in such a way enclaved as to be lacking the necessary access to a public road, or if the existing access is inadequate for its proper use, development or utilization, the owner of such immovable property shall be entitled to claim an access over the adjacent immovable properties on payment of a reasonable compensation.

(2) The route of the access and the extent of the right to the use thereof, as well as the compensation payable shall be determined by the Director after previous notice to all interested parties.

(3) There shall be no obligation of the neighbours to provide an access if the communication of the immovable property to the public road has ceased through a voluntary act or omission of the owner thereof.

(6) An access granted under this section shall be deemed to be a right, easement or advantage acquired under the provisions of section 11 of this Law, and the provisions of this Law shall apply to any such access.

(7) The Council of Ministers may make regulations regulating any matter requiring to be regulated for the better application of this section and, in particular, the procedure to be followed for the purposes thereof :

."

In the present case both the appellant and the respondent are owners of orange gardens in the Syrianochori area. The respondent applied to the Director of Land Registration and Surveys under the provisions of section 11A for a right of way to her plot 41, under sheet plan XIX/22.E.1, and the Director, by his decision dated the 29th May, 1968, determined the route over the appellant's plots 29 and 260. At the same time he allowed part of the route over plot 264, but the owner of that plot has not appealed against the determination of the Director.

The Director, acting under the powers conferred on him under the Law, determined also the compensation payable to the appellant and the owner of 264 for such access as follows : £285 in respect of the appellant's plot 260 ; £9

in respect of plot 29 ; and £220 in respect of the other neighbour's plot 264 (with which we are not concerned). In any event, the amount of compensation assessed is not the subject of this appeal and, consequently, we do not have to determine the correctness of such assessment.

The only complaint of the appellant in the present appeal is that the Land Registry Clerk, who was acting on behalf of the Director of Land Registration pursuant to the provisions of section 11A of the Law and the Rules made thereunder, that is, the Immovable Property (Granting of Access) Rules, 1967 (*Gazette* of 1967, Supplement No. 3, page 282), failed to comply with the provisions of rule 6 (2) of the aforesaid Rules, which reads as follows :—

«6. (2) Ἐν περιπτώσει ὑπάρξεως καὶ ἄλλου ἢ ἄλλων ἀκινήτων πλὴν τοῦ δουλεύοντος ἀκινήτου τὰ ὁποῖα κατὰ τὴν γνώμην τοῦ Διευθυντοῦ εἶναι κατάλληλα διὰ τὴν δημιουργίαν διόδου ἐπ' αὐτῶν, ὁ Διευθυντὴς δύναται νὰ ἀναβάλῃ τὸν καθορισμὸν τῆς αἰτουμένης διόδου καὶ νὰ ζητήσῃ παρὰ τοῦ ἀποκτῶντος μέρους ὅπως, ἐντὸς ἐξήκοντα ἡμερῶν ἀπὸ τῆς ἐκφράσεως τῆς τοιαύτης γνώμης ὑπὸ τοῦ Διευθυντοῦ περὶ τῆς ὑπάρξεως καὶ ἄλλων καταλλήλων ἀκινήτων διὰ τὴν δημιουργίαν διόδου ἐπ' αὐτῶν ἐπιδώσῃ εἰς τὸν ἰδιοκτήτην ἢ τοὺς ἰδιοκτήτας τῶν τοιούτων ἀκινήτων τὴν ἐν τῷ Κανονισμῷ 3 προνοουμένην εἰδοποίησιν, καὶ ἐπὶ τῇ συμμορφώσει τοῦ ἀποκτῶντος μέρους πρὸς τὰς προνοίας τοῦ Κανονισμοῦ 4 καὶ τοῦ Διευθυντοῦ πρὸς τὰς προνοίας τοῦ Κανονισμοῦ 5, ὁ Διευθυντὴς κατόπιν νέας ἐπιτοπίου ἐρεύνης καὶ μελέτης πάντων τῶν σχετικῶν στοιχείων καὶ γεγονότων καὶ ἐπὶ τῷ σκοπῷ ὅπως προκληθῇ ἡ μικροτέρα δυνατὴ ζημία, ὀχληρία ἢ ταλαιπωρία ἀποφασίζει ἐπὶ ποίου ἢ ἐπὶ ποίων ἀκινήτων θὰ παραχωρηθῇ ἡ δίοδος καὶ καθορίζει τὴν κατεύθυνσιν τῆς διόδου, τὴν ἔκτασιν τοῦ πρὸς χρῆσιν αὐτῆς δικαιώματος τοῦ ἀποκτῶντος μέρους καὶ τὴν ὑπ' αὐτοῦ καταβλητέαν ἀποζημίωσιν, καὶ γνωστοποιεῖ τὸν ὑπ' αὐτοῦ καθορισμὸν τῶν θεμάτων τούτων πρὸς πάντα τὰ ἐνδιαφερόμενα μέρη.»

It will be seen that, if there are other plots of land which "*in the opinion* of the *Director* are *suitable* for the creation of access over them ", then he may ask the acquiring party to give notice to the owners of such plots of land which may be affected by an alternative route. After the giving of such notice, the Director will have to hold a fresh local enquiry and, after considering all the relevant facts and circumstances, he shall determine the route of the access in such a way as to cause the least possible damage, inconvenience or hardship.

The grounds of appeal read as follows :—

" A. The trial Court misdirected itself on the question of the procedure followed by D.L.O. Clerk, and failed

to decide on the submission of applicant, i.e. since the D.L.O. Clerk thought reasonable to follow and apply rule 6 (2) of the regulations in question as he admitted in his evidence and sets out in his written report he had to give notices to the owners of the plots indicated by applicant (alternative route)
and/or

B. The trial Court failed to notice that the D.L.O. Clerk applied rule 6 (2) as above, and exercised his discretion, on question of damages, nuisance and balance of hardship, although the owners of the plots of the alternative route indicated by applicant, were not summoned as provided by the regulations and were not present while the above were decided."

There is also ground C which reads as follows :—

" C. The finding of the trial Court is against the weight of evidence adduced."

We may say at once that this ground is far too vague and we find no substance in it.

For the purpose of determining the complaint of the appellant we have to go into the facts as they appear on the record, including the decision of the Director of Land Registration.

The reasoned decision of the Director is dated 11th October, 1968 and forms part of the record. Paragraph 4 is one of the material parts of the decision and in that paragraph the Director states that the Land Registry Clerk, after considering all the facts and circumstances and, with the object of causing, as far as possible, less damage, inconvenience and hardship, he came to the conclusion, that there being no other property or properties for the creation of such access over them, the access decided upon was the only suitable one.

The length of the access granted, by the Director is 535 feet and the width 10 feet. The width of 10 feet is not taken all from the appellant's properties. In the case of appellant's plot 260, the width taken is 7 feet, and the other 3 feet is taken from the other neighbour's plot 264. In the case of appellant's plot 29, a very small area is taken, the total of which is 245 square feet. On the one side the passage begins with a width of 7 feet and it tapers off to nil after 42 feet ; and at the other end of plot 29 the passage begins from nil and at the end of 48 feet on the boundary line it

has a width of 4 feet. About two-thirds of the passage along plot 29 the whole width of 10 feet is taken from the adjoining plot 264 which belongs to the person who has not appealed against the decision of the Director.

The total area covered by the right of way over the two plots of the appellant is as follows : In the case of plot 260, 1995 square feet, and in the case of plot 29, as already stated, 245 square feet.

As a result of the granting of the access a number of orange-trees belonging to the appellant will have to be uprooted for which the Director has assessed compensation. The number of trees is in the case of plot 260, 19 orange trees and in the case of plot 29, nil.

The appellant alleged that there was an alternative route which the Director should have considered and, decided upon instead of the one on which he eventually decided upon. The alternative route suggested by the appellant was *via* plot 40 (which belongs to him), plot 311 and plot 309. But it should be noted that the length of the suggested alternative route is 1205 feet, while the length of the route of the access granted is only 535 feet. The Land Registry Clerk gave evidence before the trial Court and explained the reasons which led him to his conclusion. The complaint of the appellant is that the Land Registry Clerk followed the wording of rule 6 (2) without actually following the provisions thereof, that is to say, the Clerk failed to cause notice to be given to the owners of other plots which were suitable for the creation of access over them.

We would observe that the Land Registry Clerk, who is acting on behalf of the Director, in the capacity of an arbitrator in a quasi-judicial capacity under the law, finds himself in a very difficult position in trying to comply with the provisions of rule 6 (2). He finds himself between Schylla and Charybdis. If he makes a full comparison of the various possible routes, then there may be a complaint that he made that comparison and he reached his conclusion without giving notice to the interested persons as regards the alternative routes and that he, consequently, failed to comply with rule 6 (2), and his decision is vitiated. If, on the other hand, he fails to make any comparison at all, or to give any consideration to the alternative routes suggested by the owner of the servient tenement, then he may be faced with the complaint that, without considering the matter at all, he came to the conclusion that there was no

other suitable property or properties for the creation of access over them, as envisaged in the opening words of rule 6 (2). We must say that the Director finds himself in an unenviable situation.

The question now before us is whether the Director has or has not complied with the provisions of rule 6 (2). We are of the view that, before the provisions of rule 6 (2), with regard to the giving of notice to the owners of other properties, may come into play, the Director must be of opinion that there are such other properties which are " *suitable* " for the creation of access over them, and he, therefore, has a duty to carry out an enquiry to satisfy himself that, *prima facie*, such other property or properties are *suitable* for the purpose aforesaid. It is not in every case that an alternative route is suggested, any impossible alternative route, that the Director has a duty to set into motion the provisions of rule 6 (2). In the present case we are satisfied that, on the findings of the trial Court, the Land Registry Clerk, acting on behalf of the Director, gave due consideration to the alternative route suggested by the appellant, that he considered whether he should proceed under the provisions of rule 6 (2) or not, and that, after considering all the facts and circumstances, he formed the opinion that there was no other property which was *suitable* for the creation of access over it. We are, therefore, of the view that the Director did not act in contravention of rule 6 (2) and, consequently, the appellant's complaint cannot succeed.

With regard to the trial Court's findings of fact, we are of opinion that they are warranted by the evidence on record. The Court, after summing up the evidence adduced on both sides, said :—

> " We have considered carefully the evidence before us and even if we accept the evidence of the witnesses called by the applicant in *toto*, we may say forthwith that no grounds have been proved before us sufficiently strong to disturb the findings of the D.L.O. The alternative route indicated by the applicant is not a straight one, and will also entail uprooting of trees. It was alleged by the applicant and some of his witnesses that the respondent had permission from the owners to pass over the alternative route indicated by him, but this evidence is not only unsatisfactory but also of dubious nature. We cannot at all rely on the evidence of P.W. 4, Georghios Kamilaris, whose desire to distort the truth and assist the case of the applicant was manifest throughout the course of his evidence.

The evidence of all the other witnesses is too general and does not afford a reasonably strong ground or show that the decision of the D.L.O. was erroneous and that it should be set aside. "

And they concluded as follows :—

" The evidence called by the respondent is by professionals and experts in their respective fields. The one being a D.L.O. clerk and the other one a Government Agriculturist, who both stated on oath their expert opinion, and the reasons for their decision. We, are, therefore, of the view that the decision of the Director was the right one."

With regard to the argument put forward in support of the appellant's case that in some part of his evidence the Land Registry Clerk appears to have made a comparison between the route decided upon and the alternative one suggested by the appellant, without complying with the provisions of rule 6 (2), we would observe that what the L.R. Clerk did was to satisfy himself whether there was any other property which was suitable for the creation of access over it, apart from that of the appellant's, for the purpose of invoking the provisions of rule 6 (2). In giving his evidence he stated his guiding principles and the factors which he took into account in forming his opinion. Briefly they were the following : The distance of the proposed route, the creation of a straight route, as far as possible, and, generally, the minimizing of damage of the servient tenement or tenements.

The trial Court were satisfied that the Director followed the proper procedure and that his determination of the route of the access was the right one in the circumstances. Having given due consideration to the submissions made by appellant's counsel today we find ourselves in complete agreement with the judgment of the trial Court, and the appeal is accordingly dismissed with costs.

Appeal dismissed with costs.