

1985 January 10

[LORIS, J.]

PETROS YEROLEMIDES,

Applicant,

v.

THE MUNICIPALITY OF NICOSIA AND/OR
THE MUNICIPAL COMMITTEE OF NICOSIA
AND/OR THE CHAIRMAN OF THE MUNICIPAL
COMMITTEE OF NICOSIA,

Respondents.

(Application No. 65/84).

Execution—Warrants of execution on movables in Criminal Cases—Civil Procedure Rules applicable—Sections 20 and 21 of the Criminal Procedure Law, Cap. 155—Order 40, rule 8 of the Civil Procedure Rules applicable in cases where 6 years have elapsed since the day of the judgment sought to be enforced—Sub judice warrants issued without prior compliance with above rule 8—Order of certiorari quashing, and order of prohibition preventing, their execution. 5

Execution—Writs of execution on judgments or orders of the Supreme Court in appeals—Shall be issued out of the Court appealed from—Order 35, rule 26 of the Civil Procedure Rules—Warrants of execution of a judgment of the Supreme Court in a criminal appeal—Challenged by application for orders of certiorari and prohibition—Application not directed against the judgment of the Supreme Court but against alleged default in its procedural enforcement—Therefore is not attacking the judgment of the Supreme Court. 10 15

Certiorari—Prohibition—Jurisdiction—Article 155.4 of the Constitution—"Warrant of execution" on movables in a criminal case—Alleged procedural defaults in the issue of—Can be challenged under the above Article and do not 20

fall within the jurisdiction under Article 146.1 of the Constitution.

5 The applicant sought an order of certiorari quashing and an order of prohibition preventing the execution of two
“warrants of execution on movables” issued by the District Court of Nicosia pursuant to the provisions of section 120 of the Criminal Procedure Law, Cap. 155. The penalties indicated in the warrants emanated from the substitution by the Court of Appeal of the original sentence of one month’s imprisonment, imposed on the applicant by the District Court of Nicosia with a fine per day so long as he failed to obey an order of the Court to abate a nuisance.

15 Counsel for the appellant mainly contended that the said warrants which were based on a judgment given on 9.7.1971 were issued in direct violation of the Law and the relevant Rules made thereunder in view of the fact that, even though six years have elapsed since the judgment no leave was ever obtained or even applied for, prior to
20 the issue of the said warrants as required by 0.40, rule 8 of the Civil Procedure Rules, which are applicable to the execution of any warrant issued under the provisions of s. 120 of Cap. 155, as envisaged by the provisions of s. 121 of Cap. 155.

25 Counsel for the respondent raised a preliminary objection challenging the jurisdiction of this Court on the ground that these proceedings were aimed at attacking the judgment of the Court of Appeal.

30 *Held*, (1) that writs of execution on judgments or orders of the Supreme Court in appeals shall be issued out of the Court appealed from (see Order 35, rule 26 of the Civil Procedure Rules); that since the warrants were signed by Judges of the Court appealed from; and that since the applicant simply complains that they were issued
35 in direct violation of rule 8 of Order 40 of the Civil Procedure Rules it is crystal clear that these proceedings are not attacking the judgment of the Court of appeal as such but merely the alleged default in its procedural enforcement; accordingly the preliminary objection must
40 **fail.**

(2) That the matters raised by virtue of the present proceedings are within the jurisdiction of this Court under Article 155.4 of the Constitution and cannot be deemed as falling within the jurisdiction under para. 1 of Article 146.

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(3) That since, by virtue of section 121 of Cap 155, the provisions relating to execution of judgment debts in civil proceedings, under any enactment in force for the time being, shall apply to the execution of any warrant issued under the provisions of section 120 of Cap. 155, there is no doubt that the Civil Procedure Rules, are applicable in the case of warrants of execution on movables under s. 120 of Cap. 155 which is the case with the warrants in these proceedings; and that, therefore, Order 40, rule 8 of the Civil Procedure Rules is, also, applicable in cases where 6 years have elapsed since the day of the judgment sought to be enforced; and that since the respondent had not obtained, or even applied for leave pursuant to the provisions of Order 40, rule 8, prior to the issue of the said warrants, the orders of certiorari and prohibition must be granted as applied.

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Application granted.

Cases referred to:

Yerolemides v. Municipality of Nicosia (1971) 10 J.S.C. 1347;

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Frangos v. Medical Disciplinary Board (1983) 3 C.L.R. 256 at p. 259;

Ramadan v. Electricity Authority of Cyprus, 1 R.S.C.C. 49 at p. 54.

Application.

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Application for an order of certiorari to remove into the Supreme Court and quash and for an order of prohibition preventing the execution of two warrants issued by the District Court of Nicosia in Criminal Case No 7780/71.

L. N. Clerides, for the applicant.

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L. Georghiadou (Mrs.), for the respondents.

Cur. adv. vult.

LORIS J. read the following decision. By virtue of the present application, the above named applicant, who has already obtained the required leave of this Court on 11.9.84, seeks an order of certiorari quashing, and an order of prohibition preventing, the execution of two warrants issued by the District Court of Nicosia, which were produced before me in the present proceedings as exhibits 1 and 2.

The present application is supported by an affidavit sworn by the applicant on 20.9.84.

The respondent Municipality has filed an opposition to the present application on 10.10.84 which is relying on the affidavit of the secretary thereof dated 10.10.84.

The aforesaid two warrants are "warrants of execution on movables" issued pursuant to the provisions of s. 120 of our Criminal Procedure Law, Cap. 155 and they refer to Nicosia Criminal Case 7780/71; both warrants have been signed by different Judges of the District Court of Nicosia.

Exhibit No. 1 which bears Sheriff No. 2549/78 was issued on 7.2.78 and the penalty therein shown is £6,207; it is indorsed at the bottom thereof "fine payable to Municipality of Nicosia for the period 28.5.72—25.1.78".

Exhibit No. 2 with Sheriff No. 10311 was issued on 27.4.84 and the penalty therein indicated is £6,741; it is likewise indorsed "fine payable to municipality for the period 26.1.78—5.4.84".

It is common ground that the penalties referred to in both said warrants (totalling £12,948) emanate from the substitution by the Court of Appeal of the original sentence of one month's imprisonment imposed on the applicant by a Judge of the District Court of Nicosia in Nicosia Criminal Case 7780/71, with a fine per day as stated at p. 1349 in Appeal case *Petros Yerolemides v. Municipality of Nicosia* (1971) 10 J.S.C. 1347, the relevant part of which reads as follows:

"Having taken into account...we have decided to sentence him to pay a fine of 500. mils per day (instead of the maximum of £3.— per day) as from

the 19th March, 1971, until the 31st July, 1971, and thereafter, if he still fails to obey the Court Order in question, £3.— per day until full compliance therewith”.

The respondents maintaining that the applicant in the present proceedings failed to obey the said Court Order, issued the warrants in question which as already stated are signed by Judges of the District Court of Nicosia, obviously pursuant to the provisions of O. 35, r. 26 of our Civil Procedure Rules which provides as follows:

“Writs of execution on judgments or orders of the Supreme Court in Appeals shall be issued out of the Court appealed from upon the filing of an office copy of such judgment or order”.

The complaint of the applicant is to the effect that both aforesaid warrants, which were based on judgment and/or order given on 9.7.71, were issued in direct violation of the Law and the relevant Rules made thereunder, in view of the fact that no leave was ever obtained or even applied for, prior to the issue of the said warrants as required by O. 40, rule 8 of our Civil Procedure Rules, which are applicable to the execution of any warrant issued under the provisions of s. 120 of the Criminal Procedure Law, Cap. 155, as envisaged by the provisions of s. 121 of Cap. 155.

Although the prayer in the present proceedings is confined to the above complaint only, I have noted that in the statement of “the grounds upon which the reliefs are sought”, it is alleged that the applicant has abated the nuisance.

I feel that I should make it clear straight away that I am not ready to examine either the alleged abatement of the nuisance or any other ground except the one included in the prayer which is after all the single ground for which the applicant has obtained leave on 11.9.84 to apply for the issue of the writs of certiorari and prohibition; it is not within my task in the present proceedings to examine questions connected with the alleged abatement of the nuisance, a matter which I leave entirely open, to be raised in any other proceedings, if need arises.

The respondent Municipality by its opposition, and in particular by virtue of paras. 1, 2 and 3 of the affidavit in support thereof, raises a preliminary objection to the present proceedings, which is in effect a challenge to the jurisdiction of this Court on the ground that the present proceedings are aimed at attacking the judgment of the Court of Appeal.

I have considered the preliminary objection in the light of argument advanced by counsel on both sides and I hold the view that such an objection is unsustainable for the simple reason that the present proceedings are not aiming at impugning the judgment of the Court of Appeal but merely they are attacking the alleged non-compliance of the respondent with the provisions of the Civil Procedure Rules, allegedly applicable in the present instances, in executing the judgment in question.

It is true that the judgment and/or order dated 9.7.71 was given by the Court of Appeal; according to O. 35, r. 26 of the Civil Procedure Rules "writs of execution on judgments or orders of the Supreme Court in Appeals shall be issued out of the Court appealed from" and the Court appealed from in the present case was the District Court of Nicosia; furthermore the warrants under consideration i.e. exh. 1 and exh. 2 were issued out of the District Court of Nicosia and they were both signed by Judges of the aforesaid District Court. The applicant in the present proceedings simply complains that the aforesaid warrants were issued in direct violation of the Civil Procedure Rules in view of the fact that the provisions of O. 40, r. 8 were not complied with prior to the issue of the warrants in question inspite of the fact alleged that over "six years have elapsed since the judgment or date of the order".

It is crystal clear therefore, that the present proceedings are not attacking the judgment and/or Order of the Court of Appeal as such but merely the alleged default in its procedural enforcement.

For all the above reasons the preliminary objection fails and it is accordingly dismissed.

I shall now proceed to examine the substance of the present application.

The power of the Court to issue orders of certiorari and prohibition emanates from the provisions of Article 155.4 of our Constitution which reads as follows:

“155.4 the High Court shall have exclusive jurisdiction to issue orders in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari.

The jurisdiction of the Supreme Court under Article 155.4 is exclusive of the jurisdiction specifically entrusted to the Supreme Constitutional Court, and now to the Supreme Court in virtue of Law 33/64, under Article 146”. (vide *Frangos v. Medical Disciplinary Board* (1983) 1 C.L.R. 256 at p. 259).”

The above principle was laid down by the then Supreme Constitutional Court as early as 1961 in the case of *Hussein Ramadan v. Electricity Authority of Cyprus and another* (1 R.S.C.C. 49) where at p. 54 the following are stated:

“In the opinion of this Court the powers of the High Court to issue the orders set out in para. 4 of Article 155 extend only to such matters which are within the jurisdiction of the High Court and which are not already within the jurisdiction of the Supreme Constitutional Court under paragraph 1 of Article 146”.

Having considered the facts of the present application in the light of the above principles I hold the view that the matters raised by virtue of the present proceedings are within the jurisdiction of this Court under Article 155.4 of our Constitution and cannot by any stress of imagination be deemed as falling within the jurisdiction under para. 1 of Article 146.

Now, two crucial issues fall for determination in the present proceedings before me:

(a) Whether the Civil Procedure Rules are applicable

to the execution of the warrants which are exhibits 1 and 2 before me.

(b) Whether six years have elapsed since the day of the judgment and/or order sought to be enforced.

5 I shall deal with issue (a) above first. Section 121 of the Criminal Procedure Law Cap. 155 reads as follows:

10 "121. Subject to the provisions of section 120 of this law, the provisions relating to execution of judgment debts in civil proceedings under any enactment in force for the time being, shall apply to the execution of any warrant issued under the provisions of section 120 of this Law".

Order 40, rule 8 of our Civil Procedure Rules reads as follows:

15 "8. Where six years have elapsed since the judgment or date of the order, or where any change has taken place by death or otherwise in the parties entitled or liable to execution may apply to the Court or a Judge for leave to issue execution accordingly.
20 And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which
25 any question in an action may be tried. And in either case the Court or Judge may impose such terms as to costs or otherwise as shall be just".

Exhibits 1 and 2 in the present proceedings are self-described as "warrant(s) of execution on movables" issued under s. 118 of Cap. 14; Cap. 14 was the Criminal Procedure of the 1950 codification of the Cyprus Laws and s. 118 thereof (subject to an amendment of 1953 - s.
30 10 of Law 6/53) is identical to s. 120 of Cap. 155. The contents of both said warrants coupled with their afore-said self-description leave no margin for doubt that they are warrants of execution on movables issued under the
35 provisions of s. 120 of Cap. 155.

The provisions of s. 121 of Cap. 155 are clear and

unequivocal: the provisions relating to execution of judgment debts in civil proceedings, under any enactment in force for the time being, shall apply to the execution of any warrant issued under the provisions of s. 120 of Cap. 155. The words of s. 121 of Cap. 155 are not susceptible of any interpretation as there is no ambiguity; clear and unequivocal as they are must be given their ordinary meaning.

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Therefore there can be no room for doubt that the Civil Procedure Rules are applicable in the case of warrants of execution on movables issued under s. 120 of the Criminal Procedure Law, Cap. 155, which is the case with exhibits 1 and 2 of the present proceedings.

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It follows that once the Civil Procedure Rules are applicable, O. 40, r. 8 thereof is also applicable in cases of course where 6 years have elapsed since the day of the judgment and/or order sought to be enforced.

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Having answered issue (a) in the affirmative I shall now proceed to examine issue (b).

On this latter issue learned counsel for applicant submitted that the time of six years runs from the date of the judgment or order, which is the 9th of July 1971.

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Learned counsel for the respondent submitted that we should not look upon the date of the judgment of the Court of Appeal (9.7.71) in order to decide from which period does the time of six years run; the amount is not fixed, counsel submitted, therefore time should be computed to run from the time each instalment became due and payable.

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Although I am inclined to the view that the time should be computed to run from the date of the judgment and/or order (9.7.71), as O. 40, r. 8 provides verbatim "where six years have elapsed since the judgment or date of the order", I have carefully considered the submission of learned counsel of the respondent but I am afraid her way of computing time cannot help the respondent for the following reasons:

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- (1) As regards ex. 1 time of six years has elapsed from

the time each one of the instalments therein contained became due and payable; this is apparent on the face of ex. 1 and it was so conceded by learned counsel appearing for the respondent.

- 5 (2) As regards ex. 2 it is true that time of six years has elapsed for instalments covering approximately £270.— out of the total of £6,741 sought to be enforced, but the fact remains that the amount in ex. 2 is one and indivisible and it is not for me at this
10 stage to see that the time-barred amount be separated from the remainder.

Having answered issue (b) in the affirmative as well, and bearing in mind that learned counsel appearing for the respondent conceded that the respondent had not
15 obtained, or even applied for leave pursuant to the provisions of O. 40, r. 8 prior to the issue of warrants ex. 1 and ex. 2. I have decided to grant the Orders of Certiorari and Prohibition as applied.

In issuing the aforesaid Orders, I repeat that I have
20 ignored the allegation of the applicant to the effect that the nuisance in question has been abated; I leave entirely open the question of alleged abatement. Further I feel that it should be added here that the issue of the present orders does not prevent the respondent Municipality from
25 initiating once again warrants of execution on movables for the same or any amount due by the applicant subject of course to prior compliance with the provisions of O. 40, r. 8 of the Civil Procedure Rules.

30 Having given to the matter by best consideration I have decided to make no order as to the costs of the present application.

*Orders of certiorari
and prohibition granted.*