1983 October 26

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

SAVVAS YIANNI VALANA,

Appellant-Plaintiff.

v.

ANGELIKI NICOLA ELIA,

Respondent-Defendant.

AND

THE ATTORNEY-GENERAL OF THE REPUBLIC,

Respondent-Third-Party.

(*Civil Appeal No.* 6190).

Immovable Property—Right of way—Prescription—Thirty years user without interruption—Section 11(1)(*b*) *of the Immovable Property (Tenure, Registration and Valuation) Law, Cap.* 224—*Strip of land over which respondent exercised a right of way was from* 1938 *to* 1971 *registered as public road to the knowledge of both parties—This fact deprived owner of the land to object to respondent's making use of the said strip of land and, also, to take steps to prevent her from passing over it—Nature of the right exercised by respondent and her predecessors not such as to amount to a right envisaged by the above section* 11(1)(*b*) *of Cap.* 224.

In an action by the appellant-plaintiff for damages for trespass and for an injunction restraining the respondent-defendant from trespassing upon his property the trial Judge held that the respondent and her predecessors in title were exercising a right of way over the disputed strip of land since 1930, and that the fact that the said strip of land was registered by mistake as a public road from 1938 to 1971 had no effect because once such registration was made by mistake, which was subsequently amended it was null and void ab initio in view of the provisions of section 61* of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224; and that, therefore, the exercise of a right of passage by the respondent continuously for over

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* This section is quoted at p. 736 post.

30 years entitled her to have such right over the land of the appellant registered in favour of her property.

In deciding as he did the trial Judge relied on section 11(1)(b) of Cap. 224 which provides as follows:

"11. (1) No right of way or any privilege, liberty, easement, or any other right or advantage whatsoever shall be acquired over the immovable property of another except—.....

.....

(b) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption; provided that the provisions of this paragraph shall not apply to any immovable property which is Crown property or property vested in the Crown".

Upon appeal by the plaintiff:

Held, that since the disputed strip of land over which the respondent exercised a right of passage was since 1938 till 1971 registered as public road to the knowledge both of the appellant and the respondent, this fact deprived on the one hand, the appellant of any right to object to the respondent's making use of such passage, and on the other hand, to take any steps to prevent her or her predecessors in title from passing over such strip of land; that the nature of any right exercised by the respondent and her predecessors in title over the disputed strip of land during the years 1938–1971, was not such as to amount to a right envisaged by section 11(1)(b) of Cap. 224; and that as the full period of 30 years of user without interruption has not been established, the respondent could not acquire such right; accordingly the appeal must be allowed.

Appeal allowed.

Cases referred to:

Valana v. *Republic*, 3 R.S.C.C. 91;

Shemmedi v. *Shemmedi*, 16 C.L.R. 85;

Demetri v. *Kleanthi and Another*, 18 C.L.R. 141;

Voskou v. *HjiPetri*, 1964 C.L.R. 21 at pp. 26, 27;

Dalton v. *Angus* [1881] 6 A.C. 740 at pp. 773, 774;

Chaplin & Co. Ltd. v. *Westminster Corporation* [1901] 2 Ch. 329;

Dikomiti and Another v. *HjiKolos and Another*, 24 C.L.R. 53.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 30th September, 1980 (Actions Nos. 4795/75 and 2119/72) whereby it was adjudged that the defendant was entitled to a right of way over plaintiff's property.

A. Ladas, for the appellant.

N. Pelides, for the respondent.

Gl. HadjiPetrou, for the third-party.

Cur. adv. vult.

TRIANTAFYLLIDES P.: 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 Nicosia in two actions brought against the respondent for trespass and damages, which were consolidased and heard together. By the first action No.2119/72 the appellant claimed £74.- damages for trespass and an injunction restraining the respondent from trespassing upon his property. By the second action No. 4795/75 the appellant claimed an order of the Court directing the respondent to remove any structures erected on his property and for an injunction restraining her from trespassing upon his property. The respondent by a counterclaim in Action No. 4795 claimed a right of passage over the disputed strip of land, alleged as having been exercised by her and her predecessors in title for over thirty years, and, also, for an injunction restraining the appellant from interfering with the exercise by the respondent of such right. Also, by a third party notice issued by leave of the Court, the respondent joined as a third party the Attorney-General of the Republic on behalf of the Republic of Cyprus, claiming against him a declaration that the disputed strip of land which was registered in the name of the appellant by the third party is part of the public road and that the action of the third party to transfer it in the name of the appellant, was illegal. In the alternative, damages were claimed by the respondent against the third party.

By his judgment the trial Judge found that the respondent had acquired a right of way by prescription over the disputed strip of land and made a declaration accordingly with an injuction restraining the appellant from interfering with such

right of passage of the respondent. The Court further found that certain structures which had been erected by the respondent on the said strip of land constituted a trespass over the land of the appellant and he gave judgment in favour of the appellant restraining the respondent from trespassing upon the property of the appellant otherwise than by exercising her right of way as found by him and directing her to remove the part of a staircase and of a verandah which she had erected on the land of the appellant. By the same judgment, the proceedings against the third party were dismissed.

The appellant filed the present appeal against that part of the judgment, whereby the respondent was found and adjudged as entitled to a right of way over his property.

The grounds of appeal as finally formulated before this Court, were to the effect that the trial Court erred in adjudicating that respondent is entitled to a right of way through appellant's property and that on the evidence adduced, no such right has been proved because in view of the fact that the strip of land of the appellant over which the alleged right of way was exercised, had, mistakenly, been registered in the books of the L.R.O. as being part of a public road and stood so registered from 1938 until 1971 when the error was rectified the respondent could not acquire any easement by way of prescription over land registered in the name of the Government. It was further submitted that the Court exercised its discretion in a defective and/or wrong manner in not awarding costs in favour of the appellant.

In the course of the hearing of the appeal, counsel for respondent filed an application for extension of time to file an appeal against that part of the judgment of the trial Court, whereby the third party proceedings were dismissed and for leave to file an appeal out of time. Such application was later withdrawn and, therefore, the dismissal of the proceedings against the third party, stands unchallenged.

The facts of these cases as appearing from the record of the proceedings and from the various exhibits, are as follows:

The appellant is the registered owner of a plot of land at Platanistassa village which is adjacent to that of the respondent. When a survey for the purposes of general registration took

place in the years 1924 and 1926, the disputed strip of land was found to be part of the property of the appellant and was so recorded in the field record. In the year 1938, when appellant filed an application to the Lands' Department under No. A 1549/38, for the registration in his name of his property, as found at the survey for the purposes of general registration, after a local inquiry was carried out by the Lands Office for the purposes of such application, the disputed strip of land was found by the clerk who carried out such inquiry, as part of the public road and was so registered. The respondent, according to the findings of the trial Court, was using the disputed strip of land, by herself and her predecessors in title, as a passage for her property since 1930.

The title deeds issued by the Lands Office in 1938 described the disputed strip of land as part of the public road and as such boundary of the appellant's property on one side and also as boundary of the respondent's property on the northern side. The appellant never consented to such action on the part of the Lands Office, and was disputing that such strip of land was part of the public road.

Plot 1274/1/1 of an extent of 1225 sq. ft. covered by Registration No. 14189, was, at the time when the two actions were brought by the appellant, registered in the name of the respondent. At the survey carried out for the purposes of the general registration in 1924 - 1926, such plot was part of another plot of a larger area, Plot 1274 which was recorded in the Field Book as belonging to the heirs of HadjiDemetri Fella of Platanistassa. Subsequently, it was registered under Registration No. 7307 of which 1/7th share was registered in the name of the heirs of Savva HadjiDemetri and remained so registered till 20.11.45 when Plot 1274 was subdivided into four plots as a result of an application made by the co-owners to the Lands Office in 1941. Out of the sub-divided plots which resulted from the original plot, Plot 1274/1 was registered as a whole in the name of Nicolas Elia Hj.Nicola, the father of the respondent, under Registration No. 14186, who, subsequently, transferred it in the name of the respondent on 22.7.1955. Such plot had, as its boundary on the northern side, the disputed strip of land as public road.

Early in 1959 the appellant filed an application to the Director

of Lands (No. A. 589/59 appearing in exhibit 1) contesting that the disputed strip of land and an additional strip opposite to Plot 1274/2, which adjoins the property of the defendant and which was registered in the name of HadjiSavva HadjiDemetri Fella under Registration No. 12856, were part of the public road and persisting that they belonged to him.

After a local enquiry was carried out and the Director of Lands examined the case, he reached the decision that the strip of land along the Northern boundary of Plot 1274/2 was in addition to the strip of land the subject matter of this appeal, part of the public road and directed that the registration in the name of the appellant and the owner of Plot 1274/2 be amended accordingly to show such strip as one of the boundaries of their respective properties. The decision of the Director was communicated to the appellant and the owner of Plot 1274/2 by letter dated 22nd February, 1960. Such decision was not communicated to the respondent obviously due to the fact that her title deed need not be amended as the strip of land on the Northern boundary of her property appeared as public road.

The appellant objected to such decision and in fact filed a recourse to the Supreme Constitutional Court in 1961 (see, *Savvas Valana and The Republic of Cyprus through the Director of Lands and Surveys* (1962) 3 R.S.C.C. 91). Such recourse was dismissed on the ground that the act of the Director of Lands and Surveys was within the domain of private law and not of public law and in consequence it could not be the subject matter of a recourse.

The respondent erected stairs on the disputed strip of land to enable her enter her house which was on a higher level, and, also, a verandah, part of which was built on the disputed land. The appellant never gave up his efforts of having the alleged error of the Lands Office rectified, so that the said strip of land be included in his registration as part of his property. In 1971 the appellant filed a new application to the Director of Lands and Surveys for reconsideration of the case and cancellation of the registration of the disputed strip of land as public road. The Director of Lands and Surveys, after re-examining the case, came to the conclusion that the complaint of the appellant was justified and in the exercise of his power under section 61(2) of

the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224, as amended by Laws 3/60 to 75/68, decided to amend the error and register the two strips of land, the one of which along the Northern boundary of respondent's property, and the other along the Northern boundary of Plot 1274/2, in the name of the appellant as part of his property and cancel their previous registration as public road. He also decided to amend the boundaries of respondent's property and of its adjoining property so that instead of having such strip of land appearing in their title deeds as "public road", to have as boundary in its place "Plot 1273 Savvas Yianni Valana". The decision of the Director of Lands was communicated on the 25th November, 1971, to the parties and all other persons concerned, informing them at the same time that any person having any objection to such amendment, should make his objection within 30 days from the mailing of the said notice, as provided by section 61(2) of Cap. 224. No objection was made by anybody to such decision and after the expiration of the prescribed time, the Director proceeded to give effect to his decision by amending the previous registration accordingly and issuing new title deeds describing the disputed portion as part of appellant's property.

The respondent continued to make use of that strip of land as passage and the appellant filed her first Action 2119/72 and then Action 4795/75 claiming the remedies already mentioned.

The trial Judge after hearing a number of witnesses, called by both sides, came to the conclusion that the respondent and her predecessors in title were exercising a right of way over the disputed strip of land since 1930. In dealing with the fact that the said strip of land was registered as a public road since 1938 till 1971, the trial Judge decided that once such registration was made by mistake which was subsequently amended, it was null and void ab initio under section 61 of Cap. 224 which provides that - "any amendment will have effect as if the mistake or omission has never taken place", and, therefore, the exercise of a right of passage by the respondent continuously for over 30 years, entitled her to have such right over the land of the appellant registered in favour of her property.

Prior to 1945 Article 13 of the Ottoman Land Code which was the law then in force, provided as follows:

"Every possessor of land by title deed can prevent another from passing over it unlawfully but if the latter has an ab antiquo right of way he cannot prevent him."

In *Shemmedi* v. *Shemmedi*, C.L.R. Vol. 16, p. 85, the analogy is drawn between the provision of section 13 of the Land Code to a right of prescription under the English Law. At page 87, we read:

"The ground on which the appellant relies is that he has an ab antiquo right to pass over part of a passage on which respondent has built. According to the Ottoman Land Code article 13 every possessor of land by title-deed can prevent another from passing over it, but if the latter has an ab antiquo right of way he cannot prevent him. There is a definition of an 'ab antiquo right' given in the Mejelle. It is there defined as, 'that, the beginning of which no one knows.' It is practically analogous to a right by prescription in English law. Originally the time necessary to establish a title by prescription was 'time whereof, the memory of man runneth not to the contrary.' In practice the enjoyment as of right for 20 years was regarded as proof of user from the time of the commencement of legal memory. The courts resorted to the fiction of a lost modern grant, and where user for 20 years was proved, juries were directed to find that the right in question had been the subject of a grant, but that the grant had been lost. This period of 20 years was fixed by analogy to the period required by the old Statute of Limitations - 21 of James the first."

In *Chrysanthos Demetri* v. *Arestis Kleanthi and Another*, C.L.R. 18, p. 141, Griffith Williams J., though one of the two judges who were constituting the Bench in the *Shemmedi* case, expressed the view that the doctrine of lost grant under the English law was not applicable in Cyprus, and, therefore, what was said in that case, in this respect, must be considered an obiter dictum.

In *Christodoulos (alias Tooulis) Yianni Voskou* v. *Michael HjiPetri*, 1964 C.L.R. 21 at pp. 26, 27, Zekia, J. in expounding on the principle of "ab antiquo" right makes the following com-

parison between the old law (the law in force prior to 1945) and the new law:

> "The following passage from page 547, Halsbury's Laws of England, 3rd Edition, volume 12, in my view may be taken to be a brief statement of the law on the subject which equally applies to ab antiquo rights under Ottoman Laws:
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> > 'Time for which user must be proved. As it is usually impossible to prove user or enjoyment further back than the memory of living persons, proof of enjoyment as far back as living witnesses can speak raises a prima facie presumption of an enjoyment from the remoter era. Where evidence is given of the long enjoyment of a right to the exclusion of all other persons, enjoyed as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have arisen beyond legal memory.'

According to the previous law what was material in the acquisition of the right of passage - otherwise than by an express grant - over the land of another was the length of time this right was exercised irrespective of any change in the possessors or owners of the dominant land. The uninterrupted user of such right in favour of a particular piece of land for a long period amounting to 'Qadim' secured a right of passage over the servient plot for any possessor of the dominant land. This kind of right of way of course lapses when the possessor of both dominant and servient land is the same person, which is not the case here.

The new law apparently in order to overcome the difficulties of establishing user and enjoyment of easements from time immemorial or 'Qadim' - an indefinite and uncertain period - adopted the modern feasible way of prescribing a definite minimum period for acquiring such rights. It seems the length of user independently of any change in the possessor of the dominant tenement is what is material also in English Law in the acquisition of ease-

ments by long user (see page 152, Gale on Easements, 13th Edition)."

From early times English authorities in dealing with the acquisition of rights over the land of another by long user, have followed the definition of Roman Law: The user which will support a prescriptive right must be exercised nec vi, nec clam, nec precario (without force, without secrecy without permission). Fry, J. in advising the House of Lords in *Dalton* v. *Angus* [1881] 6 Appeal Cases 740 at pp. 773, 774, in a famous passage, reference to which is made by most authors on real property, based the doctrine of prescription upon acquiescence.

"But leaving such technical questions aside, I prefer to observe that, in my opinion, the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest. It becomes then of the highest importance to consider of what ingredients acquiescence consists. In many cases, as for instance, in the case of that acquiescence which creates a right of way, it will be found to involve, 1st, the doing of some act by one man upon the land of another; 2ndly, the absence of right to do that act in the person doing it; 3rdly, the knowledge of the person affected by it that the act is done; 4thly, the power of the person affected by the act to prevent such act either by act on his part or by action in the Courts; and lastly, the abstinence by him from any such interference for such a length of time as renders it reasonable for the Courts to say that he shall not afterwards interfere to stop the act being done. In some other cases, as, for example, in the case of lights, some of these ingredients are wanting; but I cannot imagine any case of acquiescence in which there is not shown to be in the servient owner: 1, a knowledge of the acts done; 2, a power in him to stop the acts or to sue in respect of them; and 3, an abstinence on his part from the exercise of such power. That such is the nature of acquiescence and that

such is the ground upon which presumptions or inferences of grant or covenant may be made appears to me to be plain, both from reason, from maxim, and from the cases."

The provisions existing in the law prior to 1945 concerning the acquisition of easements were repealed by the Immovable Property (Tenure, Registration and Valuation) Law, Law 26/45, now Cap. 224 which, under section 11, as amended by section 3 of Law 16/80 provides as follows:

"11. (1) No right of way or any privilege, liberty, easement, or any other right or advantage whatsoever shall be acquired over the immovable property of another except -

(a) under a grant from the owner thereof duly recorded in the books of the District Lands Office; or

(b) where the same has been exercised by any person or by those under whom he claims for the full period of thirty years without interruption: Provided that the provisions of this paragraph shall not apply to any immovable property which is Crown property or property vested in the Crown; or

(c) where the same has been recognized by a judgment of a competent Court; or

(d) where the same has been conferred by a Firman or other valid document made before the 4th June, 1878, which has been acted upon from the time when it was made; or

(e) where the same has been acquired under the provisions of section 11A; or

(f) where the same has been created and acquired under the provisions of the Compulsory Acquisition of Property Law, 1962, or any Law amending or substituted for the same; or

(g) where the same has been reserved in writing by the owner of any immovable property upon the transfer of such property.

Provided that the aforesaid paragraph applies also whenever any provision is included related to the use

or development of any immovable property or with restriction as to its use or development.

(2) No person shall exercise any right of way or any privilege, liberty, easement or any other right or advantage whatsoever over the immovable property of another except where the same

(a) has been acquired as in subsection (1) of this section provided; or

(b) is exercised under the provisions of any Law in force for the time being; or

(c) is exercised under a licence in writing from the owner thereof."

In addition to the above, in cases where immovable property is surrounded and enclosed by other properties and is lacking access to the public road, a right of acquiring such access subject to payment of reasonable compensation and by means of a defined procedure has been provided by section 11(A) to CAP. 224 which has been added by Law 10/66.

Having examined the modes of acquisition of easements over the immovable property of another, we are coming now to consider whether in the circumstances of the present case, the respondent has acquired a right of passage over the immovable property of the appellant as found by the trial Judge.

It is an admitted fact in this appeal that the disputed strip of land over which the respondent exercised a right of passage was since 1938 till 1971 registered as public road to the knowledge both of the appellant and the respondent, such fact being recorded in their respective title deeds. The fact that such strip of land was registered as public road deprived, on the one hand, the appellant of any right to object to the respondent's making use of such passage, and, on the other hand, to take any steps to prevent her or her predecessors in title from passing over such strip of land.

Adopting the words of such an eminent Judge, as Fry, J., in *Dalton* v. *Angus* (supra) at p. 774,

"_____ it is plain good sense to hold that a man who can stop an asserted right, or a

continued user, and does not do so for a long time, may be told that he has lost his right by his delay and his negligence, and every presumption should therefore be made to quiet a possession thus acquired and enjoyed by the tacit consent of the sufferer. But there is no sense in binding a man by an enjoyment he cannot prevent, or quieting a possession which he could never disturb."

Furthermore what was the nature of the right of passage enjoyed by the respondent and her predecessors from 1938 till 1971? Was it in the nature of a private right over the land of another which could be acquired by long user or was it an exercise of a public right? As already mentioned, the respondent and her predecessors were aware that the land over which they were passing was public road, over which the provisions of section 11(1)(b) of Cap. 224 could not apply. The question of enjoyment of the highway and of any right arising therefrom has been considered in *Chaplin & Co. Ltd.* v. *Westminster Corporation* [1901] 2 Ch. 329 which has been adopted by our Supreme Court in *Christina Yorki Dikomiti and Another* v. *Michael Costi HadjiKolos and Another* (1959 - 1960) C.L.R. Vol. 24, p. 53. Lord Buckley at p. 333 of the above case, had this to say:

"A person who owns premises abutting on a highway enjoys as a private right the right of stepping from his own premises on to the highway, and if any obstruction be placed in his doorway, or gateway, or, if it be a river, at the edge of his wharf, so as to prevent him from obtaining access from his own premises to the highway, that obstruction would be an interference with a private right. But immediately that he has stepped on to the highway, *and is using the highway, what he is using is not a private right, but a public right.*" (the underlining is ours).

In the result, we have reached the conclusion that the nature of any right exercised by the respondent and her predecessors in title over the disputed strip of land during the years 1938 - 1971, was not such as to amount to a right envisaged by section 11(1)(b) of Cap. 224 and, therefore, as the full period of 30 years of user without interruption has not been established, the respondent could not acquire such right.

The appeal is therefore allowed and an order of injunction is

granted restraining the respondent, her servants and agents from passing over the property of the appellant, the subject matter of this appeal, which will be in addition to the other orders already made in the two actions and which have not been appealed.

In the circumstances of the case, we have decided not to disturb the order of the trial Judge, directing each party to bear its own costs for the trial before him, but concerning this appeal, we award costs in favour of the appellant and we make an order accordingly.

Appeal allowed. Order for costs as above.