1984 April 26

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

AVGOUSTA K. THEORI AND ANOTHER,
Appellants-Plaintiffs,

v.

MAROULLA A. DJONI AND ANOTHER,
Respondents-Defendants.

(*Civil Appeal No.* 5102).

Res judicata—Plea of—It applies to every point properly belonging to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

By means of an action, which was instituted in 1967 ("the first action") by the appellants against the respondents, the former claimed ownership of certain plots of land (Nos. 39/2 and 40/2) on the grounds of inheritance and undisputed possession; and on the 5th July, 1969 a consent judgment was issued in their favour and they were registered as owners in one half share each of the above plots.

By a second action which was again instituted by the appellants against the respondents the former claimed ownership of plots 39/1 and 40/1 on the same, as in the first action, grounds. The trial Court held that the appellants were estopped from raising their claims on the ground of res judicata and hence this appeal.

Held, that the plea of res judicata applies, except in special cases not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time; that although it is correct that the ownership of the property covered by plots 39/1 and 40/1 was not an issue between the plaintiffs and the defendants in the first action, the plaintiffs, admittedly, could

have raised their contention as to the ownership of these plots in that action, in which the issue was also the ownership of parts of what previously to the institution of the first action were plots 39 and 40 and to which their present claim "properly belonged"; that in the circumstances it was their duty to include it in such action so as to avoid multiplicity of proceedings; accordingly the appeal must fail.

Appeal dismissed.

Cases referred to:

Public Trustee v. *Kenward* [1967] 2 All E.R. 870;

Henderson v. *Henderson* [1843-1860] All E.R. (Rep.) 378;

Vernaeke v. *Smith* [1982] 2 All E.R. 144.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Limassol (Stylianides, Ag. P.D.C. and Chrysostomis, Ag. D.J.) dated the 29th May, 1972 (Action No. 3061/70) whereby their action for a declaration that they were the owners of one half share of certain properties situated at Ayia Phyla village was dismissed.

P. Pavlou, for the appellant.

P. L. Cacoyiannis, for the respondent.

Cur. adv. vult.

L. LOIZOU, J. read the following judgment of the Court. This appeal is directed against the judgment of the District Court of Limassol in Action No. 3061/70 on a point raised by the defendants-respondents in their defence which, with the consent of the parties, was heard as a preliminary point of law pursuant to the provisions of Order 27 of the Civil Procedure Rules. By their judgment the Court disposed of the whole action by dismissing it with costs.

The point raised by the respondents and decided by the Court was that the plaintiffs-appellants were estopped from raising their claims on the ground of res judicata.

The relevant facts are as follows:

By Action No. 962/67 (to which we shall hereinafter refer as the first Action) instituted by the same plaintiffs against the same defendants as in the present Action, the plaintiffs in their

Statement of Claim alleged that they were, by virtue of inheritance and/or of continuous uninterrupted, undisputed adverse possession by themselves and/or their predecessors in title the owners of a piece of land, four donums, one evlek and 1800 sq. feet in extent, with 44 carob trees standing thereon at locality "Aggathidkia" area of Ayia Phyla, forming plots 39/2 and 40/2 of sheet-plan LIV/49; that the defendant 1 was the owner by virtue of inheritance of plot 39/1 which abuts the plaintiffs' aforesaid properties; that the plaintiffs' properties were wrongly registered in the name of defendant 1 as a result of an erroneous certificate of the ex-chairman of the village commission of Ayia Phyla and that the defendant 1 transferred the whole property including plaintiffs' properties in the name of defendant 2 on the 19th August, 1966. And the plaintiffs prayed for a declaration of the Court that they were the owners in one half share each of the above described properties by virtue of adverse possession and/or inheritance; an order of the Court ordering the cancellation of any existing registration affecting their properties; an order for the transfer and/or registration of the said properties in their names; and finally, for an injunction and damages.

After a local inquiry was carried out by the D.L.O. pursuant to an order of the Court the action was set down for hearing on the 5th July, 1969. On that day a consent judgment was issued in favour of the plaintiffs and as a result they were registered as owners in one half share each of plots 39/2 and 40/2, sheet-plan LIV/49 and of the 44 carob trees standing thereon.

By their present Action (Action No. 3061/70) the plaintiffs claimed

(1) A declaration of the Court that they were the owners in one half share each of the following properties with all trees standing thereon, situated at locality "Aggathidkia" of Ayia Phyla village:

(a) Plot 40/1 of sheet-plan LIV/49, three evleks and 1800 square feet in extent;

(b) part of plot 39/1 of sheet-plan LIV/49, about one donum and one evlek in extent from the northern part of the said plot.

(2) An order of the Court cancelling the registration of the

above described properties in the name of defendant 2 or any other person.

(3) An order of the Court ordering defendant 2 to transfer and register the above properties in the name of the plaintiffs.

(4) An injunction restraining the defendants and/or their agents and/or their servants from in any way interfering with the said properties.

(5) Any other order or remedy as the Court might consider necessary and just;

and in the alternative, £8,500.- damages representing the value of the properties.

In their Statement of Claim they alleged that they are, by virtue of continuous undisputed, uninterrupted adverse possession by themselves and/or their predecessors in title and/or by virtue of inheritance or otherwise the owners in one half share each of the properties in question; that defendant 1 was, before 19th August, 1966 the owner of properties adjoining the plaintiffs' aforesaid properties; that due to an erroneous certificate issued by the then Chairman of the village commission of Ayia Phyla and/or due to an error of the D.L.O. Limassol the above described properties were registered in the name of defendant 1 who on the 19th August, 1966, sold and transferred same in the name of defendant 2 and that defendant 2 when called upon refused to transfer the said properties in the name of the plaintiffs and she continued to interfere with them.

By paragraph 1 of their defence the defendants raised the point of law to which we have referred earlier on and at the direction stage it was agreed that such point should be heard and determined by the Court as a preliminary point of law under Order 27 of the Civil Procedure Rules.

The only witness called at the hearing of the point so raised was the Registrar of the District Court of Limassol who produced the file of the first Action. A certificate of search showing particulars of the registrations of the said properties with a survey plan of the properties in question was also produced by consent and it is exhibit 2. Copy of the pleadings in the first Action

as well as the drawn up judgment were attached by learned counsel for the respondents to his defence in the present action.

There is no question and indeed it is clear from the certificate of search exhibit 2 that before the institution of the first action the whole area of both plots 39/1 and 39/2 was covered by registration No. 17847 in the name of respondent 1 and that the whole area of both plots 40/1 and 40/2 was covered by registration 17848 again in the name of respondent 1 and that they were both transferred in the name of respondent 2 on the 19th August, 1966. That by the first Action the plaintiffs claimed plots 39/2 and 40/2 with all trees standing thereon covered partly by registration 17847 and partly by registration 17848 which as a result of the consent judgment in that action was registered in the name of the appellants under registrations 23022 and 23024 on the 5th September, 1967 and that on the same day the rest of the property i.e. the property comprising plots 39/1 and 40/1 also covered partly by both registrations was registered in the name of respondent 2 under registrations No. 23023 and 23025.

The trial Court in their judgment deal very carefully and in great detail with all aspects of the legal point raised and argued. At p.42 of the judgment they say:

> "Estoppel per rem judicatam covers not only claims actually included in the former action but also claims which could properly be included.
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> The rule on this subject was set forth as long ago as 1843 in the words of Wigram, V.C. in *Henderson -v- Henderson*, [1843-1860] All E.R. (Rep.) 378 at p. 381 at p. 381 as follows:
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> > 'I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident,

omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time'.

This principle was adopted by the Privy Council in *Hoystead & Others -v- Taxation Commissioner*, [1925] All E.R. (Rep.) p. 56 at p. 64 and in the *Fidelitas* case (supra).

In *Greenhalgh -v- Mallard* [1947] 2 All E.R. p. 255, Somervell, L.J., in the Court of Appeal said this at p. 257:

'I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation *and so clearly could have been* raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them'.

This rule was applied by Buckley, J. in *Public Trustee -v- Kenward* [1967] 2 All E.R. p. 870 in which a Defendant sought to raise counterclaim in an administration action. Accounts and inquiry as to Defendant's indebtedness to estate had been taken. It was held: Defendant, who is seeking to raise counterclaim in action that certain assets referred to in certificate were partnership assets in which he was interested, was debarred from counterclaiming on the ground of res judicata as he failed to raise the claim at the time of the taking of the account.

In the concluding paragraph of the judgment we read:

'The parties, and in particular the defendant had, however, every reason to understand that the inquiry was directed to discovering any sort of claim which he could put forward to reduce or counterbalance his indebtedness to his wife's estate, whether it would

in strictness then be called a present right of set-off or not. On these grounds, I think that as he did not then put forward this claim he is now barred from doing so on the ground that the matter is in fact res judicata'.

In Spencer-Bower & Turner, Res Judicata, 2nd Edition, paragraph 204 we read:-

'204. If the party, though omitting to bring to the notice of the judicial tribunal some fact or matter which he desires to establish or raise in subsequent litigation, can show that at the time of the former proceedings he was not only in fact, but also excusably, ignorant thereof, and that such fact or matter, if then proved, would have altered the whole aspect of the case, he is entitled to claim that no estoppel by implied res judicata shall take effect, or other adverse inference of any kind shall be made against him by reason of such omission' ".

And after dealing with the two actions and the claims and allegations made therein they conclude as follows:

"It is obvious that the Plaintiffs' claim in both Actions is based on inheritance and undisputed adverse possession. In both Actions the Plaintiffs claimed part of plot 39 and 40. The questions of law and of fact raised in both Actions are the same with only one exception: the physical indentity of the subject-matter in the second Action is but an extension of the claim in the first Action. The Plaintiffs knew and understood that the enquiry in the first Action was directed to discover their claim with regard to the propperties they were entitled to by virtue of inheritance and/or undisputed adverse possession, and forming part of plots 39 and 40. If the Plaintiffs exercised reasonable diligence, they might have brought forward at the time of the first Action the issue raised in the present Action. If from negligence or inadvertence, omitted part of their case, they are not excused. They are within the ambit of the Rule in *Henderson -v- Henderson* (supra) which is the 'settled' law on the subject.

In the result the claim in this Action is an abuse of the

process of the Court, completely untenable and is, therefore, hereby summarily dismissed."

The appellants appeal against the trial Court's judgment.

What learned counsel for the appellants has, in essence, challenged before this Court is the conclusion of the trial Court that res judicata applies to claims not actually included in the former action but which could properly be so included. He submitted that estoppel could only operate against a party and preclude him from raising issues which could have been raised in the previous proceedings only if the subject-matter raised in the previous proceedings was the same as the subject-matter of the subsequent proceedings; and that the real test should not be whether the issues could have been raised in the first action but whether the basis of the two actions was the same. And although, he argued, the subject-matter of the present action could be included in the first action the fact that it was not so included does not mean that the plea of res judicata applies and this because what the appellants were claiming in the first action was the ownership of the land under plots 39/2 and 40/2 of sheet-plan LIV/49 by virtue of inheritance and adverse possession and that what they are now claiming is that in addition to the above they are, on the same grounds, the owners of more property, plots 39/1 and 40/1, which, though adjacent to the above, was not included in their claim in the first action; and that this being the position res judicata does not apply in these proceedings because the subject-matter of the two proceedings was different; and he invited this Court to rule that in the circumstances the plea of res judicata should not be allowed to stand.

We find ourselves unable to agree with learned counsel's proposition. In our view it is contrary to the principle enunciated by Wigram V.C. in *Henderson* v. *Henderson* (supra) which, in addition to the cases cited above, was quite recently approved by the House of Lords in *Vervaeke* v. *Smith* [1982] 2 All E.R. 144.

Therefore, although it is correct that the ownership of the property covered by plots 39/1 and 40/1 was not an issue between the plaintiffs and the defendants in the first action, the plaintiffs, admittedly, could have raised their contention as to the ownership of these plots in that action, in which the issue was also the ownership of parts of what previously to the insitution of the

'irst action were plots 39 and 40 and to which their present claim 'properly belonged"; and in the circumstances it was, in our view, their duty to include it in such action so as to avoid multiplicity of proceedings.

For the above reasons we are in agreement with the conclusion reached by the trial Court and, in the result, this appeal fails and it is dismissed with costs. 5

Appeal dismissed with costs.