

1978 March 3

[STAVRINIDES, L. LOIZOU, A. LOIZOU, JJ.]

XANTHOS I. CLERIDES,

Appellant,

v.

AFRODITE N. VASSILIADES AND ANOTHER,

Respondents.

(Civil Appeal No. 4957).

Immovable property—Undivided shares—Partition—Section 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Disagreement by co-owners as to the particular holdings to be allotted to each one of them—The matter has to be determined by the drawing of lots—No discretionary power vested in the Director of Lands and Surveys—Section 29 (3) of the Law. 5

Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Construction of section 29 (3) of the Law.

In dealing with partition of property held in undivided shares, the Director of Lands and Surveys, in the exercise of his powers under section 29 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, proceeded to partition the property at his discretion and did not, following disagreement between the co-owners as to the holding to be allotted to each of them, determine the question by the drawing of lots. 10 15

The main point for determination in this appeal was whether the Director had, under the said section 29, discretionary power to apportion the property and allot, at his own discretion, the several portions in any manner that he deemed fair, or he merely had to ensure the division of the property in portions, leaving it to the lot to decide which piece will go to each party. 20

The material provisions of section 29 are those of sub-sections (1) and (3) which read as follows:

“ 29. (1) Where immovable property is held in undivided shares, it shall be lawful for the Director, on the application 25

of any co-owner, to cause a partition of the property to be made amongst the several parties entitled thereto and to register the holdings into which the property is divided in the names of the persons to whom the same are respectively allotted.

(3) In making a partition under the provisions of this section the Director shall, as far as possible, apportion the property in accordance with the wishes of the several co-owners, and if the co-owners, though otherwise agreeing with the partition, do not agree as to the holding or holdings to be allotted to each one of them, the question shall be finally determined by the drawing of lots by the Director".

Held, the interpretation to be given to sub-section (3) of section 29 has to be deduced from its very wording and the material point in that respect is, what is the meaning of the words "though otherwise agreeing with the partition, do not agree as to the holding or holdings to be allotted to each one of them." All the possible meanings of the word "though" need not be set out here, since for the purposes of the construction of the phrase in question it is clear, that it is equivalent to "while" so that that provision in question conveys one and only one possible meaning, viz. that it is not a prerequisite that there should be any agreement as to the actual partition as determined by the Director. This interpretation is borne out by the fact that an application for partition of immovable property does not require the agreement or consent of any other party. The application under s. 29 sets the procedure outlined therein in motion, and if there is an agreement as to the partition the matter is at an end. If there is no such agreement, or even if there is such agreement but there is no agreement as to the holding or holdings to be allotted to each co-owner, then the matter is to be decided by lot. The word "finally" in the context of s. 29 (3) can only mean that the matter is ultimately and conclusively decided by the drawing of lots.

Appeal dismissed.

Appeal.

Appeal against the judgment of the District Court of Famagusta (Savvides and Pikis, D.J.J.) dated the 30th January, 1971, (Applications Nos. 57/70 and 58/70) setting aside a decision of

the Director of Lands and Surveys concerning partition of property held in undivided shares.

Z. A. Mylonas with *A. Markides*, for the appellant.

J. Kaniklides, for the respondent.

Cur. adv. vult. 5

STAVRINIDES J.: The judgment of the Court will be delivered by Mr. Justice A. Loizou.

A. LOIZOU J.: The District Court of Famagusta by its judgment, in two consolidated appeals taken under the provisions of section 80 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 (hereinafter referred to as "the Law"), set aside the decision of the Director of Lands and Surveys acting through the Famagusta District Lands Officer, by which decision the allotment of holdings into which property held in undivided shares was partitioned under section 29 of the Law, was made by the Director at his discretion and not left to be determined by the drawing of lots following disagreement between its co-owners as to the holding to be allotted to each of them. 10
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The relevant facts are as follows: 20

The appellant soon after he became the owner of one-half share in plot 127, sheet plan XXIV/26, Ayios Serghios, Famagusta, of a total extent of 28 donums and two evleks, applied to have this land compulsorily divided between himself and the then co-owner, Afrodite Vassiliadou (respondent 1 in this appeal and applicant in Application No. 57/70), under the provisions of section 29 (1) of the Law which provides – 25

“Where immovable property is held in undivided shares, it shall be lawful for the Director, on the application of any co-owner, to cause a partition of the property to be made amongst the several parties entitled thereto and register the holdings into which the property is divided in the names of the persons to whom the same are respectively allotted.” 30

When the application to the Lands office was pending respondent 1, for reasons best known to herself and her brother Afxentis, made a gift of half her share, to wit, the one-fourth share in the aforesaid property to him, (applicant in application No. 58/70, respondent 2 in this appeal). 35

It was claimed that the timing of the transfer was nothing more than a coincidence, but the trial Court had grave doubts about the motives that prompted this transfer; we share their doubts, but they are immaterial to the outcome of these proceedings.

Following the application under section 29 of the Law, Iacovos Zacharia, an experienced clerk in the Valuation Section of the District Lands Office, Famagusta, visited the property on the 30th May, 1970, in the presence of the appellant and the two respondents. They all then withdrew to a nearby hotel, where a discussion took place in order to secure, if possible, agreement between the parties as to the division of the property.

On the evidence adduced, the trial Court concluded that there was an agreement among the parties about the desirability of division and also that all parts of land have the same value, but that they failed to agree about the mode of division. Having heard the parties, Mr. Zacharia made a suggestion for the possible division of the land which was adopted by Mr. Christodoulos Marcou, the Ag. Director of the District Lands Office. Thus the land was divided into three plots, as they appear in *Exhibit 'B'*, plot 127/1, an L-shaped plot adjacent to plot 150, being allotted to the appellant, and two plots 127/2 and 127/3 allotted to respondents 2 and 1 respectively, the latter of whom is also the owner of the adjacent property under plot 126/3.

A suggestion made by the respondents at the trial that the division was unfair was dismissed by the trial Court. The division made was found, in fact, to be fair and in the interests of the parties. Obviously it was prompted, not only by the extent of the area allotted to each co-owner, but also by the fact that the appellant was holding this property in trust for the owners of the adjacent plot 150, the Fair Clough Co. Ltd. who built a hotel on that and other adjacent plots, and who apparently needed the subject land for possible extensions. Likewise, the holding allotted to respondent 1, abuts other property owned there by her, as already shown.

The main point for determination by this Court is whether the Director has, under section 29 of the Law, discretionary power to apportion the property and allot, at his own discretion, the several portions in any manner that he deems fair,

or he merely has to ensure the division of the property in portions, leaving it to the lot to decide which piece will go to each party.

The approach of the trial Court was to the effect that no apportionment could be made under the relevant provisions of the Law other than by drawing of lots when the parties did not agree as to the share to be taken by each of them, and went on to say: "Despite our finding that Mr. Marcou divided the land in a most fair way designed to serve the interests of all parties, we are none the less of the view that failure to abide by the provisions of section 29 (3) of the Law is fatal for the decision. The practice explained to the Court by Mr. Mavroudis followed in the Department of the Lands in the past, is obviously a practice warranted by the provisions of section 29 (3). It is the intention of the legislator that the lot will be the final arbiter of the division of land among co-owners into separate holdings. In this case, it was rightly decided that plot 127 has a uniform value and secondly that division was desired by all co-owners. He should have divided the property into three lot, or possibly four lots and let it to the lot to decide. We, therefore, find that the appeals succeed and the cases will be sent back to the Director with directions to divide the land in accordance with the Law, as explained in this judgment."

The mode of partition is governed by sub-section (3) of section 29 of the Law. It reads as follows:

"In making a partition under the provisions of this section the Director shall, as far as possible, apportion the property in accordance with the wishes of the several co-owners, and if the co-owners, though otherwise agreeing with the partition, do not agree as to the holding or holdings to be allotted to each one of them, the question shall be finally determined by the drawing of lots by the Director."

It has been argued on behalf of the appellant that the said sub-section is inapplicable in the present case for two reasons:

- (a) Its practical application is impossible because the undivided shares of the three co-owners are unequal, and
- (b) the expression in this sub-section "though otherwise agreeing with the partition" should be interpreted as

meaning, “agreeing with the partition actually made” and consequently the Director properly partitioned the property without the drawing of lots.

5 Regarding the question of the practical impossibility of effecting a partition by lots where the co-owners hold property in unequal shares, as in this case, there has been evidence before the trial Court to the effect that this could be resolved by different methods. In the first place the plot could be divided into two parts. Lots would then be drawn as to which of the
10 two parts would be allotted to the one-half owner and which part to the other two co-owners. If the latter agree as to the division of the plot so allotted to them that would be the end of the matter; otherwise the Lands Office must proceed to divide the land between those two by the drawing of lots.
15 Secondly, the land could be divided into four plots, to be numbered 1 to 4 respectively. The appellant could then draw one lot and, depending on the plot he drew, would be entitled to that plot and also to the plot bearing the next higher number or, if the plot first drawn was number 4, the plot number 3.
20 Thus, if he drew number 2 he would be entitled to plot number 3 as well. If he drew plot number 3 he would also be entitled to plot number 4, and if he drew plot number 4 he would be entitled to plot number 3 as well. A third method would be that there would be three lots, *i.e.* one numbered 1 and 2, one
25 numbered 2 and 3 and one numbered 3 and 4. The appellant would draw one lot and the remaining lots would be drawn by one of the other two co-owners. This comes out of the evidence of Mr. Mavroudis (A.W.1.), a valuer and estate agent, and for years an official of the Lands Department.

30 The practical application of the section by the drawing of lots not being impossible in the case of holding in unequal shares, it has to be seen whether, on the true construction of the section, the drawing of lots is imperative in the absence of agreement as to the particular holding or holdings to be taken
35 by each of the co-owners.

Section 29 of the Law in its present form—with the exception of an amendment to the proviso to sub-section (2) thereof, immaterial as regards the present proceedings—was introduced by the Immovable Property (Tenure, Registration and Valuation) Law, 1945 (Law 26/45) which consolidated and amended
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the law relating to immovable property. This Law came into force on the 1st September, 1946 with all its sweeping and far reaching effects on the land law applicable until then in Cyprus, partly depending on the Ottoman Laws and partly on statutory provisions gradually introduced by the British since they took over the administration of the island in 1878. 5

A provision corresponding to sub-section (3) of section 29, is to be found in sub-section (3) of section 30 of the Immovable Property, Registration and Valuation Law of 1907, which says:-

“ In making such partition the Land Registry Officer shall, as far as possible, apportion the property in accordance with the wishes of the persons co-interested, having regard to the Ottoman Law concerning partition.” 10

Also, by sub-section (5) -

“ Nothing in this section contained shall be construed as depriving any person co-interested in immovable property from obtaining a partition of the same by proceeding in a Court of Law.” 15

This last provision must have been referring to the action for partition which was regulated by the Cyprus Courts of Justice Order, 1882. (See section 28 (1) (g) and the District Courts Jurisdiction (Amendment) Law, 1897, sections 2 and 3) These sub-sections were not retained in the 1945 legislation as a general provision regarding appeals from decisions of the Director was made by section 80 of the Law, excluding also the entertainment by a Court of any action or proceeding on any matter in respect of which the Director is empowered to act under the provisions of the Law 20 25

The relevant provision of the Ottoman Laws concerning partition of Immovable Property is to be found in the Mejelle Article 1151 which relates to partition of a house. It reads:- 30

“ When he is going to partition a house, the person who is making the partition must first make a plan of it on paper, and measure the site by the zira, and value the buildings, and arrange and adjust them according to the shares of the owners, and, if it be possible, to separate each share with its right of way (haqq tarik) and right of getting water (Art. 143), and right of overflow (Art. 144), 35

so that they may not remain dependent the one on the other; and he must name them 'first', 'second', 'third', and afterwards he must draw lots. And 'first' belongs to the person whose name comes out first and 'second' to him
5 whose name comes out second and 'third' to him whose name comes out third. If there are more shares, he proceeds also in this way."

It is also governed by Article 15 of the Ottoman Land Code which reads as follows:

10 "If any land possessed in individual shares by several persons is capable of being divided, that is to say if each portion can yield separately as much produce as if it continued to form part of the whole, if partition is demanded
15 by the co-possessors, or by one or more of them, shares should be parcelled out, according to their value, and distributed by lot in accordance with the provisions of the Sacred Law, or in any other equitable manner. The partition shall be made in the presence of the interested parties or their representatives by the Official who shall
20 allot to each his share."

In going through this background one cannot help observing that under the Law as it was before the 1945 legislation and in particular when bearing in mind the words "distributed by lot in accordance with the provisions of the Sacred Law," "or in
25 any other equitable manner" and especially the words "in any other equitable manner" to be found in Article 15 of the Ottoman Law, the Lands official was entrusted with power to act in an equitable manner in addition to the drawing of lots. Also, the provision of sub-section (5) whereby the right of a
30 person to seek through the Court partition of property otherwise than through the Lands official, had with it the notion that the Court would perform judicial functions and exercise its discretion in apportioning the property and allotting the separate holdings to the several co-owners, for the purpose of doing
35 justice and not to proceed to partition the property by merely drawing lots, a function that could be done by the official as such. There were, in other words, in those days, two concurrent procedures, the one through the Lands Office, subject to the supervision of a Court and the other by direct recourse
40 to the Court for partition.

We have spoken of the sweeping reforms brought about by the 1945 legislation, the predominant feature of which was to entrust the Department of Lands and Surveys and in the person of its Director with powers that were until then exercised by Courts and with the object of relieving the Courts of the burden of determining disputes over boundaries and other interests in land that could, in the first place, be determined by the Lands Office using their experts in the matter. 5

It has to be examined, therefore, whether the legislator by the wording used has retained for the Director the power to partition land not only by lot but “in any other equitable manner” as was the case under Article 15 of the Ottoman Land Code and also has given him the powers that the Courts had in an action for partition; but before attempting to come to a final conclusion, it is pertinent to examine—and this is relevant also to the question already dealt with regarding the difficulties of partitioning by lot property—the remaining sub-sections of section 29. 10 15

Sub-section (4) empowers the Director to effect such adjustments in the various interests so that the partition of the property will be fair and include also the payment of compensation to those persons, who on account of the extent or nature of their share in an undivided property, is not possible to receive a divided share in it or it is fair that they should receive monetary compensation in view of the value of the share of property that they are likely to receive under the partition. 20 25

When this mode of partition is effected, including the award of compensation, sub-sections (5), (6) and (7) of the section come into play. The Director under sub-section (5) has to give notice of the order he made under sub-section (4). Sub-section (6) empowers the Director to put up for sale by auction the holding allotted to a co-owner who is in default of paying compensation to another co-owner within 42 days. Sub-section (7) provides that until payment of compensation, the person who was ordered so to do cannot deal with the holding without the consent of the person to whom the compensation is payable. The order that can be made under sub-section (4) is that those co-owners who take holdings of greater value than their due, shall pay to those who take holdings of less value than their due or have no holding at all, such compensa- 30 35 40

tion as the Director may determine. In assessing this compensation, he will have regard to their respective shares and the values which he allocates to the holdings. Sub-section (4) does not speak of drawing lots.

5 These sub-sections do not carry the case any further, inas-
much as they deal with the particular situation of where by
reason of the nature of the property to be partitioned or of the
number of the parties interested therein or for any other reason
it appears to the Director that it is not practical to allot holdings
10 to the co-owners of a value corresponding to their respective
shares. It supplies, therefore, a further answer to the first
argument advanced by learned counsel for the appellant where
questions of practical impossibility of division come into play.

In our view the interpretation to be given to sub-section (3)
15 has to be deduced from its very wording and the material point
in that respect is, what is the meaning of the words "though
otherwise agreeing with the partition, do not agree as to the
holding or holdings to be allotted to each one of them". I
need not set out here all the possible meanings of the word
20 "though", since for the purposes of the construction of the
phrase in question it is clear, in our view, that it is equivalent
to "while" so that that provision in question conveys one and
only one possible meaning, *viz.* that it is not a prerequisite that
there should be any agreement as to the actual partition as
25 determined by the Director. This interpretation is borne out
by the fact that an application for partition of immovable
property does not require the agreement or consent of any
other party. The application under s. 29 sets the procedure
outlined therein in motion, and if there is an agreement as to
30 the partition the matter is at an end. If there is no such agree-
ment, or even if there is such agreement but there is no agree-
ment as to the holding or holdings to be allotted to each co-
owner, then the matter is to be decided by lot. The word
"finally" in the context of this section can only mean that the
35 matter is ultimately and conclusively decided by the drawing
of lots.

The unconstitutionality of section 29 has not been raised in
this appeal, though it was an issue before the District Court.
The section was found not to be unconstitutional, in view of

the finding of the trial Court that the Director had no discretion regarding the holdings to be allotted to the various co-owners; and it has been urged before us, that the interpretation to be given to section 29 should be such as to leave no discretion in the hands of the Director for the determination of private rights. In view of our conclusion that the procedure envisaged by sub-section (3) of section 29 is one whereby in the absence of any agreement as to the particular holdings to be allotted to each co-owner the matter is determined by the drawing of lots, the point does not arise. Under sub-section (1) of section 29 the Director is employed to proceed with the partition, once an application has been made for that purpose and no consent to the setting of the machinery of section 29 in motion is required on the part of any co-owner.

The trial Court having found that the Director had no discretion in the matter, set aside his decision. However, it went on further to consider whether the decision, subject matter of the appeals before it, was that of the Director and concluded that there was no evidence before it that the Director had personally authorised Mr. Marcou, the officer who signed the decision communicated to the respondents on the 22nd July, 1977, in which decision it was clearly stated that he had decided to partition the said property as shown on the plan attached thereto and the subject decision were stated to be "again vitiated for lack of authority to take it". It is unnecessary for us to consider this aspect of the case, though it formed the second ground of appeal before us, since once we upheld the decision of the trial Court setting aside the *sub judice* decisions taken under section 29 (3) of the Law so that the first ground of appeal fails there is no valid decision of the Director requiring us to examine the second ground of appeal, namely, the lack of competence of the organ that took it. We may, however, point out here that the organ having competence in the matter under section 29 is the Director, a term defined in section 2 of the Law to mean "The Director of Lands and Surveys" and to include "any officer appointed by the Director for all or any of the purposes of this Law either generally or for any particular purpose", and it may properly be presumed that an officer acting in lieu of the Director does so by his authority, unless the contrary is shown.

For all the above reasons this appeal is dismissed with costs;

the decision of the trial Court setting aside the *sub judice* decisions of the Director is confirmed.

Appeal dismissed with costs.