IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

EVANGELIA I. KYRIACIDES,

Applicant,

and

THE MUNICIPALITY OF NICOSIA,

Respondent.

(*Case No.* 49/73).

Administrative Law—Executory Act—What constitutes an executory act—Application for building permit—And letter by respondent Authority indicating that application would not be considered unless applicant submitted new plans taking into account the new street alignment as a result of an acquisition order—Contents of said letter amount to an expression of the will of the respondent and not merely to an expression of intention—They are of an executory nature and as such can be the subject of a recourse in the sense of Article 146 *of the Constitution.*

Building—Building permit—Part of plot to be built upon subject matter of an acquisition order—Compensation as provided by Article 23. 4(c) *of the Constitution not paid to applicant—And provisions of s.* 13 *of the Compulsory Acquisition of Property Law,* 1962 (*Law* 15 *of* 1962) *not complied with—Strip of land, subject matter of acquisition order, should have been considered as being part and parcel of the whole of applicant's plot and not part of the public road.*

Compulsory Acquisition—Application for building permit on plot affected by compulsory acquisition order.

On 9. 7. 1972 the Republic of Cyprus, as the Acquiring Authority, by a notice of acquisition, published in the Official Gazette, acquired compulsorily, for the purpose of a street widening scheme, part of a building site, situated at Dhigenis Akritas Avenue Nicosia, belonging to the applicant.

On 27. 11. 1972 the applicant submitted an application to the respondent Municipality for the issue of a building permit in respect of the above building site, and submitted the relevant

plans. This application was submitted as if the acquisition order had not taken place.

By a letter, dated 17. 1. 1973, (see the whole text of the letter at p. 186 *post*) the respondent informed the applicant that in order to proceed with the consideration of his application he had to make certain alterations in the plans regarding the percentage analogy of the ground floor, the distance of the proposed buildings from the acquisition line and the plot ratio. Applicant wrote back expressing her disagreement and on the 21. 2. 1973 the respondent wrote to her that her building site was affected by an order of acquisition and that she had to comply with the remarks embodied in the aforesaid letter of the 17. 1. 1973 in order that "the issue of the permit applied for should be rendered possible".

Hence the present recourse:

On the question whether (a) *the letter of* 17. 1. 1973 *amounted to an executory act or decision or merely to an act of preparation and* (b) *whether in considering the application for a building permit the respondent authority should take into account the area affected by the acquisition order or not:*

Held, (*after stating the meaning of an executory administrative act—vide p.* 189 *post*) (1) that the contents of the said letter amounted to an expression of the will of the respondent authority and not merely to an expression of intention; that this was verified by the letter of the respondent authority to the applicant dated 21. 2. 1973; and that, accordingly, the act of the respondent complained of is of an executory nature and as such can be the subject of a recourse in the sense of Article 146 of the Constitution (see conclusions from the case Law of the Greek Council of State 1929–1959 p. 237; pp. 189–190 *post*).

(2) That the property which is under acquisition does not vest in the acquiring authority upon the publication of the order of acquisition as in the past, but upon the payment in cash and in advance of a just and equitable compensation to be determined in cases of disagreement by a civil Court (see Article 23. 4(c) of the Constitution); that, even so, again the property does not vest in the acquiring authority unless the provisions of section 13 of Law 15/1962 are complied with (see this section at p. 190 *post.*); that in this case besides the publication of the order of acquisition no further step was taken by the acquiring

authority up to the date of hearing of this recourse and that, accordingly, the strip of land, the subject matter of the acquisition order, on the date the applicant applied for a building permit should have been considered by the respondent authority as being part and parcel of the building site of the applicant and not as part of the public road.

Sub judice decision annulled.

Cases referred to:

Michael Theodossiou Co. Ltd. v. *The Municipality of Limassol* (1975) 3 C.L.R. 195 at p. 205.

Recourse.

Recourse for a declaration that the act and/or decision of the respondent Municipality whereby part of applicant's property was considered as compulsorily acquired and applicant was asked to alter her plans before a building permit could be issued to her, is *null* and *void.*

M. I. Kyriakides, for the applicant.

K. Michaelides, for the respondent.

Cur. adv. vult.

The following judgment was delivered by:-

MALACHTOS, J.: The applicant in this recourse is the owner of a building site situated in Nicosia at Dhigenis Akritas Avenue under Registration No. 861 dated 31/10/67, being Plot 328 of Sheet XXI Plan 54.3.I and II.

On 9/7/72 the Republic of Cyprus, as the Acquiring Authority, caused the publication in the Official Gazette No. 942 of a Notice of Acquisition under P.I.383 whereby, *inter alia*, part of the aforesaid property of the applicant was compulsorily acquired for the purpose of a street widening scheme affecting Dhigenis Akritas Avenue. The part of the building site of the applicant affected by the said scheme is its whole frontage in length and 5 ft. in width, which abutted the said Avenue.

On 13/10/72 it was published in Supplement No. 3 to the Official Gazette of the Republic No. 967, the Order of Acquisition under P.I.705 whereby the acquisition of applicant's aforesaid property was ordered.

On 27/11/72 the applicant submitted an application to the respondent Municipality as the appropriate authority, for the

issue of a building permit, and submitted the relevant plans. This application for a building permit was submitted as if the Acquisition Order had not taken place. Taking into consideration the area resulting after the deduction of the part of her property compulsorily acquired, applicant's application was not in accordance with the law as the area of the plot proposed to be covered by her buildings exceeded 50% of the total, *i.e.* the plot ratio was 2.29 instead of 2.2 and the said buildings were to stand at a distance of 5 ft. from the new street alignment instead of 10 ft.

On 17/1/73 the applicant received a letter from the respondent in connection with her application, *exhibit* 5, which reads as follows:

" *Your application for building permit under No.* 717/72.

We refer to your above application and we inform you that in order to be able to proceed for its consideration it is necessary that:-

1. You make arrangements so that:-

(a) The percentage analogy of the ground floor should not exceed the 50%. As you propose it is 51.71%;

(b) The plot ratio should not exceed the 2.2. As you propose it is 2.29;

(c) The proposed buildings should be at a distance of not less than 10 feet from the acquisition line. As you propose is only at a distance of 5 feet.

2. You submit a plan for watertight septic tank of a capacity of not less than 50 tons."

On 2/2/73 the applicant addressed through her advocate a letter to the respondent (*exhibit* 6) to which a plan was attached. This letter is as follows:

" We have received your letter dated 17/1/1973 in connection with our application for a building permit under No. 717/72.

We attach a plan of a watertight septic tank of 50 tons.

We regret to mention that we do not agree on the rest of the remarks of your letter."

The respondent replied to the said letter by letter dated 21/2/73, (*exhibit* 7), which reads as follows:

" *Your application for the issue of a building permit under No.* 717/72.

I have been instructed to refer to your application under No. 717/72, and to the letter of your legal adviser Mr. M. Kyriakides dated 2.2.73.

The plot under No. 328 on which the erection of the building is proposed, is affected by order of acquisition No. 705 published in the Official Gazette of the Republic under No. 967, dated 13.10.72.

In order that the issue of the permit applied for should be rendered possible it is necessary that you should comply with the rest of the remarks which are referred in my letter to you of the 17.1.73, *i.e.* the remarks 1(a)(b) and (c) of the said letter."

In the meantime the applicant on 19/2/73 had filed the present recourse claiming a declaration of the Court that the act and/or decision of the respondent Municipality, by which the part of her property under Registration No. 861, Sheet XXI Plan 54.3. I and II Plot 328, was considered as compulsorily acquired and to require her to comply with the contents of paragraph 1(a), (b) and (c) of their letter of 17/1/73, for the issue of a building permit, is *null* and *void* and of no legal effect whatsoever.

Counsel for applicant argued that the respondent authority misconceived the legal situation that resulted from the publication of the Order of Acquisition and considered that the portion of land affected by the Acquisition Order belonged at that time to the Government of Cyprus and not to the applicant. He also argued that the act and/or decision of the respondent is contrary to Article 23.4 of the Constitution. This Article reads as follows:

" 23.4 Any movable or immovable property or any right over or interest in any such property may be compulsorily acquired by the Republic or by a municipal corporation or by a Communal Chamber for the educational, religious, charitable or sporting institutions, bodies or establishments within its competence and only from the persons

belonging to its respective community or by a public corporation or a public utility body on which such right has been conferred by law, and only–

(a) for a purpose which is to the public benefit and shall be specially provided by a general law for compulsory acquisition which shall be enacted within a year from the date of the coming into operation of this Constitution; and

(b) when such purpose is established by a decision of the acquiring authority and made under the provisions of such law stating clearly the reasons for such acquisition; and

(c) upon the payment in cash and in advance of a just and equitable compensation to be determined in case of disagreement by a Civil Court."

Counsel for applicant further argued that up to the time when payment is made as provided in Article 23.4(c) of the Constitution, the property affected by the acquisition belongs to its owner who can exercise all his proprietary rights.

On the other hand, counsel for the respondent argued that the letter of the 17/1/73, addressed to the applicant, contains a preparatory act and not an executory one. Even if we assume that the act complained of is of an executory nature then the application of the applicant was not in compliance with the Streets and Buildings Regulation Law, Cap. 96, after the publication of the Order of Acquisition which could not be ignored by the respondent authority.

From the above arguments of counsel it is clear that the two following points fall for consideration by the Court in this recourse:

1. Whether the letter of 17/1/73, addressed by the respondent authority to the applicant, amounts to an executory act or merely contains acts of preparation; and

2. Whether in considering the application of the applicant for a building permit the respondent authority should take into account the area affected by the Acquisition Order or not.

It is not in dispute that the submitted plans for a building permit were in accordance with the law provided that the area

affected by the Acquisition Order is to be considered as part and parcel of the building site of the applicant and not as being part of the public road. Also the fact that nothing was paid to the applicant for the value of the property, the subject matter of the Acquisition Order, up to the date of the hearing of this recourse, is not in dispute.

An executory administrative act is defined in the Conclusions from the Case Law of the Greek Council of State 1929–1959 at page 237 as an act by means of which there is expressed the will of the Administration in order to produce legal consequences regarding those governed and which entails immediate administrative enforcement; the main element of the notion of an administrative act is the production of a legal result through the creation, modification or termination of a legal situation. A mere expression of the intention of the Administration as contradistinguished from an expression of its will does not amount to an executory act.

In the present case the letter of the respondent authority of the 17/1/73, *exhibit* 5, makes it clear to the applicant that no building permit would be granted to her unless new plans were submitted, taking into account the new street alignment as a result of the Acquisition Order.

The contents of the said letter, in my view, amount to an expression of the will of the respondent authority and not merely to an expression of intention. This was verified by the letter of the respondent authority to the applicant dated 21/2/73, *exhibit* 7. Therefore, the act of the respondent complained of is of an executory nature and as such can be the subject of a recourse in the sense of Article 146 of the Constitution.

The second and last point that falls for consideration, as I have already said, is whether in considering the application of the applicant for a building permit, the respondent authority was in law entitled to take into account the publication of the Order of Acquisition and, consequently, to consider the street alignment, as the one created by the publication of the said order.

Before the coming into force of our Constitution the position was clear. Under the then existing legislation, the Land Acquisition Law, Cap. 226, section 8, when the Governor notified his sanction to the acquisition of any land, the land was thereupon

vested absolutely in the public body concerned. In the new Compulsory Acquisition of Property Law, 1962 (15/62), there exists no such provision in view of Article 23 of the Constitution which safeguards the right of property of a citizen. Interference with such right can be made only under certain conditions. The property which is under acquisition does not vest in the acquiring authority upon the publication of the Order of Acquisition, as in the past, but as provided by Article 23. 4(c) of the Constitution, upon the payment in cash and in advance of a just and equitable compensation to be determined in cases of disagreement by a Civil Court. And, even so, again the property does not vest in the acquiring authority unless the provisions of section 13 of Law 15/62 are complied with. This section is as follows:

> " 13. On payment or deposit with the Accountant-General of the sum agreed or determined to be paid as compensation for the acquisition of any property, such property shall vest in the acquiring authority free from all encumbrances; and where the property is immovable property, production of satisfactory evidence of such payment or deposit shall be sufficient authority to the Chief Lands and Surveys Officer of the Republic to cause registration of such property to be made in the name of the acquiring authority on payment of any fees or charges which, under the provisions of any Law in force, are leviable on such registration".

The same above view has been expressed by a Judge of this Court in the case of *Michael Theodossiou Co. Ltd.* v. *The Municipality of Limassol* (1975) 3 C.L.R. 195, where at page 205 the following passage from the System of Constitutional Law of Greece, 4th edition, Vol. 3 at p. 215, by Saripolos, translated in English is cited:

> " But the Constitution, above all, protects the possession from any deprivation or disturbance so long as the payment of compensation has not preceded same. So, for example, not only 'the entry' is prohibited but also 'the refusal by the appropriate authority of a permit to build on a place whose acquisition has been announced but the compensation has not been paid; such refusal by the Authority undoubtedly constitutes a disturbance of the possession of the citizen', as G. Ballis observes, ibid, at pages 43 and 44. See especially Case No. 1/1918 of Arios Paghos in 'The Newspaper

of the Greek and French Case Law', 1918, Vol. 137, page 97, according to which from Article 17 of the Constitution the conclusion is clearly drawn that from the issuing only of a decision of a competent authority, in accordance with the law that there is a public need to take over certain private ownership without, however, the assessment in accordance with the law, and the payment of the proper compensation the person to whom the subject belongs, does not cease to be its owner and consequently have, as such, intact, the rights, belonging according to law, to an owner, of possession, disposition and enjoyment of every kind of benefit which it can possibly produce ..... although, it does not constitute deprivation of the possession of the owner, that is to say, entry in the subject property, it, however, prevents him from the enjoyment of the use of his property, as it is the nature of the refusal by the appropriate District Engineer to grant a permit for the erection of a building on immovable, simply because it is affected by a town plan for the construction of a road, such action being contrary to the aforesaid constitutional prohibition and constituting, according to law, a disturbance of the possession, hence, it is unlawful.....".

In the present case, besides the publication of the Order of Acquisition no further step was taken by the acquiring authority up to the date of hearing of this recourse. So, the strip of land, the subject matter of the Acquisition Order, on the date the applicant applied for a building permit should have been considered by the respondent authority as being part and parcel of plot 328, the property of the applicant, and not as part of the public road.

Therefore, the act of the respondent municipality complained of is hereby declared null and void.

On the question of costs, taking into consideration the circumstance of this case and the novel point involved, I have decided to make no order.

Sub judice decision annulled. No order as to costs.