

1985 February 18

[TRIANTAFYLIDIS, P., LORIS, PIKIS, JJ.]

FREDDIE A. ELEFThERIADES AND TWO OTHERS.

Appellants-Defendants,

v.

CHRISTOS MAVRELLIS AND FOUR OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 6559).

Civil Procedure—Practice—Summons for directions—Order 30 of the Civil Procedure Rules—Objects and scope of—Probate Action—Extension of time for the filing and inspection of affidavits of scripts—And inspection of will and examination thereof by an expert—Properly made—Section 56 of the Courts of Justice Law, 1960 (Law 14/60) and Order 30, rule 2(e) of the Civil Procedure Rules. 5

Civil Procedure—Practice—Pleadings—Probate action—Statement of claim—Allegations of forgery—Struck out for non-compliance with section 67 of the Civil Wrongs Law, Cap. 148—Open to trial Judge to indicate that allegations of forgery might be included in the defence to counterclaim, subject to an application being made for amendment—Section 67 (supra) does not apply to the defence to the counterclaim. 10 15

Civil Wrongs Law, Cap. 148—Section 67—Objects of—Not applicable to defendants.

The appellants and the respondents were the beneficiaries of two wills signed in the name of Frosso Mary Marsh who died on the 5th February, 1982. They were executed on 24th November, 1980 and 28th November, 1981. Upon 20

an action by the beneficiaries of the 1980 will to propound the will that favoured them and impugn the validity of the 1981 will, the beneficiaries of the second will joined in their defence a counterclaim aimed to propound the will that benefited them.

By means of summons for directions taken under Order 30 of the Civil Procedure Rules, the plaintiffs sought directions in respect of matters preliminary to the hearing including (a) extension of time for the filing and inspection of affidavits of scripts, and (b) inspection of the 1981 will and its forensic examination by an expert in the field of graphology.

At the hearing of the summons the defendants applied to strike out part of the case of the plaintiffs, that relating to the invalidity of the 1981 will, on the ground that it infringed the provisions of s. 67 of the Civil Wrongs Law, Cap. 148. According to the statement of claim the validity of the 1981 will was challenged on three separate grounds, that is, (a) fraud, (b) undue influence, and (c) forgery.

The trial Court upheld the application of the plaintiffs and extended the time for the filing of an affidavit of scripts taking the view there was discretion under Order 30 to remedy procedural defects without need arising for a separate application, in this case an application to extend time under Order 57, r. 2. The Court, also, authorized forensic examination of the 1981 will subject to terms designed to ensure a proper opportunity of defendants to follow the examination and the Registrar to supervise the process. Both the above orders were challenged on appeal as erroneously made.

The trial Court, further, made an order directing that allegations of forgery be struck out for non-compliance with the provisions of section 67 of the Civil Wrongs Law, Cap. 148, requiring notice to the Attorney-General before litigating a civil wrong that amounts to a felony as well; but expressed readiness to allow the plaintiffs to amend their defence to the counterclaim in order to include there-

in allegations of forgery struck out from the statement of claim.

Upon appeal by the defendants it was contended:

- (a) That the professed readiness of the Court to allow an amendment of the defence to the counterclaim was defying the constitutional role of the Judge to keep aloof from the dispute of the parties a necessary attribute of his independence in the judicial process. 5
- (b) That there was no power on a summons for directions to extend the time for the taking of necessary procedural steps, a course that can only be legitimized on a specific application founded on the provisions of Order 57, r. 2. 10
- (c) That there was no jurisdiction under either s. 56 of the Courts of Justice Law, 1960 or under Order 30, r. 2 (a) of the Civil Procedure Rules, to direct forensic examination; and that the order made will place obstacles in the way of preservation and presentation of the will by the appellants at the trial. 15

Held, per Pikis, J., Loris J. concurring and Triantafyllides P. partly concurring, (1) that the provisions of Order 30 of the Civil Procedure Rules are designed to make possible at the stage of the summons for directions the resolution of as many interlocutory matters as it is feasible; that quite rightly the learned trial Judge ordered the expurgation of the allegations of forgery from the statement of claim for non-compliance with the provisions of s. 67, Cap. 148; that the relevance of the issue did not disappear or its legitimacy in the context of adjudication of the defence to counterclaim; and that, consequently, it was open to the trial Court to indicate in the interest of comprehensive definition of the issues in dispute that allegations of forgery might be included in the defence to counterclaim, 20
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subject always to an appropriate application being made for amendment.

5 *Held, further*, that the same objections could not be raised to the inclusion of allegations of forgery in the defence to counterclaim because the object of s. 67 is to preclude a party from vindicating rights arising from felonious conduct without heeding public interest in the reporting of crime with a view to its ultimate suppression and because
10 *different considerations apply to defending one's rights and the undoubted freedom of a defendant to put forward any defence known to the Law.*

15 (2) That the trial Court had jurisdiction to extend the time for filing an affidavit of scripts (see *Baxter v. Holdsworth* [1899] 1 Q.B. 266); and that, moreover, the Court in the exercise of its jurisdiction to control its own proceedings has, it seems, inherent power to enlarge or extend time limits, a power not limited to the express provisions of the rules of practice (see *R. V. Bloomsbury CC* [1976] 1 All E.R. 877).

20 (3) That inspection of documents encompasses power to examine them (see in *Re Saxton (deceased)* [1962] 3 All E.R. 92); that the efficacy of inspection depends, inter alia, on amenity to examine a document, subject always to proper safeguards for its preservation; that, therefore, the
25 order made for the forensic examination of the will was properly made pursuant to the provisions of both s. 56 of Law 14/60, and Order 30, r.2(e), of the Civil Procedure Rules; because inspection and examination of the 1981
30 will was as required by s. 56 material for the proper determination of the authenticity of the will; accordingly the appeal must fail.

Appeal dismissed.

Cases referred to:

Estate of G.M. v. L. and Others [1946] 1 All E.R. 579;

Baxter v. Holdsworth [1899] 1 Q.B. 266;

Re Saxton (deceased) [1962] 3 All E.R. 92;

R. v. Bloomsbury C.C. [1976] 1 All E.R. 897 (C.A.);

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Groves v. Groves [1853] L.J. Ch. 199;

In the Goods of Ibbetson, 163 E.R. 43;

Efinch v. Comber, 10 T.L.R. 35;

In the Goods of Brazier [1899] L.J.P. 6.

Appeal.

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Appeal by defendants against the ruling of the District Court of Nicosia (Nikitas, P.D.C.) dated the 21st April, 1983 (Action No. 2833/82) whereby it was ordered that the 1981 will of Frosso Mary Marsh may be examined by an expert of plaintiffs' choice and the time for filing an affidavit of scripts was extended.

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L. Papaphilippou, for the appellants.

St. McBride, for the respondents.

Cur. adv. vult.

TRIANAFYLLIDES P.: The first judgment of the Court will be delivered by Pikis, J.

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PIKIS J.: The appellants and respondents are the beneficiaries of two wills signed in the name of Frosso Mary

Marsh who died on 5th February, 1982. They were executed as far as it may be gathered from their content, reproduced in the pleadings, on 24th November, 1980 and 28th November, 1981. The two testamentary documents differ materially in respect of the persons benefited thereby. The beneficiaries of the 1980 will raised the present proceedings with a two-fold purpose, namely, to (a) propound the will that favoured them, (b) impugn the validity of the 1981 will. It was resisted by the beneficiaries of the second will who joined in their defence a counterclaim aimed to propound the will that benefited them.

Under a summons for directions taken under Ord. 30 of the Civil Procedure Rules, the plaintiffs sought directions in respect of matters preliminary to the hearing including (a) extension of time for the filing and inspection of affidavits of scripts, and (b) inspection of the 1981 will and its forensic examination by an expert in the field of graphology.

At the hearing of the summons the defendants applied, as they were entitled to, to strike out part of the case of the plaintiffs, that relating to the invalidity of the 1981 will, on the ground that it infringed the provisions of s. 67 of the Civil Wrongs Law—Cap. 148. According to the statement of claim the validity of the 1981 will was challenged on three separate grounds, that is, (a) fraud, (b) undue influence, and (c) forgery.

In a thorough and altogether well considered judgment, the trial Court reviewed the compass and ambit of Ord. 30 and the role it is designed to serve in the pretrial process. It was noted its provisions are purposely wide in order to confer discretion on the Court to advert to all preliminary matters with a view to preparing the ground for the hearing. An order was made directing that allegations of forgery be struck out for non-compliance with the provisions of s. 67, Cap. 148, requiring notice to the Attorney-General

before litigating a civil wrong that amounts to a felony as well. However, the relief itself for a declaration of the invalidity of the 1981 will was left unaffected as there were other unobjectionable factual averments that supported it, such as, allegations of fraud and undue influence. This aspect of the judgment is not questioned on appeal. 5

The defendants by the present appeal challenge the expressed readiness of the Court to allow the plaintiffs to amend their defence and counterclaim in order to include therein allegations of forgery struck out from the statement of claim. The professed readiness of the Court to allow an amendment of the defence and counterclaim was criticised as defying the constitutional role of the Judge to keep aloof from the dispute of the parties a necessary attribute of his independence in the judicial process. In support of this submission reference was made to a passage in the White Book to the effect that the Judge should not dictate to the parties how they should frame their case⁽¹⁾. 10 15

The trial Court upheld the application of the plaintiffs and extended the time for the filing of an affidavit of scripts taking the view there is discretion under Ord. 30 to remedy procedural defects without need arising for a separate application, in this case an application to extend time under Ord. 57, r. 2. More consequentially the Court authorized forensic examination of the 1981 will subject to terms designed to ensure a proper opportunity of defendants to follow the examination and the Registrar to supervise the process. Both the above orders are challenged on appeal as erroneously made. 20 25

Appellants submitted there is no power on a summons for directions to extend the time for the taking of necessary procedural steps, a course that can only be legitimized on a specific application founded on the provisions of Ord. 57, r. 2. On the other hand, there is no jurisdiction, it was sub- 30

¹⁾ Annual Practice 1960, Vol. 1, p. 477.

mitted, under either s. 56 of the Courts of Justice Law⁽¹⁾ or under Ord. 30, r.2(a), Civil Procedure Rules, to direct forensic examination. Additionally, it was argued, the order made will place obstacles in the way of preservation and presentation of the will by the appellants at the trial. To a question to the Court whether they would be ready to submit to an order for forensic examination after the production of the will in Court, counsel for the appellants gave a negative reply.

Respondents supported the judgment as valid on every ground and invited the Court to dismiss the appeal. Respecting extension of time on a summons for directions counsel drew attention, as the trial Court did, to r. 41, Administration of Estates Rules 1955, that makes applicable in relation to probate matters the Civil Procedure Rules in the absence of provision to the contrary in the 1955 Rules. And as no provision to the contrary exists, Ord. 30 is applicable; inasmuch as it confers discretion on the Court to order extension of time on a summons for directions, the course followed was perfectly open to the Court. Equally impeccable, it was submitted, is the order of the Court for forensic examination justified under the provisions of both s. 56—Law 14/60—and Ord. 30, Civil Procedure Rules. In the context of the case such examination was necessary in the interest of justice.

I find the suggestion that the Court descended into the arena of litigation by indicating that defence to counterclaim may properly be amended to include allegations of forgery is wholly misconceived. It is based on an erroneous view of the role of the Court at the preliminary stage of issuing directions for the definition and elucidation of the issues in dispute. At that stage the Court is not adjudicating on the merits of the case, it is concerned to pave the way for the trial by ensuring that the issues are properly elicited so that the Court may ultimately resolve the

⁽¹⁾ Law 14/60.

dispute of the parties in the proper context. The powers vested in the Court under Ord. 30 are purposely wide to afford the Court freedom to achieve the above ends. The order is largely fashioned on the corresponding provisions of Ord. 30 of the old English Rules of the Supreme Court. As explained in the White Book(1) the provisions of Ord. 30 are designed to make possible at the stage of summons for directions the resolution of as many interlocutory matters as it is feasible, an objective within the contemplation of the Evershed Committee that recommended its introduction.

Quite rightly the learned trial Judge ordered the expurgation of the allegations of forgery from the statement of claim for non compliance with the provisions of s. 67, Cap. 148. The relevance of the issue did not disappear or its legitimacy in the context of adjudication of the defence to counterclaim. Consequently, it was open to the trial Court to indicate in the interest of comprehensive definition of the issues in dispute that allegations of forgery might be included in the defence to counterclaim: subject always to an appropriate application being made for amendment. Also we are in agreement with the trial Court that the same objections could not be raised to the inclusion of allegations of forgery in the defence to counterclaim. The object of s. 67 is, as it may be surmised, to preclude a party from vindicating rights arising from felonious conduct without heeding public interest in the reporting of crime with a view of its ultimate suppression. Different considerations apply to defending one's rights and the undoubted freedom of a defendant to put forward any defence known to the Law(1).

The role of a Judge under the adversarial system of the

(1) Annual Practice 1958, p. 661 et seq.

(1) See, Halsbury's Laws of England, Vol. 1, 3rd Ed., para. 16, the judgment of Willmer J., in *The Estate of G.M. v. L. and Others* [1946] 1 All E.R. 579, (cited by the trial Court).

common Law is that of an impartial arbiter; in the discharge of his adjudicative duties, he must distance himself from the arena of litigation. This role is in no way compromised by ensuring that the dispute is properly defined before the Court. In matters of procedure and practice, the Court has wide discretion in exercise of its powers to regulate proceedings before it. It is perfectly legitimate for the Court, both under the rules and in exercise of inherent powers, to regulate proceedings before it, for the Court to issue all necessary directions in order to make possible adjudication upon the substance of the case. The trial should centre on the substantive dispute of the parties, if justice is to be done. Procedural irregularities should, so far as possible, be remedied before the trial so that adjudication on the merits is not deflected by procedural side issues. Ord. 30 specifically aims to institutionalize the exercise of this jurisdiction of the Court; r. 2(g) in particular confers power to make any order with respect to the proceedings that seems necessary or desirable with a view to saving time and expense. Consequently, we dismiss the submission that the trial Judge transgressed the limits of his discretion by indicating readiness to allow an amendment of the defence to counterclaim by inclusion of allegations of forgery.

As earlier explained, it is desirable at the summons for directions stage to deal with as many interlocutory matters as possible, preparing thereby the ground for the speedy progress of the action to trial. In our judgment the trial Court had jurisdiction to extend the time for filing affidavit of scripts, a proposition supported by the decision in *Baxter v. Holdsworth* [1899] 1 Q.B. 266, on the interpretation of analogous English provisions. Moreover, the Court in the exercise of its jurisdictions to control its own proceedings has, it seems, inherent power to enlarge or

extend time limits, a power not limited to the express provisions of the rules of practice (1).

Inspection of documents encompasses power to examine them as decided in England(2) in *Re Saxton (deceased)* [1962] 3 All E.R. 92; microchemical examination of an agreement signed by the testator was ordered in exercise of the powers of the Court to authorize inspection of documents. The efficacy of inspection depends, inter alia, on amenity to examine a document, subject always to proper safeguards for its preservation. We are of opinion in agreement with the trial Judge that the order made for the forensic examination of the will was properly made pursuant to the provisions of both s. 56, Law 14/60, and Ord. 30, r. 2(e), Civil Procedure Rules. Inspection and examination of the 1981 will was as required by s. 56 material for the proper determination of the authenticity of the will.

For the reasons given above, the appeal fails. It is dismissed with no costs.

LORIS J.: I have read the judgment of Pikis, J. and I am in agreement with it. There is nothing further I wish to add. I join in the order for the dismissal of the appeal with no costs.

TRIANAFYLLIDES P.: In relation to the extension of the time within which the affidavit of scripts was to be filed by the respondents and in relation to the examination, by an expert of the respondents' choice, of the will dated 28th November 1981, which is relied on by the appellants, I am in agreement with the outcome of this appeal as stated

(1) See, *R. v. Bloomsbury CC* [1976] 1 All E.R. 897 (CA).

(2) *Groves v. Groves* [1853] 23 L.J. Ch. 199; *In the Goods of Ibbetson*, 163 E.R. 43; *Efinch v. Comber*, 10 T.L.R. 35; *In the Goods of Brazier* [1899] 88 L.J.P. 6.

in the judgment just delivered by my learned brother
Pikis J.

5 I would like, however, to draw particular attention to
the way in which there was framed the order of the trial
Court allowing the examination of the will; it reads as
follows:

10 ".... I make an order that the 1981 will may be
examined by an expert of the plaintiffs' choice in the
presence of the defendants or any other authorised
person as well as in the presence of the probate re-
gistrar who now has custody of the document, but I
suspend its enforcement until a formal amendment of
the reply and defence to counterclaim is properly ob-
tained and until the plaintiffs file an affidavit of
15 scripts."

It is clear from the above order that an amendment of
the reply and defence to the counterclaim of the respond-
ents, as plaintiffs, is necessary for the purpose of rendering
operative the order for the examination of the will con-
cerned, because until the issue of the authenticity of the
20 execution of such will would become once again part of
the pleadings filed by the respondents, through being in-
corporated in their reply and defence to the counterclaim
after the allegation that the said will was a forged docu-
ment had been struck out from their statement of claim,
25 there could not be said to exist any good reason for allow-
ing the examination of such will as applied for by the res-
pondents.

Earlier on in its ruling the trial Court had indicated
30 that the respondents would be allowed to amend their reply
and defence to the counterclaim. As, however, at that time
there was not yet before the trial Court any application for
leave to effect such an amendment I am of the view that
what the trial Court said in this connection cannot be re-
35 garded as being an operative part of its ruling which is
challenged by the present appeal and, consequently, the

outcome of this appeal cannot be treated as prejudging the fate of an application by the respondents for leave to amend their reply and defence to the counterclaim.

I would like to stress, also, the following:

First, that, though I would not be prepared to hold that an extension of time for filing the affidavit as to scripts could not be lawfully granted in the course of dealing with the summons for directions in the present case, it is more desirable that such an extension should, as a rule, be applied for by a separate application independently from a summons of directions. 5 10

Secondly, that it is open to the appellants to insist that the examination of the will of 1981 should be carried out after all necessary steps will have been taken, by photocopying it or otherwise in order to ensure that if it is destroyed or damaged during the course of the examination there will be admissible secondary evidence of such will. 15

I would not make any order as to the costs of this appeal.

Appeal dismissed with no order as to costs. 20