1981 April 22

[MALACHTOS, DEMETRIADES, SAVVIDES, JJ.]

KATERINA PAPANEOCLI AND OTHERS,
Appellants-Defendants,

v.

SOFRONIS SOLOMOU AND ANOTHER,
Respondents-Plaintiffs

(*Civil Appeal No.* 5406).

Findings of fact made by trial Court—Based on credibility of witnesses—Principles on which Court of Appeal intervenes

Retrial—Land case—Claim to restrain interference with land-Registration and plot numbers of lands affected, at time of trial not the same as those stated in the pleadings because of sub-division of certain plots and issue of new certificates of registration—No amendment of the pleadings—Evidence on which trial Court relied to reach its conclusions not type of evidence which would have been accepted—Retrial ordered—Section 25(3) of the Courts of Justice Law, 1960 (Law 14 of 1960).

This was an appeal against the judgment of the District Court of Paphos in a land case in which an order was made restraining the defendants from interfering with the property of the plaintiffs and directing them to remove any obstructions built by them thereon. At the same time a declaration was made that defendants 1 and 2 have a right of passage on foot and with their animals along the route of a water channel running over the property of the plaintiffs as specified in Action No. 204/49.

Though the parties were described in the pleadings as owners of certain plots of land at Emba village under registrations Nos. 7381 and 7382, both such registrations were not in existence at the time of the hearing of the action because in the meantime they had been substituted by new ones owing to the sub-division of one of the plots into two plots. At no stage of the proceedings, however, there was any application to the Court for

any amendment of the pleadings so that the properties would be described in the pleadings as sub-divided and in accordance with the records of the Land Registry Office.

In reaching its conclusions and making its findings of fact the trial Court based itself on the evidence of a civil engineer (P.W.2) who visited the properties in question, in the absence of the defendants, and prepared a plan showing the position of the channel as described in the settlement of Action No. 204/49. In preparing such plan he relied on what the plaintiff told him and he did not make any effort to verify on the spot where the channel was actually situated. The position of the channel in such plan was different from the position mentioned by plaintiffs and his witnesses and also contrary to the L.R.O. plan; and though an inspection of the locus in quo was carried out by the Court the position of the channel was not fixed on the plan at such local inquiry because nobody took the trouble to dig the channel and indicate to the Court the real position of the channel.

Upon appeal by the defendants:

Held, (1) though it is well settled that this Court will be reluctant to interfere with findings of fact of a trial Court based on the credibility of witnesses it will do so when satisfied that such findings are unsatisfactory or not warranted by the evidence as a whole.

(2) That the evidence on which the trial Court relied to find the position of the channel, was not the type of evidence which would have been accepted, especially in the light of the rest of the evidence called by the plaintiffs, and the plan prepared by the Land Registry clerk and which places the channel in a completely different position than that given by P.W.2 (the civil engineer); that the plan prepared by the said witness was not an accurate plan as to the exact position of the channel and was based on hearsay evidence provided by the plaintiffs.

(3) That what should have been considered by Counsel before the trial was an application for amendment of pleadings so that the description of the properties would correspond with the new registrations and, furthermore, a summons for directions should have been taken for a local inquiry by the Land Registry office in accordance with the pleadings, indicating the exact

position of the channel as existing on the spot in which case the right of passage could easily be defined, as its position over the channel is not disputed; that, therefore, in view of the above, there is no alternative but to set aside the finding of the trial Court and order a new trial; accordingly the decision of the trial Court is set aside and an order is hereby made for a new trial under section 25(3) of the Courts of Justice Law, 1960 which will necessarily have to take place before a differently constituted Bench.

Appeal allowed.
Retrial ordered.

Cases referred to:

Mylonas and Others v. *Kaili* (1967) 1 C.L.R. 77;

Moumdjis v. *Michaelidou and Others* (1974) 1 C.L.R. 226;

Georghiou v. *Georghiou* (1975) 1 C.L.R. 134;

Charalambides v. *HjiSoteriou and Sons and Others* (1975) 1 C.L.R. 269;

Charalambous v. *Pillakouris* (1976) 1 C.L.R. 198;

Charilaou and Another v. *HjiGeorghiou and Another* (1976) 1 C.L.R. 193;

Achillides v. *Michaelides* (1977) 1 C.L.R. 172;

Vassiliko Cement Works v. *Stavrou* (1978) 1 C.L.R. 389.

Appeal.

Appeal by defendants against the judgment of the District Court of Paphos (Laoutas, D.J.) dated the 1st February, 1975. (Action No. 1190/73) whereby they were restrained from interfering with plaintiffs' property and they were ordered to remove any obstructions built by them on the said property.

E. Komodromos, for the appellant.

A. Triantafyllides, for the respondent.

Cur. adv. vult.

MALACHTOS J.: The judgment of the Court will be delivered by Mr. Justice Savvides.

SAVVIDES J.: This is an appeal against the judgment of the District Court of Paphos in a land case in which an order was made restraining the defendants from interfering with the property of the plaintiffs and directing them to remove any obstructions built by them thereon. At the same time, a declaration

was made that defendants 1 and 2 have a right of passage on foot and with their beasts along the route of a water channel running over the property of the plaintiffs as specified in Action No. 204/49.

The plaintiffs are husband and wife and are described in the pleadings as owners of one-half share each, of plots 72, 75 and 78/1 at Emba village covered by Registration No. 7381. Defendants 1 and 2 are also husband and wife. Defendant 4 is their daughter and defendant 3 is the husband of defendant 4 Defendant 1 is described in the pleadings as the owner of plots 76 and 78/2 covered by Registration 7382. As it appears from the various *exhibits* before the Court, such registrations, both that in favour of the plaintiffs and that in favour of defendant 1, were not in existence at the time of the hearing because, in the meantime, they had been substituted by new ones. Also, plot 78/1 had been sub-divided into plots 78/1/1 and 78/1/2, the former registered in the name of the plaintiffs and the latter registered in the name of defendant 1. This took place shortly after the filing of the action and the completion of the pleadings. Such sub-division and new registrations were effected, according to what is recorded on the new title deeds, "as a result of amendment of title and cession of part to the road and also by virtue of an order of the Court in Action No. 817/70" At no stage of the proceedings there was any application to the Court for any amendment of the pleadings so that the properties as now existing as sub-divided to be described properly and in accordance with the records of the Land Registry Office. As a matter of fact, nowhere in the evidence or on the plans which were produced before the Court plots 78/1/1 and 78/1/2 are mentioned So, one cannot say as to what part of previous plot 78/1 which is mentioned in the pleadings is now plot 78/1/1 and which part of same is now plot 78/1/2. Defendant 1 also under the new registration appears as a registered owner of a right of way through plot 78/1/1.

The material part of the claim as set out by counsel for plaintiffs in a vague and poorly drafted pleading, reads as follows.

> "(2) The defendants acting under a common design and/or purpose and/or each one of them at the request and approval of the other and in any event unlawfully and arbitrarily claiming that they have such a right since September—

October 1973 started to pass by vehicles through their aforementioned yard and pass in 1973 on foot and by their animals instead of over the admitted right of passage over another part of the above property of the plaintiffs, changing the position and/or direction of their right of passage as same existed and was exercised by virtue of two judgments of the District Court of Paphos No. 204/49 and 817/70 between the predecessors in title and the present parties for the benefit of their property. The defendants by such unlawful and arbitrary change which they have created and by the arbitrary and unlawful erection of a stone staircase, part of which is on their property and part on the property of the plaintiffs, and for which plaintiffs reserve all their rights, they have made the yard of the plaintiffs useless and affect rights of the plaintiffs worth £50, they also caused damage of £3 by themselves or at the request, consent and approval of each other on or about 8.10.73 by the cutting of part of a fig tree with the ripe fruit which was on it which fruit was ready for sale. As a result of the said constructed obstruction on the right of passage, the exercise of such right by another person entitled to it has also been changed".

Counsel for defendants, very rightly, in our view, raised an objection in his defence that the claim as set out in the pleadings was vague and uncertain but he never took any steps to remove any uncertainty and the action went on for hearing on the pleadings as exchanged between the parties.

The dispute between the parties has a long history extending over a period of 30 years. It started with Action No. 204/49 which was an action brought by the predecessors in title of defendant 1 against the present plaintiffs and in which a settlement was reached, which, however, did not solve the differences between the parties. Another action was brought in 1970 under No. 817/70 by the present plaintiffs against the defendants 1 and 2 in which a new settlement was reached, but albeit not bound to last long, as three years later the present action was instituted by the same plaintiffs against defendants 1 and 2 with the addition, this time, of defendants 3 and 4. The history of the case is given in the judgment of the Court briefly as follows:

"The property under plot 78/1 and 78/2 was originally

one plot. This plot 78 which was by an application No. 5586/46 divided into the aforesaid plots. Plots. 72, 75 and 76 (*exhibit* 3) were held also in undivided shares and were divided under the same application. There used to be houses consisting of one room standing on the aforementioned plots. The previous owner of plot 76 as well as the residents of those houses used to go to their properties (houses) through an entrance (gate) on the eastern side near plot 74 (*exhibit* 3) and proceed along a route close to their houses. The doors of these rooms (houses) before demolition, were facing the yard of plot 78/1. A dispute arose between Georghios Theophanous the predecessor in title of plot 76 and plaintiff No. 2 in the present action, over a water channel and rights conducting water therefrom. Action No. 204/49 was instituted which was finally settled. That judgment which binds the parties defined the route, the water channel would follow. This is specifically stated in para. 1 of the settlement, *exhibit* 2 which reads as follows:

> 'The plaintiffs to build within two months from today at their own expense, a covered channel for conducting their water through the defendants' yard in the following direction:
>
> The channel to start at a point of 2 ft. away from the south-east corner of the new plot 74 on a sketch which is produced and marked 'A' and to proceed therefrom in a straight line across defendants' yard southways, so that at the door of the room to be 9 ft. away from that door'.

Plots 78/1/1 and 72 which belong to plaintiffs 1 and 2 are subject to a right of way in favour of plot 76/1, 78/1/2 and 78/2 the property of defendant 1. This appears on the title deed of plaintiffs, *exhibit* 1.

In 1960 most of the rooms were demolished by the Administration and most of the land was taken up for the construction of a public road (*exhibit* 3). The room standing on plot 76 was rebuilt but in a different position than the original one. It was built 4 ft. inwards, so that part of it covered a portion of the property of the plaintiffs and part extending into plot 78/2. A verandah was also

built, as well as staircase. These were built on the property of the plaintiffs.

A new action was instituted, viz. Action No. 817/70 by the present plaintiffs against the present defendants Nos 1 and 2 for trespassing. That action was settled after it had been partly heard. The proprietory rights of the parties were settled, the boundaries of the respective properties were defined. Their respective title deeds were accordingly amended to conform with the terms of settlement. Defendants 1 and 2 in order to get inside their house (room) they had to use the staircase indicated by colour green on *exhibit* 3".

Then, the trial Judge proceeds in his judgment to find that defendant 3 uses the space between the fence and the staircase to drive his car to his house which is standing on a different plot than plots 76 and 78/2.

One important issue before the trial Judge was the position of the passage which appears on the registration of defendant 1 over plot 78/1/1 belonging to the plaintiffs and, also, whether this right of way entitles the defendants to make use of such passage for driving their tractors or cars through the passage or whether such passage is only for use on foot and by animals.

A number of witnesses was called by both parties who gave evidence in respect of the position of the water channel and the position of the passage. No local inquiry was carried out by the Land Registry Office in accordance with the pleadings and with a proper plan to be produced to the Court, showing the disputed passage and the position of the channel and also the various properties in question not as referred to in the pleadings but as described in the new registrations which cover the new plots into which the previous plots were sub-divided, and the distance between the fence and the verandah built by the defendants or the part of the verandah and the stairs alleged as having been built by the defendants on plaintiffs' property or any other details material to the present action.

The trial Judge after hearing the evidence he accepted the version of the plaintiffs and rejected that of the defendants and proceeded at page 41 of the record as follows:

"I have examined thoroughly and in detail the evidenc

adduced before me. I had also an opportunity to watch very closely the demeanour of the witnesses in the witness box. I accept, on the balance of probabilities, the evidence of plaintiff No. 1 and his witnesses. P.W.4, Georghios Ellinas impressed me as a truthful witness. I consider him as an independent witness and a person who tried to help the Court in administering justice.

On the other hand, and I say this with great regret, defendant 2 impressed me very poorly in the witness box. I do not wish to comment on his evidence as that would be very embarrassing and difficult task for me. The evidence of this witness conflicts in a material particular with the evidence of D.W.2, the D.L.O. clerk. According to the evidence of this witness the new house was built about 4 feet inside plots 78/1 and 78/2, whereas defendant 2 alleged, and this was also alleged by the rest of his witnesses, the new house was built on the old foundations. All those who testified the above including defendant 2, tried, in my opinion, unsuccessfully, to substantiate their allegations by saying that the new house (room) was shorter by 6 feet. This allegation I completely reject as unsound and put forward only with the object of easing the unpleasant position the defendant No. 2 and his witnesses have created. The evidence of defendant witness 3 contradicts and conflicts with that of D.W.4. I consider the evidence of D.W.4 as prejudicial because, as he conceded in cross-examination, he is not on good terms with plaintiff No. 1. He must have been biased and a person who tried to help those who summoned him and not the Court in finding out the true facts".

And further down in his judgment the trial Judge said:

"Having directed my mind to the evidence before me, and the contents of the previous settlements which have been made rules of Court, I shall proceed to make my own findings.

.....

It is clear and this is corroborated from the evidence of defendant 2 and his witnesses that the right of way was along the same route as that of the water channel

and in effect the water channel was covered so as to be used as a passage.

I accept the evidence of P.W.2 who prepared the plan (*exhibit* 3) the measurements of which were taken in accordance with the terms of settlement reached in Action No. 204/49. I do find as a fact that the route of the underground water channel should have been along A. and B. (*exhibit* 3). This route is underneath the steps leading to the verandah of the house of defendants 1 and 2. This is necessarily so, due to the original position of the house of defendants 1 and 2 after it had been demolished and built afresh. I find also as a fact that the predecessor of the house of defendants 1 and 2 used to shelter his beasts in the stable standing thereon and in doing so, he used to follow the track from the existing gate in a straight line and not moving away from it, then taking a diversion, as alleged by the defendants. The learned counsel of defendants in his final address submitted that the route of the right of way has not been defined in either of the two previous judgments, he proceeded, however, to add that the right was until 1970 exercised over the existing water channel which is near the wire fence facing the yard of the plaintiffs. I am in agreement with the learned counsel so far as the first limb of the above submission is concerned. Having regard to the evidence before me and particularly of the evidence of P.W.2, I disagree with the second limb of the submission. It is abundantly clear and this has not been seriously challenged that the wire fence is at a considerable distance from the track of the water channel. A perusal of *exhibit* 3 sufficiently substantiates the above finding. It follows from what is hereinabove stated, that the route of the right of passage was over the existing water channel".

It is well settled that this Court will be reluctant to interfere with findings of fact of a trial Court based on the credibility of witnesses unless satisfied that such findings are unsatisfactory or not warranted by the evidence as a whole. (Vide, *inter alia, Mylonas & Others* v. *Kaili* (1967) 1 C.L.R. 77, *Moumdjis* v. *Michaelidou & Others* (1974) 1 C.L.R. 226, *Georghiou* v. *Georghiou* (1975) 1 C.L.R. 134, *Charalambides* v. *HjiSoteriou*

& Sons and Others (1975) 1 C.L.R. 269, *Charalambous* v. *Pillakouris* (1976) 1 C.L.R. 198, *Charilaou and Another* v. *HjiGeorghiou & Another* (1976) 1 C.L.R. 193, *Achillides* v. *Michaelides* (1977) 1 C.L.R. 172 and *Vassiliko Cement Works* v. *Stavrou* (1978) 1 C.L.R. 389).

The question, therefore, which poses before us is whether in the present case the findings of fact of the trial Judge are satisfactory and warranted by the evidence accepted by him.

It is evident that in reaching his conclusions the trial Judge based himself on the evidence of P.W.2, a civil engineer from Paphos who visited the property at the request of the plaintiffs in the absence of the defendants and who prepared a plan showing the position of the channel as described in the settlement of Action No. 204/49. In preparing his plan he relied on what the plaintiff told him about the position of the rooms existing at the time when Action No. 204/49 was instituted and which, at the material time when this witness visited the properties, were not in existence. He did not carry out any investigation to find out if there were any signs of the rooms mentioned in the settlement in Action No. 204/49, nor did he make any effort to verify on the spot where the channel was actually situated. He simply relied on what the plaintiff told him as to the position of the old rooms and on such basis he drew an imaginary line indicating the position where the channel should have been. P.W.2 shows in his said plan (*exhibit* 2) that the channel must be passing under the verandah of the house built by defendants 1 and 2. He is giving the distance of such channel on his plan as being 15 ft. away from the fence erected by plaintiffs on their property. Such position, however, is different from the position mentioned by plaintiffs and his witnesses, and also contrary to the L.R.O. plan prepared at the local inquiry in Action No. 817/70.

Plaintiff himself in cross-examination stated that the position of the channel on the land was not as described in the judgment in Action No. 204/49 but in a different one and it has always been in the same position and it was in that channel that defendants placed the pipes and they covered same with cement slabs. This is what appears in the evidence of plaintiff 1:

> "I do not agree with the judgment of the Court in Action No. 204/49. The defendants did not direct the water

from the channel indicated in that action. The water channel is in the same place as it was originally directed".

P.W.4, Georghios Ellinas, in cross-examination said that the position of the water channel was about 3–4 ft. from the fence. Also, P.W.5, Antonis Ellinas, described the position of the channel as being at a distance of 4–5 ft. from the fence, and in cross-examination he said that the channel was about 4 ft. all along the length of the fence, that is, in a parallel line to the fence. The evidence of these two witnesses for the plaintiff who knew the exact position of the channel, place it at a maximum distance of 4–5 ft. parallel to the fence and not in a position of 15 ft. away from the fence as indicated theoretically on the plan of P.W.2. When a local inquiry was carried out in Action 817/70 which was instituted after the defendants had constructed the verandah and the staircase alleged to stand on the property of the plaintiffs, the Land Registry clerk prepared a sketch plan which was *exhibit* 1 in that action. The position of the channel is shown on such plan as being parallel to the fence and not passing under the stairs of the verandah. It is clear from all this evidence that the plan prepared by P.W.2 is not an accurate plan as to the exact position of the channel and was based on hearsay evidence provided by plaintiffs on which evidence he tried to adopt his plan in the light of the decision in Action No. 204/49.

What has also escaped the attention of the trial Judge is that whatever settlement was reached in Action No. 204/49 merged in a new settlement which was reached by the parties in Action No. 817/70 which reads as follows:

"1. The litigants agree that the boundaries of their properties are those which have been fixed by the D.L.O. as indicated on *exhibit* 2.

2. The plaintiffs submit to an order for the amendment of their title deed No. 7381 so that the part of the land on which part of the room of the defendants has been built, coloured brown on *exhibit* No. 1 to be excluded and to be transferred and included in the title deed of the defendants No. 7382. The defendants will pay £20.—in consideration of the above, within one month from to-day.

3. The defendants undertake to demolish the verandah and the steps which are outside the above mentioned rooms, within three months from today. They submit to an order not to interfere with the property of the plaintiffs regarding the land on which the steps and the verandah are situated.

4. The plaintiffs acknowledge to the defendants a right for the conduct of water for the irrigation of their properties through the existing ditch covered with concrete. The defendants undertake to project the existing pipe, in the above ditch, until the boundary of plot 78/2 as shown on *exhibit* 2, and cover the pipe with a slate of concrete cement. This is to be completed within three months from today.

5. The right of way of the defendants to remain the same as the one which has been indicated by D.L.O. and is referred in the title deed of the defendants. The route of the right as shown on *exhibit* No. 1 is to be disregarded.

6. The defendants to pay £25.—towards plaintiffs' costs. COURT: Paras. 1, 4 and 5 above become a Rule of Court. Order as per paras. 2 and 3 above. Judgment for £25.—towards plaintiffs costs".

Part of the settlement in Action No. 817/70 and in particular paras. 1, 4 and 5 above were made a rule of Court, whereas an order was made in accordance with paras. 2 and 3 directing the parties to take certain steps to comply with the said order. The order made under para. 3 was to the effect that the defendants were not to interfere with the property of the plaintiffs regarding the land on which the steps and the verandah were built and also to demolish the verandah and the steps within three months from such date. Therefore, what the trial Judge mentioned in his judgment that the terms of settlement in both actions were made a Rule of Court, is not correct, as there was a specific order in Action No. 817/70 directing the defendants to demolish the verandah and the staircase which they had erected and to stop interfering with the plaintiffs' property. The plaintiffs could have enforced such order by taking steps

against the defendants for disobeying same instead of making it an issue in the present action.

We agree with the submission made by counsel for the respondents that this case was very simple once the right of way is admittedly over the water channel. All disputes in the present action could have very easily been resolved, if the position of the channel was fixed on the plan at a local inquiry properly carried out for such purpose and in accordance with the pleadings in the present action and not by relying on assumptions as to where the channel might have been. Though an inspection of the locus in quo was carried out by the Court, nobody took the trouble at such local inspection to dig the ground and indicate to the Court the real position of the channel, once no local inquiry was carried by the Land Registry Office for the purposes of the action. The evidence of P.W.2 Raftis and the contents of *exhibit* 3 on which the Court relied to find out the position of the channel, was not the type of evidence which would have been accepted, especially in the light of the rest of the evidence called by the plaintiffs, to which we have already referred, and the plan prepared by the Land Registry clerk as a result of the local inquiry in Action No. 817/70 and which places the channel in a completely different position than that given by P.W.2.

Coming to part A. of the judgment of the Court whereby an order was made restraining the defendants from in any way interfering with the property of the plaintiffs, no mention is made as to the property over which the defendants. are restrained to interfere. This was essential, in view of the fact that the description of the property as given in the statement of claim is different from that really existing at the time of the hearing of the action, in view of the sub-division of plot 78/1 into two plots.

As to the declaration made under paragraph B. we have to observe that in the declaration made under such paragraph, defendants 1 and 2 are described as owners of plot 76, 78/1 and 78/1/2. This declaration is manifestly wrong, in view of the fact that plot 78/1 according to the statement of claim is alleged as belonging to the plaintiffs and not the defendants. Furthermore, defendant 2 is nowhere mentioned as owner

of any of the plots referred to in the said declaration but only defendant 1 is mentioned as the owner of plots 76 and 78/2.

In the present case we find that what should have been considered by counsel before the trial was an application for amendment of pleadings so that the description of the properties would correspond with the new registrations and, furthermore, a summons for directions should have been taken for a local inquiry by the Land Registry Office in accordance with the pleadings, indicating the exact position of the channel as existing on the spot in which case the right of passage could easily be defined, as its position over the channel is not disputed.

In view of the above, we have no alternative but to set aside the finding of the trial Court and order a new trial. The decision, therefore, of the trial Court is set aside and an order is hereby made for a new trial under section 25(3) of the Courts of Justice Law, 1960 which will necessarily have to take place before a differently constituted Bench.

Regarding costs, we order that all costs in these proceedings here and in the Court below, should be costs in the cause.

The appeal thus succeeds to the extent stated in this judgment.

Appeal partly allowed. Retrial ordered. Order for costs as above.