1985 February 22

[A. LOIZOU, DEMETRIADES, LORIS, JJ.]

MAROULLA SAVVA,

Appellant-Plaintiff.

v.

SAVVAS PETROU,

Respondent-Defendant.

(Civil Appeal No. 6694).

Immovable property—Certificate of registration—Is prima facie evidence of ownership only—Prescription—Prescriptive period started and completed prior to the coming into force, on 1st September, 1946, of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224—Prescriptive rights governed by the Law in force at the time i.e. the Ottoman Land Code which did not include provisions such as those of sections 22 and 27 of Cap. 224—And, therefore, ownership of trees independently of the land was perfectly legitimate and land could be divided irrespective of its extent—No interruption of prescriptive right by the issue of a title deed because the period of prescription was completed prior to the coming into force of Cap. 224 and to the issue of the title-deed.

Civil Procedure—Appeal—Point of law relating to procedure—Not taken in the Court below—Cannot be taken in the Court of Appeal.

In March 1981, a piece of land at Praetori village, under registration No. 4960, covering the whole of plot 124 was registered in the name of the appellant-plaintiff ("the plaintiff") by virtue of a gift from her uncle. Though the said plot was recorded during the general survey for fiscal purposes it was never registered up to 1966. In 1967 on the application of a certain Evdokia Charalambous for the issue of registration in her name "of her vineyard" the above title No. 4960 covering the whole

of the above plot was issued to her and she thereafter sold her said "vineyard" to the uncle of the plaintiff.

On the spot the above plot was divided into three smaller portions which after the institution of these proceedings were marked by the D.L.O. on the survey plan, which was revised into plots 124/1, 124/2, and 124/3. Plot 124/2—the disputed portion—was a field with two olive trees standing thereon and was separated with barbed wire from plot 124/3 which was a vineyard and was the undisputed property of the plaintiff. In 1982, the respondent-defendant ("the defendant") who was allegedly the owner of plot 124/2 applied for the first time to the D.L.O. in order to register same in his name by virtue of inheritance from his mother who was allegedly possessing such property for over fifty years prior to her death. The plaintiff who was the registered owner of the whole plot refused to give her consent for such registration and resorted to Court claiming a declaratory judgment to the effect that plot 124/2 belonged to her; and the defendant counterclaimed for an order directing registration of the said plot 124/2, with the two olive trees standing thereon, in his name and for an order amending the title-deed. The trial Court having accepted the evidence adduced by defendant found that the disputed portion was cultivated by the mother of the defendant for over 50 years prior to her death in 1976 and eversince was cultivated by the defendant. It, also, found that the registration in the name of the plaintiff covering the whole plot No. 124 was erroneously issued and proceeded to give judgment for the defendant on the counterclaim.

Upon appeal the plaintiff mainly contended:

(1) That the trial Judge erred in accepting the evidence as he did in preference to the evidence adduced by plaintiff.

(2) That the trial Judge drew inferences which were not open to him and in particular the inference that title deed under No. 4960 dated 5.3.81 in the name of the appellant was erroneously issued.

(3) That the trial Judge misdirected himself as to the

Law applicable and/or that he misapplied the law to the facts as he found them, in that:

(i) He disregarded the provisions of s. 22 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 224 in respect of unregistered trees standing on the land of a different owner.

(ii) He disregarded the provisions of s. 27 of Cap. 224 in allowing the sub-division of the whole plot 124, of an extent of 2,500 sq. ft., into smaller portions and ordering the registration of the so sub-divided plot under No. 124/2 in the name of the respondent by virtue of the counterclaim.

(iii) He ignored the Cyprus Case Law which has established that the issue of a title deed interrupts the period of prescription on immovable property.

Held, (1) that the findings of the trial Court were properly warranted by the evidence and there is no reason whatever to interfere with such findings; that the certificate of registration is prima facie evidence of ownership only; that there is no reason why the trial Court should not have accepted the evidence it accepted which evidence indicated clearly that the disputed portion of land was throughout in the possession of the defendant and his predecessor in title.

(2) That since Cap. 224 came into force on the 1.9.1946 and prior to the coming into operation of this Law, the Ottoman Land Code was in force; and that since the mother of the defendant was in possession of the disputed land with the two olive trees standing thereon for a period of over 50 years prior to her death in 1976 she must have started her prescriptive right sometime even prior to 1926 and therefore her prescriptive right must have been governed by the law in force at the time i.e. the Ottoman Land Code; that if this property was of arazi mirie category then the

period of prescription of the mother of the defendant which had taken it sometime in 1926 or even earlier must have been completed up to 1936; that if it was of mulk category, in which case the period of prescription would be 15 years, the prescription which had started in 1926 would have been completed some time in 1941; that, consequently, in either instance the period of prescription having commenced prior to 1926 was on any view completed prior to the 1.9.46 when Cap. 224 came into force; and that, therefore, at the time when the mother of the appellant had completed her prescriptive right, and therefore she was entitled to registration, Law Cap. 224 was not even enacted and so section 22 and section 27 of Cap. 224 were not in existence according to the old Law and it was perfectly legitimate at the time for any one to own and possess trees independently of land and land independently of any trees standing thereon, which might belong to a different owner and further a land could be divided irrespective of its extent.

(3) That the question of interruption of a prescriptive right by the issue of a title deed does not arise in the present case, as this property was possessed for the full period of prescription, whether that was 10 or 15 years, and it was completed prior to the coming into operation of the new Law Cap. 224; that this disputed portion as well as that of the plaintiff-appellant (the vineyard) were never registered up to 1966 and, therefore, the question of interruption by registration of the running of the period of prescription cannot arise, (vide *Kannavia* v. *Argyrou and Others,* 19 C.L.R. 186, *Angeli* v. *Lambi and Others* (1963) 2 C.L.R. 274; *Charalambous* v. *Ioannides* (1969) 1 C.L.R. 72), because the period of prescription had already been completed some 25 years prior to the issue of the registration for the first time.

Held, *further, on the point of law which was not raised in the Court below to the effect that as the defendant-respondent allegedly derives his right from his mother by inheritance, the provisions of section 34(7) of the Administration of Estates Law, Cap. 189 were not complied with:*

That as this point of law refers to procedure, an objection to procedure, not taken in the Court below will not be allowed to be taken in the Court of Appeal; and that even if the issue was not merely procedural in cases where the defect in proceedings depends on a fact not apparent on their face, the Court of Appeal cannot take the objection without evidence.

Appeal dismissed.

Cases referred to

Theodorou v. *HadjiAntoni,* 1961 C.L.R. 203;

Kannavia v. *Argyrou and Others,* 19 C.L.R. 186;

Angeli v. *Lambi and Others* (1963) 2 C.L.R. 274;

Charalambous v. *Ioannides* (1969) 1 C.L.R. 72;

Aradipioti v. *Kyriakou and Others* (1971) 1 C.L.R. 381;

Dyolt v. *Neville* (1887) W.N. 35;

Westminster Bank v *Edwards* [1942] A.C. 529.

Appeal.

Appeal by plaintiff against the judgment of the District Court of Paphos (Miltiadou, D.J.) dated the 27th January, 1984 (Action No. 1095/82) whereby it was ordered that two olive trees and the land on which they are standing is the property of the defendant.

Chr. Demetriou, for the appellant.

E. Komodromos, for the respondent.

Cur. adv. vult.

A LOIZOU J.: The judgment of this Court will be delivered by Loris J.

LORIS J: This is an appeal from the judgment of the District Court of Paphos (A. Miltiadou D.J.) in action No. 1095/82 whereby (I) the plaintiff's-appellant's claim for a declaratory judgment, injunction and damages in respect of two olive trees allegedly standing on her land at Praetori village (Paphos District) was dismissed whilst (II) defendant's-respondent's counterclaim for registration of the disputed area of land with the aforesaid two olive trees standing on it and for injunction was sustained.

It is the main complaint of the appellant that the Court below in deciding the case made findings and drew inferences which are incompatible with the title deed under No. 4960 dated 5.3.81 in her name in respect of plot 124 of Sheet/Plan XLVI/39 at Praetori village. The appellant complains that despite the existence of the aforesaid title deed for the whole plot 124, the Court held that part of the said plot, plot 124/2 on which the two olive trees are standing, is the property of the defendant-respondent and proceeded to order registration of same as per counterclaim in the name of the respondent ordering at the same time the amendment of the title deed in the name of the appellant whose claim was accordingly dismissed.

According to the evidence of the D.L.O. clerk, who carried out pursuant to a Court order, the local enquiry on 23.7.83 in the presence of the litigants and the Chairman of the Village Committee of Praetori village, the property described in the official survey plan as plot 124 of Sheet/Plan XLVI/39 of an extent of 2500 sq. ft., was found by him on the spot to be divided into three smaller portions which he proceeded to mark accordingly on the survey plan, which was thus revised by him into plots 124/1, 124/2 and 124/3. Of these, the disputed portion as indicated by the litigants who were present, was plot 124/2, a field. In that small piece of land there existed two olive trees. This piece was separated according to his evidence with barbed wire from plot 124/3 which is a vineyard; he also prepared a sketch which was pro-

duced before the trial Court as exhibit 1, in which plot 124/3 is marked as a vineyard and it is the undisputed property of the appellant, whilst plot 124/1 would have been registered by the D.L.O. in the name of a certain Salomi Georghiou Lambrianou who was never a party in the present proceedings.

The history of plot 124 was given by the D.L.O. clerk as follows: Plot 124 was recorded during the General Survey for fiscal purposes but it was never registered up to 1966. In 1966 a certain Evdokia Evripidou Charalambous (D.W.2) applied to the D.L.O. by virtue of application 1962/66 (exh. 2) for the issue of registration in her name "of her vineyard" as she herself has stated when giving evidence in this case in the first instance. As a result of the said application the D.L.O. issued in the name of Evdokia Evripidou Charalambous a title deed under No. 4960 dated 5.5.67 covering the whole plot 124. The aforementioned Evdokia sold her aforesaid "vineyard" and transferred same in the name of Chrysostomos Neofytou, the uncle of the appellant. Finally, this uncle of the appellant gifted to her the property in question and eventually same was registered in her name on 5.3.81 under Registration No. 4960 (exh. 4).

On 13.1.82 the respondent who was allegedly the owner of the disputed portion (plot 124/2) applied for first time to the D.L.O. in order to register same in his name by virtue of inheritance from his mother, namely Evanthia Papachristoforou who was allegedly possessing such property for over fifty years prior to her death. The aforesaid application of the respondent under No. A41/82 was examined by the D.L.O. but as it was revealed on the aforesaid examination that the whole plot was already registered as aforesaid, in the name of the appellant, the D.L.O. asked the respondent to produce the written consent of the registered owner. The appellant refused to give her written consent and instead resorted to the Court claiming a declaratory judgment to the effect that the disputed property belongs to her. The respondent maintaining that the disputed property belongs to him did set up a counterclaim praying for an order of the Court ordering the disputed area of land with the aforesaid two olive trees

standing on it in his name and the amendment of the title deed in the name of the appellant accordingly. He also claimed an injuction restraining the appellant from interfering with the disputed property.

The trial Court after hearing the evidence adduced by the litigants found that the disputed property i.e. plot 124/2 with the two olive trees standing on it was the property of the respondent and as a result dismissed the appellant's claim and gave judgment on the counterclaim.

The appellant apart from the evidence of the D.L.O. clerk as aforesaid (P.W.1) gave evidence herself (P.W.2) and called another witness namely her father Savvas Papanicolas, (P.W.3). The appellant gave evidence and produced by consent the title deed in her name which was put in as exhibit 4 and a copy of the official Survey Plan covering the area (exh. 5). It is a fact, and this was also stated by the D.L.O. clerk, that the title deed in the name of the appellant under No. 4960 dated 5.3.81 covers the whole plot 124 of Sheet/Plan XLVI/39. It is remarkable that the appellant did not give any account as to actual possession of the disputed area covered by the plot of her title deed prior to 5.3.81, when the property as aforesaid was registered in her name. She stated verbatim in cross-examination "I do not know who were cultivating the land or who were reaping the crop of the two olive trees before same was registered in my name by my uncle" (5.3.81).

The evidence of the father of the appellant in connection with the disputed area was similar to that of his daughter with the exception perhaps that for the last 15 years he was visiting the vineyard which then belonged to the uncle of the appellant in order to assist him in reaping the crop.

This is, in a very brief summary, the evidence adduced by the appellant.

The respondent called two witnesses and gave evidence himself (D.W.3). He stated that the disputed area was being cultivated and possessed by his mother Evanthia Papachristoforou for over 50 years and the crop of the

two olive trees standing thereon was collected by her. He added that his mother died in 1976 and eversince he is cultivating the disputed property himself and he is reaping the crop of the two olive trees undisputedly up to 1981 when the appellant for the first time attempted to reap the crop of the aforesaid trees.

Two more witnesses gave evidence for the respondent; they are: (a) Neophytos Stylianou, D.W.1, a 72 year old Chairman of the Village Committee of Praetori village who stated, inter alia, that the disputed property was cultivated by the mother of the respondent Evanthia Papachristoforou for over 50 years prior to her death and that the crop of the aforesaid olive trees standing on the disputed area was reaped by her. He added that the mother of the respondent died in the year 1976 and that the defendant is her only heir, and eversince her death he has the disputed property in his possession. (b) Evdokia Evripidou Charalambous the predecessor in title of the appellant. This witness was the first person who applied to have the property of the appellant registered in her name. Her application to the D.L.O. under No. 1962/66 (exh. 2), as she herself has stated, was for the registration in her name of "her vineyard" and as indicated by the evidence of the D.L.O. clerk, (P.W.1) the vineyard of the appellant which is covered by plot 124/3 is separated by barbed wire from the adjoining disputed land with the two olive trees i.e., with plot 124/2. Evdokia, D.W.2 stated, inter alia, that "when I applied for the issue of title deed in respect of my vineyard I did never have in mind to take the field with the olive trees of the defendant".

This was the evidence before the trial Judge who stated clearly in his judgment that he accepted the evidence of the D.L.O. clerk and accepted as truthful the evidence of the defendant-respondent and his two witnesses. Relying on such evidence the trial Judge made his findings of fact and drew inferences from such facts which appear on record and which we do not intend repeating. One of his inferences was that the registration in the name of the appellant covering the whole plot No. 124 was obviously wrong. The findings of the trial Judge led to the inevitable result of dismissing the plaintiff's-appellant's claim and

giving judgment on the counterclaim of the respondent.

The grounds of appeal on which the appellant relied in order to impugn the decision of the trial Judge may be conveniently grouped into three categories;

I. That the trial Judge erred in accepting the evidence as he did, in preference to the evidence of the plaintiff and that of her father. In particular the appellant attacked the evidence of D.W.1, namely the chairman of the village committee which, he maintained, should have never been accepted in view of the fact that this witness as chairman of the Village Committee had given a certificate, emanating from the village authority in 1966, which is to be found in the application (exh. 2). contradictory to the evidence given by him before the trial Judge viva voce.

II. That the trial Judge drew inferences which were not open to him and in particular the inference that title deed under No. 4960 dated 5.3.81 in the name of the appellant was erroneously issued.

III. That the trial Judge misdirected himself as to the Law applicable and/or that he misapplied the law to facts as he found them, in that:

(i) he disregarded the provisions of s. 22 of the Immovable Property, Tenure, Registration e.t.c. Law Cap. 224 in respect of unregistered trees standing on the land of a different owner.

(ii) he disregarded the provisions of s. 27 of the Immovable Property Tenure Registration e.t.c. Law Cap. 224 in allowing the sub-division of the whole plot 124, of an extent of 2,500 sq. ft., into smaller portions and ordering the registration of the so sub-divided plot under No. 124/2 in the name of the respondent by virtue of the counterclaim.

(iii) He ignored the Cyprus Case Law which has established that the issue of a title deed inter-

rupts the period of prescription on immovable property.

Independently of the above grounds of law the appellant is relying on another ground of law which was never raised in the Court below, notably that as the respondent allegedly derives his rights from his mother by inheritance, the provisions of section 34(7) of the Administration of Estate Law, Cap. 189 were not complied with.

We shall proceed to examine the grounds on which the appellant is relying as grouped above.

We shall be dealing with grounds I and II together. We have carefully considered the judgment of the learned trial Judge in the light of the evidence adduced and we are satisfied that there is no misdirection and therefore, no reason whatever to interfere with his findings, which are properly warranted by the evidence. It was repeatedly stressed by this Court "that the certificate of registration is prima facie evidence of ownership only". *(Thomas Antoni Theodorou* v. *Christos Theori HadjiAntoni,* 1961 C.L.R. 203; and it is abundantly clear that the mother of the respondent was in undisputed uninterrupted adverse possession of the disputed area (plot 124/2) with the two olive trees standing on it, for a period of over 50 years up to the time of her death in 1976. Furthermore, it is clear from the evidence of the predecessor in title of the appellant, namely Evdokia (D.W.2) that she applied for the issue of title deed in her name for "her vineyard" and that when she did so apply "she did never have in mind to take the field with the olive trees of the defendant". This evidence coupled with the evidence of the D.L.O. clerk (P.W.1) which was accepted by the trial Court, and indeed we see no reason why he should not accept it, indicates clearly that the disputed portion of the land was throughout in the possession of the respondent and his predecessor in title, his mother.

On the contrary the evidence of the appellant and her father indicates clearly, even if accepted in toto, that they did not even allege that they were in possession of the disputed area. This leads to the inescapable inference that the registration in the name of the appellant (exh. 4) was

issued owing to some mistake or error as it covers the whole plot 124. The D.L.O. clerk was not in a position to say how this error occurred. Nevertheless, it is obvious that there must have been an error in the registration, as found by the trial Judge.

It was strenuously argued by learned counsel appearing for the appellant that the evidence of the Chairman of the village committee should not have been accepted by the trial Court for the reason that his testimony before the trial Court was incompatible with the village certificate he has signed as a Chairman of the Village Committee in application No. 1966/62 (exh. 2) i.e. the D.L.O. application by virtue of which the predecessor in title of the respondent, who originally applied for registration in 1966, was registered for the whole plot 124. The Chairman of the village committee, (D.W.1) explained that he was not conversant with the survey plan when he gave his aforesaid certificate. He made it clear that he was not present at the General Survey which was carried out at about the year 1923; and it is obvious that he must have been mistaken in identifying the "vineyard" for which D.W.2 applied to be registered, with the whole plot 124.

Be that as it may, we hold the view that the certificate in question cannot in any way affect the evidence of this witness who has given evidence viva voce before the Court below, he was cross-examined and it was not even suggested that he had any personal interest in this case which might influence his veracity.

We shall now come to grounds under group III above.

The Immovable Property Tenure Registration e.t.c. Law Cap. 224 came into force on the 1.9.46. Prior to the coming into operation of this Law, the Ottoman Land Code was in force. It was found by the trial Court that the mother of the respondent was in possession of the disputed land with the two olive trees standing on it for a period of over 50 years prior to her death. It is in evidence that she died in 1976; so according to the finding of the Court she must have started her prescriptive right sometime even prior to 1926. It is obvious therefore, that her right to prescription must have been governed

by the law in force at the time i.e. the Ottoman Land Code.

The Ottoman Land Code envisaged certain categories of land which have been abolished by the Immovable Property Tenure e.t.c. Law, Cap. 224. Amongst the existing then categories of land according to the Ottoman Land Code were, arazi mirie category and mulk category. The period of prescription for arazi mirie category was ten years and the relevant period of prescription for mulk category was 15 years.

It is true that there is no evidence before us whether the disputed property was either of arazi mirie or mulk category. If this property was of arazi mirie category then the period of prescription of the mother of the respondent which had taken it sometime in 1926 or even earlier must have been completed up to 1936. If on the other hand it was of a mulk category, in which case the period of prescription would be 15 years, the prescription which had started in 1926 would have been completed some time in 1941.

Consequently in either instance the period of prescription having commence prior to 1926 was on any view completed prior to the 1.9.46 when Cap. 224 came into force.

So at the time when the mother of the appellant had completed her prescriptive right, and therefore she was entitled to registration, Law Cap. 224 was not even enacted.

Provisions such as those referred to by learned counsel for the appellant, notably section 22 and section 27 of Cap. 224 were not in existance according to the old Law and it was perfectly legitimate at the time for any one to own and possess trees independently of land and land independently of any trees standing thereon, which might belong to a different owner. The provisions of s. 27 were also unknown to the Ottoman Land Code at the time. A land could be divided irrespective of its extent.

The question of interruption of a prescriptive right by the issue of a title deed does not arise in the present case, as this property was possessed for the full period of

prescription, whether that was 10 or 15 years, and it was completed prior to the coming into operation of the new Law Cap. 224. This disputed portion as well as that of the plaintiff-appellant (the vineyard) were never registered up to 1966. The question, therefore, of interruption by registration of the running of the period of prescription cannot arise, *(Vide Kannavia* v. *Argyrou and others,* 19 C.L.R. 186, *Angeli* v. *Lambi and others* (1963) 2 C.L.R. 274; *Charalambous* v. *Ioannides* (1969) 1 C.L.R. 72), because the period of prescription had already been completed some 25 years prior to the issue of the registration for the first time in the name of Evdokia Evripidou (D. W.2.), the predecessor in title of the appellant.

In this respect it should not also be lost sight of, the fact that the registration in question even in 1966 was issued under an incorrect village certificate wrongly obtained *(Aradipioti* v. *Kyriacou and others* (1971) 1 C. L.R. 381).

As already stated above the appellant-plaintiff in the present appeal raised a point of law never raised in the Court below, notably that as the defendant-respondent allegedly derives his right from his mother by inheritance, the provisions of section 34(7) of the Administration of Estates Law, Cap. 189 were not complied with.

This point of Law refers to procedure. It was admitted by counsel appearing for the appellant that this point was never raised before the trial Judge and the simple answer of this Court to his request to consider this point is that an objection to procedure not taken in the Court below will not be allowed to be taken in the Court of Appeal. (Vide *Davis* v. *Galmoye* [1888] 39 Ch. D. 322 and *Dyolt* v. *Neville* (1887) W.N. 35). But even if the issue was not merely procedural in cases where the defect in proceedings depends on a fact not apparent on their face, the Court of Appeal cannot take the objection without evidence *(Westminster Bank* v. *Edwards* [1942] A.C. 529).

In the present appeal the only facts we know is that the mother of the defendant died some time in 1976, and that the defendant is the only heir, and apparently under no disability. All we know about the estate is this disputed

portion of land the value of which tantamounts as stated to £25.— or £30: In the circumstances this case might be squarely within the ambit of s. 29 of Cap. 189.

It is apparent, therefore that necessary facts in order to determine this issue are missing and we are not prepared to act on mere surmise.

For all the above grounds the present appeal is dismissed with costs.

Appeal dismissed with costs.