1982 November 29

[L. LOIZOU, DEMETRIADES, PIKIS, JJ.]

NITSA K. MILTIADOUS,

Appellant-Plaintiff,

v.

KRITON MILTIADOUS,

Respondent-Defendant.

(*Civil Appeal No.* 6305)

Husband and wife—Property—Matrimonial home—Husband sole legal owner—Wife contributed to the acquisition of the site and erection of the building—Wife claiming ownership of one half share—Legal ownership by husband of the whole of the property held to be subject to a trust over the property for the benefit of the wife, to the extent of one sixth having regard to the extent of her contribution.

Costs—Discretion of the Court—Outcome of the case though the first consideration to which the Court must have regard not the only one.

Shortly after their marriage in 1966 the parties planned the building of a house for the needs of the family; and they made a concerted effort in that direction by joining efforts and pooling their resources for the common purpose. When the parties separated in 1976 the property was registered in the name of the husband. By means of an action the appellant-wife claimed a share in the property and prayed for a declaration acknowledging her as the owner of one half share in the property in virtue of an agreement between the parties, or her contribution to the acquisition of the site and the erection of the building.

The trial Court, after making detailed reference to the conflicting contentions, held that both parties made a contribution to the acquisition of the house but concluded that the contribution of the wife was meagre in comparison to that of the husband, estimated at one sixth of the whole cost; and made a declaration acknowledging the interest of the wife in the property.

Accordingly, legal ownership by the husband of the whole of the property was held to be subject to a trust over the property, for the benefit of the wife, to the extent of one sixth. Therefore, the husband was declared to be answerable as trustee for the interest of his wife in the property. The Court judged it appropriate, for the sake of avoiding further complexities in the ownership of the property to refrain from ordering registration of the share of the wife in her name. Legal ownership, the trial Court held, is not the only passport to the acquisition of an interest in land. Equitable interests, arising from a trust relationship, are susceptible to precise definition, and in appropriate circumstances may become the subject of registration. Regarding costs the trial Court left each party to pay his own costs.

Upon appeal the wife has not challenged the legal premises upon which apportionment was effected but disputed the apportionment made by the trial Court on the ground that it was unfair having regard to the contribution of the parties, being unwarranted by the evidence adduced before the trial Court. Also, appellant questioned the propriety of the order made for costs.

Held, (1) that the apportionment is dependent on the contribution made by each party, direct or indirect; that it was open to the trial Court in the light of the evidence before it to find as it did; accordingly the appeal must fail.

(2) That the question of costs is a matter of judicial discretion to be exercised judicially in the light of the facts of the case; that though the outcome of the case is the first consideration to which the Court must have regard it is not the only one; that the conduct of the parties is also relevant particularly the height of the claim considered in juxtaposition to the amount awarded; that whereas in this case the outcome turned in favour of the appellant, what was achieved was meagre in comparison to what was claimed; and to that extent, appellant was held, as it may be inferred, "partly responsible for the costs occasioned"; that the order ultimately made, mitigated the costs incurred by respondent on account of the inflated claim of the appellant; that consequently, this part of the appeal fails as well.

Appeal dismissed.

Cases referred to:

Odysseos v. A. Pieris Estates Ltd. and Another (1982) 1 C.L.R. 557;

Gissing v. Gissing [1970] 2 All E.R. 780;

Falkoner v. Falkoner [1970] 1 W.L.R. 1333;

Cooke v. Head [1972] 2 All E.R. 38;

Kowalczuck v. Kowalczuck [1973] 2 All E.R. 1042;

Williams & Glyn's Bank v. Boaland [1979] 2 W.L.R. 550;

Dennis v. McDonald [1981] 2 All E.R. 632;

Papakokkinou v. Gunther (1982) 1 C.L.R. 65 at p. 79.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Stylianides, P.D.C. and Fr. Nicolaides, D.J.) dated the 20th August, 1981 (Action No. 5144/77) whereby it was declared that the defendant holds in trust for the plaintiff the 1/6th share (1/12th of the whole) of the property covered by Reg. No. D.312 dated 12.11.1968.

G. Papatheodorou, for the appellant.

A. Markides, for the respondent.

Cur. adv. vult.

L. Loizou J.: Having heard counsel for the appellant, we consider it unnecessary to hear the respondent in reply. The appeal must be dismissed. Mr. Justice. Pikis will deliver the judgment of the Court.

Pikis J.: The break-up of the marriage of the parties in 1976 led to a number of disputes including one concerning the ownership of the matrimonial house at Pallouriotissa, Nicosia. Shortly after their marriage, in 1966, or possibly earlier during their engagement, the parties planned the building of a house for the needs of the family. They made, it seems, a concerted effort in that direction, joining efforts and pooling their resources for the common purpose. When the parties separated in 1976, the property was registered in the name of the husband and co-owner who had built a house on the adjoining site. What really happened was that the site, on which the house of the parties was built, belonged to the husband and the third party, as co-owners, each having built a house on his portion of the site.

The appellant, the wife, claimed a share in the property and raised the present proceedings for a declaration, acknowledging her as the owner of one half share in the property in virtue of an agreement between the parties, or her contribution to the acquisition of the site and the erection of the building, and an order for the amendment of the register accordingly. The husband disputed her claim, maintaining he had shouldered the sum total of the financial commitments for the acquisition of the property. The case was hotly contested and conflicting evidence was adduced as to the contribution and the efforts of the parties for the acquisition and setting up of their family home.

The trial Court, after making detailed reference to the conflicting contentions, decided that both parties made a contribution to the acquisition of the house but concluded that the contribution of the wife was meagre in comparison to that of the husband, estimated at one sixth of the whole cost. Thereupon, a declaration was made acknowledging the interest of the wife in the property. Accordingly, legal ownership by the husband of the whole of the property was held to be subject to a trust over the property, for the benefit of the wife, to the extent of one sixth. Therefore, the husband was declared to be answerable as trustee for the interest of his wife in the property. The Court judged it appropriate, for the sake of avoiding further complexities in the ownership of the property given the interest of the thrid party, to refrain from ordering registration of the share of the wife in her name. Legal ownership, the trial Court held, is not the only passport to the acquisition of an interest in land. Equitable interests, arising from a trust relationship, are susceptible to precise definition, and in appropriate circumstances may become the subject of registration. The trial Court correctly observed that s.4 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 expressly exempts trusts from the network of the law, a proposition recently affirmed by the Supreme Court in *Odysseos v. A. Pieris Estates Ltd. and Another* (Civil Appeals Nos. 6427-28 - Judgment delivered on 25.10.82 - not yet reported).*

On the authorities of *Gissing v. Gissing* [1970] 2 All E.R. 780, *Falkoner v. Falkoner* [1970] 1 W.L.R. 1333, and subsequent cases affirming the same principle, the learned trial Judges found that jurisdiction vests in the Courts to pronounce the

* Now reported in (1982) 1 C.L.R. 557.

owner in law of immovable property as holding part or the whole as a trustee for the benefit of others, where the relationship between the legal owner and the beneficiary is such as to justify the imputation of a resulting, implied or constructive trust. The evolution of the law, after *Gissing*, supra, is followed by Lord Denning in his book on "*The Due Process of Law*", at p.235 et seq. The evolution was accomplished by reference to the law of trusts, one of the most fruitful trees in the orchard of English law, as the learned author observes. The existence of a trust has been implied whenever spouses or couples in co-habitation have made a joint contribution to the setting up of a house for common use. (See, *Cooke v. Head* [1972] 2 All E.R. 38; *Kowalczuck v. Kowalczuck* [1973] 2 All E.R. 1042; *Williams & Glyn's Bank v. Boaland* [1979] 2 W.L.R. 550; *Dennis v. McDonald* [1981] 2 All E.R. 632).

A trust is deemed to arise upon the coincidence of two things:-

(a) The pooling of resources and/or the exertion of efforts for the acquisition of immovable property, provided the contribution made by each is substantial; and

(b) the existence of such a relationship as to justify the attribution of a common intention to enjoy the use of the property together.

Thereafter, if co-habitation is terminated and the object of the enterprise is frustrated, equity requires a fair apportionment according to the contribution of each to the acquisition of the property.

The appellant has not challenged the legal premises upon which apportionment was effected but disputed the apportionment made by the Court on the ground that it is unfair, having regard to the contribution of the parties being unwarranted by the evidence adduced before the trial Court. In the submission of counsel for the appellant the wife was entitled to a greater portion of the common venture.

The apportionment is dependent on the contribution made by each party, direct or indirect. Indirect contributions, may, in appropriate circumstances, take the form of the assumption of family burdens by one party, usually the wife, that makes possible the release of funds for the finance of the acquisition.

Counsel for the appellant was well aware of the difficulties that lay in the path of persuading this Court to distrub the findings of fact arrived at by the trial Court after evaluation of the evidence before it. He argued, however, that certain findings were unwarranted by the evidence, particularly the findings of the trial Court, pertaining to the credibility and temperament of the wife. Our attention was drawn to the absence of any complaint on the part of the husband about the character or disposition of his wife. The findings of the trial Court, rest on the impression formed by the Court about the temperemanet and disposition of the wife and her mother, and the lack of credibility of parts of their evidence, as the trial Court discerned, on a consideration of the evidence as a whole. They were poorly impressed by the professed unawareness on the part of the wife of the fact of registration of the building site in the name of her husband, an improbable eventuality of affairs given her interest in property matters. In the judgment of the Court, she affected unawareness in order to play down the implications of the facts surrounding the acquisition of the building site by her husband.

Another complaint about the findings of the trial Court, concerns the repayment of a loan to a co-operative society. Whereas the loan was jointly contracted, the Court found that it had been essentially repaid by the husband. This finding was, in the submission of the appellant, unwarranted in law on the basis of a statement in *Underhill's Law of Trusts a d Trustees* - 13th ed., pp.274-75, resting his submission on the obligations in law of co-debtors. Nothing that is said in *Underhill* creates anything like an irrefutable presumption that a joint debt is jointly repaid by the debtors making an equal contribution for the repayment. It was perfectly open to the Court in the light of the evidence before it to find as they did, that the husband basically assumed responsibility for the repayment of the debt. All that is stated in *Underhill,* supra, underlines the obligations in law of co-debtors.

Lastly, the appellant questioned the propriety of the order made for costs, leaving each party to pay his costs in litigation - "No order as to costs.". In support of his submission, he relied on the decision in *Papakokkinou v. Gunther* (1982) 1 C.L.R. 65, 79. Far from supporting his submission, the ex-

position of the law, made on the subject of costs in the aforesaid case, tends to support the order made by the trial Court. Costs, it was there held, is a matter of judicial discretion to be exercised judicially in the light of the facts of the case. The outcome of the case is the first consideration to which the Court must have regard, but not the only one. As we said in that case,

> "the conduct of the parties is also relevant, particularly the height of the claim considered in juxtaposition to the damages awarded. Where the plaintiffs have, by their conduct, occassioned part of the costs of the proceedings, it is legitimate for the trial Court to deprive them of part or the whole of their costs ....."

The same holds good in this case. Whereas the outcome turned in favour of the appellant, what was achieved was meagre in comparison to what was claimed. And to that extent, appellant was held, as we may infer, partly responsible for the costs occasioned. The order ultimately made, mitigated the costs incurred by respondent on account of the inflated claim of the appellant. Consequently, this part of the appeal fails as well. Accordingly, the appeal is dismissed. Respondent limited his claim for appeal costs to out of pocket expenses, amounting to £16.-. Appellant is adjudged to pay £16.- costs.

Appeal dismissed. Order for costs as above.