

1985 November 25

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

ELPIDA CHARALAMBOUS,

Appellant-Defendant,

v.

C. NICOLAIDES AND A. NEOPHYTOU CO.,

Respondents-Plaintiffs.

(Civil Appeal No. 7053).

5 *Stay of execution pending appeal—Order 35, r.18 of the Civil Procedure Rules—Principles upon which the Court exercises its discretion to grant or refuse stay—To a large extent in commercial transactions they relate to the necessary confidence that must be maintained in meeting one's obligations.*

The appellant was adjudged by the District Court of Nicosia to pay £857.36 with interest at 6% per annum plus costs to the respondents-plaintiffs.

10 After filing an appeal against the said judgment she applied for stay of execution both by summons and ex parte. Pending the determination of the summons she was granted stay of execution. The trial Judge, after hearing
15 the application by summons, refused to grant the stay of execution applied for on the ground, inter alia, that the applicant failed to establish that the success of her appeal would become nugatory if the judgment debt and costs were collected.

20 As a result of such dismissal the applicant filed the present application which is based on Ord. 35, r. 18 of the Civil Procedure Rules. In her fresh affidavit she alleged inter alia that if the judgment debt and costs are paid there is no possibility to be refunded to her, if her appeal
25 is successful. She also stated that she is ready to furnish a security for the payment of the judgment debt and costs.

Held, dismissing the application (1) There are many risks, in the Court too readily exercising its discretion in favour of a stay when the matter was adjudicated upon by the trial Judge who had all the facts and all the issues before him and so the point could be argued and decided upon with relative speed and convenience by him. Moreover the exercise of a Court's discretion depends on the particular circumstances of each case and to a large extent it turns on matters relating to the necessary confidence that must exist and be maintained in meeting in commercial transactions, one's obligations.

(2) In the circumstances and as moreover the Court has not been persuaded that if the judgment debt and costs are paid there is no reasonable probability of sending them back if the appeal succeeds, the application would be dismissed.

Gruno v. Ship "Algazena" (1980) 1 C.L.R. 595 at 598 and *Iacovidou v. Christophi* (1985) 1 C.L.R. 713 cited with approval.

Application dismissed.
No order as to costs.

Cases referred to:

- Mavrohannas and Another v. Michael* (1984) 1 C.L.R. 760;
Sewing Machines Rentals Ltd. v. Wilson (1975) 3 All E. R. 553;
Gruno v. Ship "Algazera" (1980) 1 C.L.R. 595;
Atkins v. G.W.R. [1886] 2 T.L.R. 400;
Barker v. Lavery [1885] 14 Q.B.D. 769 C.A.;
Iacovidou v. Christophi (1985) 1 C.L.R. 713.

Application.

Application by defendant for an order staying the execution of the writ of movables issued against her in Nicosia

District Court Action No. 6099/82 until the determination of the present application.

E. Vrahimi (Mrs.), for the appellant.

Cur. adv. vult.

- 5 A. LOIZOU J. read the following judgment of the Court. The applicant, as defendant before the District Court of Nicosia in an action arising out of a commercial transaction, was adjudged to pay £857.36 cents with interest thereon at 6% per annum and the costs of the action.
- 10 On the 24th October, 1985, she filed an appeal against the said judgment. She then applied to the District Court, that had heard the case and issued the judgment appealed from, for a stay of execution both by summons and ex parte. Pending the determination of that application she
- 15 was granted upon the ex parte application stay of execution. The application by summons was then heard by the learned trial Judge who, after reviewing the authorities and the facts before him, refused same on the ground, inter alia, that the applicant did not put forward any allegation
- 20 and did not disclose any ground establishing even in the slightest degree that the success of her appeal would ultimately become nugatory if the execution of the judgment obtained against her was proceeded with and the judgment debt and costs were collected. He referred to the affidavit
- 25 of one of the partners of the plaintiffs, filed with their notice of opposition in which he alleged that both partners of the partnership and the firm itself had property and were solvent and in a position to refund any amount to the applicant, if she was successful in her appeal. It was
- 30 pointed out by the learned trial Judge that this allegation was not disputed by the applicant, nor was a notice given to the said affiant to be cross-examined.

- Before us to-day there is a fresh affidavit sworn by the applicant in which she asserts in addition to the fact, that
- 35 if her "Mercedes" car under Registration Number QJ 37 of a value of £20,000 is sold by auction, she will suffer irreparable damage, that if the amount of the judgment debt and costs be paid there is no possibility to be refunded to her if she is successful in her appeal which seems to

be an afterthought and nothing more than a vague assertion, and that she is ready to furnish any security with solvent guarantors that the Court might direct.

It is correct that Order 35 rule 18 of our Civil Procedure Rules on which the present application is based is so worded that an order staying execution may be made on certain conditions including the furnishing of security (*Mavrohannas and Another v. Michael* (1984) 1 C.L.R. 760 at p. 762; *Sewing Machines Rentals Ltd., v. Wilson* [1975] 3 All E.R. 553 and the Annual Practice 1960, p. 1696 under the heading "Terms on which stay is ordered").

The principles governing the issue of orders staying execution pending an appeal have been stated in numerous cases with reference to the Case Law that developed over the years in England. (See the Annual Practice 1960 p. 1695). If one wishes to see some of the latest ones he may turn to the case of *Gruno v. Ship "Algazera"* (1980) 1 C.L.R. 595 where Demetriades J., at p. 598 summed up the position as follows:

"(a) The Court, in granting or refusing a stay, has a discretion, depending on the particular circumstances of each case.

(b) The Court should not deprive a successful litigant of the fruits of his litigation pending an appeal.

(c) That when there is an appeal about to be prosecuted, the litigation is to be considered as not at an end, and that being so, if there is a reasonable ground of appeal, and if by not making the order to stay the execution of the order, it would make the appeal nugatory, not to deprive the appellant of the results of the appeal, and that if such is the case, it is the duty of the Court not to interfere and suspend the rights of the party who has established his rights for a stay of execution."

Also reference may be made to the case of *Mavrohanna and Another v. Michael* (supra); and *Nina P. Iacovidou v. Manolis Christophi* (as yet unreported)* where Piki J.,

* Reported in (1985) 1 C.L.R. 713.

summed up the position as follows:

5 "Premising his arguments on the provisions of Ord.
35 r. 18, and the principles underlying its applica-
tion, counsel submitted that stay is granted as a rule
in order to safeguard the effectiveness of the right to
appeal. The discretion of the Court is exercised upon
a consideration of two equally important considera-
tions for the sound administration of justice. The
10 need to uphold finality of judgments, on the one hand,
and the sustenance of the effectiveness of the right to
appeal, on the other."

15 No doubt this is a matter of judicial discretion and there
are many risks, in the Court too readily exercising such
a discretion in favour of a stay when the matter was ad-
judicated upon by the trial Judge who had all the facts
and all the issues before him and so the point could be
argued and decided upon with relative speed and conve-
nience by him. Moreover the exercise of a Court's discre-
tion depends on the particular circumstances of each case
20 and to a large extent it turns on matters relating to the
necessary confidence that must exist and be maintained in
meeting in commercial transactions, one's obligations.

25 Having given due consideration to the totality of the
circumstances of the case we have decided not to exercise
our discretion in favour of a stay as moreover we are not
persuaded that if the judgment debt and costs are paid
there is no reasonable probability of sending them back if
the appeal succeeds. (*Atkins v. G.W.R.* [1886] 2 T.L.R.
400, following *Barker v. Lavery* [1885] 14 Q.B.D. 769
30 C.A.).

The application is therefore dismissed with no order as
to costs.

*Application dismissed.
No order as to costs.*