

1983 May 4

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

ANDREAS DEMETRIOU AND OTHERS,

Appellants-Defendants,

v.

GEORGE PRODROMOU,

Respondent-Plaintiff.

(*Civil Appeal No. 5374*).

Practice—Probate action—Filing of an affidavit is a condition precedent to the valid initiation of the proceedings—Rule 13 of Order 2 of the Civil Procedure Rules mandatory.

5 *On the question whether the provisions of rule 13* of Order 2 of the Civil Procedure Rules are of a regulatory or a mandatory nature:*

10 *Held, that the rule is plainly mandatory; that in probate actions the filing of an affidavit as provided in Order 2, rule 13 is a condition precedent to the valid initiation of the proceedings; and that, therefore, the failure of the respondent to comply with the aforesaid rule renders the proceedings abortive.*

Appeal allowed.

Cases referred to:

- 15 *Re-Pritchard (deceased)* [1963] 1 All E.R. p. 873;
Lysandrou v. Schiza and Another (1979) 1 C.L.R. 267;
Evagorou v. Christodoulou and Another (1982) 1 C.L.R. 771.

Appeal.

20 **Appeal by defendants against the order of the District Court of Nicosia (Stavrinakis, P.D.C. and Papadopoulos, S.D.J.) dated the 19th December, 1974 (Action No. 742/74) whereby their application for the dismissal of the action against them**

* Rule 13 reads as follows:

"13. The sealing of a writ of summons in probate actions shall be preceded by the filing of an affidavit by the plaintiff, or one of the plaintiffs, in verification of the indorsement on the writ".

for failure to comply with rule 13 of Order 2 of the Civil Procedure Rules was dismissed.

A. Triantafyllides with *A. Danos*, for the appellants.

L. N. Clerides, for the respondent.

Cur. adv. vult. 5

L. LOIZOU J.: The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: Preliminary to examination of the merits of the dispute of the parties, the Court took cognizance of legal objections to the validity of the proceedings, objections that were dismissed after due consideration of the rival submissions. The defendants contended that the proceedings were void because of (a) improper initiation of the proceedings vitiating their validity and (b) so far as the alternative claim is concerned, the appointment of an administrator was not possible before resealing. 19
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The Full Court of Nicosia dismissed objections to validity. With regard to (a) above, they held that the rule contained in Order 2, rule 13 is of regulatory nature and that the procedural requirements envisaged therein are not a condition precedent to its validity. They discussed at length the background to the rule and reasons for its enactment associated, it seems, with the existence of separate divisions of the High Court in England. In England the rule has been altered and so far as we may gather from the judgment of the trial Court no valid reason exists for giving it mandatory force. 20
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The case of *Re-Pritchard (deceased)* [1963], 1 All E.R. p. 873) a most important decision with regard to the force of procedural rules is discussed in the judgment of the trial Court. The learned Judges overlooked, it seems to us, with respect, one of the categories of cases that are listed as rendering proceedings void; the class that concerns proceedings that never came to being because of a fundamental defect in their issuing. 30

Indeed this is the case before us. For Or. 2, r. 13 expressly lays down that probate actions shall be preceded by the filing of an affidavit by the plaintiff or one of the plaintiffs in verifying actions by the indorsement of the writ. 35

We feel, it is unnecessary to go any further than reciting the rule plainly mandatory on a consideration of its wording, particularly the employment of the phrase "shall be preceded". It is settled that where a regulation is set in mandatory terms and observance of its provisions is made a condition for the validity of the proceedings the Court has no discretion to relax it. See *Lysandrou v. Schiza and Another* (1979) 3 C.L.R. 267 and *Evagorou v. Christodoulou and Another* (1982) 1 C.L.R. 771. Whatever the rationale behind this rule may have been in probate actions the filing of an affidavit as provided in Or. 2, r. 13 is a condition precedent to the valid initiation of the proceedings. The failure of the respondent to comply with the aforesaid rule, renders these proceedings abortive.

They were never properly initiated. Consequently the proceedings in their entirety were void. This being the result, it is unnecessary to discuss the implications of resealing.

The appeal succeeds. It is allowed with costs against respondent.

Appeal allowed with costs.