

1979 July 26

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

GEORGHOUILLA HJICOSTA,

Appellant-Plaintiff,

v.

ETERIA THOMAIDES BROS. (CYPRUS) LTD.,

Respondents-Defendants.

(Civil Appeal No. 4810).

Civil Procedure—Execution—Attachment and sequestration—Order restraining company from causing nuisance by noise—Service of an endorsed copy of the order on the company, its directors, agents and servants an essential prerequisite for the issue of a writ of attachment and sequestration—Otherwise proceedings a nullity—Order 42A rules 1 and 2 of the Civil Procedure Rules. 5

On December 28, 1965, the appellant-plaintiff instituted legal proceedings against the respondent company claiming a perpetual injunction and damages for nuisance. The action resulted, on March 15, 1968, in a settlement and judgment* was issued in favour of the appellant restraining the respondents, their directors, officers, servants and agents from working their machinery at Famagusta so as to cause a nuisance by noise to the appellant. 10

On July, 1968, the appellant filed an application for the issue of a writ of attachment and sequestration of the property of the respondents for disobedience to the above order of the Court. The trial Court dismissed the application on the ground that no copy of the order had been served on the respondents, their directors, agents and servants as provided in Order 42**, rules 1 and 2 of the Civil Procedure Rules: and hence this appeal. 15 20

* The judgment is quoted at p. 478 *post*.

** Rules 1 and 2 read as follows:

"1. Where any order is issued by any Court directing any act to be done or prohibiting the doing of any act there shall be endorsed by the Registrar on the copy of it, to be served on the person required to obey it, a memorandum in the words or to the effect following:

'If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered'.

2. An office copy of the order shall be served on the person to whom the order is directed. The service shall, unless otherwise directed by the Court or a Judge, be personal".

Held, that it is clear from the wording of Order 42A, rules 1 and 2 of the Civil Procedure Rules that service of an endorsed copy of the order of the Court on the person disobeying such order is an essential prerequisite; that non-compliance with these rules renders the whole proceedings a nullity; that, therefore, the trial Court was bound to dismiss the application for the issue of the writ of attachment and sequestration as it had no discretion in the matter; and that, accordingly, the appeal must be dismissed. (*Mouzouris and Another v. Xylophagou Plantations Ltd.*, (1977) 7-8 J.S.C. 1209 to be reported in (1977) 1 C.L.R. 287 followed).

Appeal dismissed.

Cases referred to:

Mouzouris and Another v. Xylophagou Plantations Ltd., (1977) 7-8 J.S.C. 1209 (to be reported in (1977) 1 C.L.R. 287).

Appeal.

Appeal by plaintiff against the judgment of the District Court of Famagusta (Georghiou, P.D.C. and Pikis, D.J.) dated the 31st March, 1969 (Action No. 2260/65) whereby plaintiff's application for the issue of a writ of attachment and sequestration of the property of the defendant company for disobedience to the order of the Court, made in the said action on the 15th March, 1965, was dismissed.

A. Efstychiou, for the appellant.

C. Indianos, for the respondents.

Cur. adv. vult.

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

MALACHTOS J.: This is an appeal from the judgment of the Full District Court of Famagusta dismissing the application of the appellant for the issue of a writ of attachment and sequestration of the property of the respondent company for disobedience to the order of the Court made in action No. 2260/65 on the 15th March, 1968.

The facts relevant to the issue in this appeal are the following:

The appellant was at all material times the owner and occupier of a dwelling house situated at No. 3 Kronos Street in Fama-

gusta. The respondent company was also at the material time the owner and occupier of the building situated at No. 5 and 7 Kronos Street which was used for packing potatoes, citrus and vegetables and for making packing cases. On the 28th December, 1965, the appellant instituted legal proceedings 5 against the respondent company claiming a perpetual injunction and damages for nuisance.

The action resulted on the 15th March, 1968 in a settlement and judgment was issued in her favour in the following terms:

- “(1) This Court Doth Hereby Order that the defendants, 10 their directors, officers, servants and agents, be and they are hereby restrained from working or permitting to work the machinery including the furnace situated at their stores at Nos. 5 and 7 Kronos Street, Famagusta, so as to cause a nuisance by noise to the plaintiff or other 15 occupiers of the flats at Nos. 3 and 3a Kronos Street, but this order is not to prevent the working of the machinery and furnace to the extent following, but not otherwise, i.e.
- (a) The said machinery, i.e. grading machines for citrus 20 and potatoes and other machinery, but excluding the furnace shall only work from 7.30 a. m. to 6.30 p.m.
- (b) The said furnace shall only work from 7.30 a.m. to 12 o'clock noon.
- (2) This Court Doth Further Order that the defendants, 25 their directors, officers, servants and agents, be and they are hereby restrained from causing an obstruction to the access to the premises of the plaintiff with lorries.
- (3) This Court Doth Further Order that the defendants, 30 their directors, officers, servants and agents be and they are hereby restrained from causing a nuisance to the plaintiff or other occupiers of her premises by way of noise, other than paragraph (1) above.
- (4) This Court Doth Further Order that the defendants do 35 pay to the plaintiff the sum of £500.—with costs; costs to be assessed by the Registrar, on the scale of £2,000.—and over.”

On the 6th July, 1968, an application was filed supported by affidavit sworn by the appellant for the issue of a writ of attachment and sequestration of the property of the respondent company for disobedience to the order of the Court of 15th
5 March, 1968.

The application as stated therein was based on Order 42A, rules 1, 2,3 and 4 of the Civil Procedure Rules. Rules 1 and 2 with which we are concerned in this appeal read as follows:-

10 “ 1. Where any order is issued by any Court directing any act to be done or prohibiting the doing of any act there shall be endorsed by the Registrar on the copy of it, to be served on the person required to obey it, a memorandum in the words or to the effect following:

15 ‘ If you, the within-named A.B., neglect to obey this order, by the time therein limited, you will be liable to be arrested and to have your property sequestered.’

2. An office copy of the order shall be served on the person to whom the order is directed. The service shall, unless otherwise directed by the Court or a Judge, be personal.”

20 When the application came on for hearing before the Court in addition to the affidavit evidence, oral evidence was adduced by and on behalf of the parties in support of their respective cases. Neither in the affidavit in support of the application
25 nor in the evidence adduced on behalf of the appellant is there anything to suggest that a copy of the order was served on the defendants-respondents.

On the 31st March, 1969, the trial Court issued its reserved judgment and dismissed the application of the appellant as no
30 copy of the order had been served on the defendants, their directors, agents and servants as provided in Order 42A, rules 1 and 2 for the purposes of the application. The relevant part of the judgment of the trial Court is p. 39 of the record of proceedings and is as follows:

35 “By its very nature attachment is directed against a person having a physical existence. As opposed to a legal person see the case of *Re Hooley* [1899] 79 LT 706. But a company may be fined since fine appears to be an alternative to

imprisonment. *R. v. J.G. Hammand & Co. Ltd.* [1914] 2 K.B. 866.

Endorsement of the order and service of it in the manner prescribed in Order 42A appears to be a prerequisite to the issue of a writ of attachment. The word 'shall' is conclusive in this respect. As stated in the White Book the evidence must establish such service which evidence is singularly absent in this application. There is no evidence that an endorsed copy was served on the defendants. The strictness of the law regarding service stems apparently from the desire of the legislator to punish wilful disobedience of flagrant neglect in view of the serious consequences that may attend disobedience.

As earlier indicated a company Ltd. cannot be attached and to that extent the application is misconceived.

In England the Rules make special provision for the sequestration of the property of a company by virtue of 0.42, r.31 in the case of wilful disobedience, or attachment of its directors or other officers or by writ of sequestration against their property. The corresponding order in Cyprus is Order 40, rule 13.

The application is not based on this rule but even if we assume that this was the case and further assume that this rule is applicable in Cyprus, which point we leave open, it appears that an endorsed order would have to be served which service should be personal in the case of directors or the officers. In the case of service upon the company there shall further be evidence that the order has laid in the premises of the company for a sufficiently reasonable interval of time as to enable directors and officers take cognizance of it.

The order of the Court in this case expressly enjoins directors, servants or agents of defendant company from doing certain acts and had this application been directed against them, which is not the case, we are of the view that the provisions of 0.42A could be invoked at the instance of the applicant.

Because of all the aforesaid reasons we are of the view that the application must fail."

The trial Court went further and considered the application on its merits and after scrutinizing the evidence before them as they put it in their judgment, they were not satisfied that the respondents have acted in disobedience of the order of the Court.

Counsel for the appellant on the question of service of the order submitted that non-compliance with the provisions of rules 1 and 2 of Order 42A does not render the proceedings a nullity and relied on Order 64, rule 1 of the Civil Procedure Rules which is as follows:

“ Non-compliance with any of these rules or with any rule of practice for the time being in force, shall not render any proceeding void unless the Court or Judge shall direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such a manner and upon such terms as the Court or Judge shall think fit.”

We must say that we entirely disagree with this proposition of counsel. It is clear from the wording of Order 42A, rules 1 and 2 that service of an endorsed copy of the order of the Court on the person disobeying such order is an essential prerequisite and non-compliance with these rules renders the whole proceedings a nullity and the trial Court is bound to dismiss the application for the issue of the writ of attachment and sequestration as it has no discretion in the matter.

This point has been decided by this Court in the case of *Mouzouris and Another v. Xylophagou Plantations Ltd.*, (1977)* 7-8 J.S.C. 1209. That was a case where appellant No. 1 was sentenced to 45 days imprisonment for disobedience to an order of the Court and his wife appellant 2 was ordered to pay the costs of the application. The appeal of appellant 2 was allowed as service on her of an endorsed copy of the order was not effected personally on her but on her husband.

We are, therefore, of the view that the trial Court rightly dismissed the application of the appellant.

* To be reported in (1977) 1 C.L.R. 287.

We consider it unnecessary to deal with the other grounds of appeal which are directed against the dismissal of the appellant's application by the trial Court for other reasons.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs. 5