

1986 October 10

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

PANICCOS HJICHAMBIS,

*Appellant-Applicant,*

v.

ATTORNEY-GENERAL OF THE REPUBLIC  
AND OTHERS,*Respondents.**(Civil Appeal No. 6816).*

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- Elections—Village Authorities—Election Petition—The Village Authorities Law, Cap. 244, Section 9(3)(h), as amended by Law 43/83—“Αίτησις” (Application or Petition) in the said sections—An application by summons under Ord. 48, rules 1 and 2 of the Civil Procedure Rules is not the appropriate form for commencing proceedings under the said section—Proceedings commenced by such an application are a nullity—The only appropriate summons to be used for commencing such proceedings is an Originating Summons.* 5  
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- Civil Procedure—The Civil Procedure Rules, Ord. 48, rules 1 and 2—An application thereunder is incidental to the cause in respect of which proceedings are pending—Ord. 2, rule 1—Originating Summons, definition of—Cause, definition of.* 15
- Civil Procedure—Commencement of Proceedings—Proceedings can only commence either by a writ of summons or in exceptional cases by an Originating Summons.*
- Civil Procedure—Distinction between a nullity and an irregularity—Importance of distinction—The Civil Procedure Rules—Ord. 64, rules 1 and 2, corresponding to the old English Rules, Ord. 70, rules 1 and 2.* 20
- Words and Phrases: “Cause” in Ord. 1, rule 2 of the Civil*

*Procedure Rules and section 2 of the Courts of Justice Law 14/60, and "Originating Summons" in the said Ord. 1, rule 2.*

5 The question that arose in this case before the trial Court is whether an application by summons as prescribed by Ord. 48, rules 1 and 2 of the Civil Procedure Rules is the appropriate form of application that has to be used in proceedings for the annulment of an election as provided by section 9(3)(h) of Cap. 244, as amended on 10 this point by Law 43/83. It should be noted that no Rules of Court regulating the procedure under this section have been made.

15 The trial Court found the whole process, which was commenced by such an application as aforesaid, to be a nullity and set aside the application. The applicant appealed.

20 *Held*, dismissing the appeal: (1) An Originating Summons, which is one of the ways of commencing proceedings, is defined in Ord. 1, rule 2 as "any summons other than a summons in a pending cause or matter" and the word "cause" is also defined in the said Order as including "any action or other original proceedings between a plaintiff and defendant", a definition which is also to be found in section 2 of Law 14/60. In contrast, 25 an application under Order 48 is incidental to the cause in respect of which proceedings are pending before the Court.

30 (2) If the matter is not incidental to pending proceedings, then the cause cannot be brought before the Court in any other manner than that prescribed by the Rules, i.e. either by a Writ of Summons or in exceptional cases by an Originating Summons.

35 (3) Since the said section 9(3)(h) provides for "Αίτηση" (Application or Petition) for the annulment of an election, the only Summons that could be used under the Rules was an Originating Summons.

(4) As the defect in question did not constitute irregularity, but was of a fundamental nature, the proceedings

were rightly found to be a nullity and, consequently, the appearance entered by the respondents could not remedy the situation.

*Appeal dismissed with costs.*

**Cases referred to:**

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*Spyropoulos v. Transavia Holland N.V. Amsterdam*  
(1979) 1 C.L.R. 421

*Re Pritchard* (deceased) [1963] 1 All E.R. 873;

*Lyssandrou v. Schiza* (1979) 1 C.L.R. 267;

*Evagorou v. Christodoulou and Another* (1982) 1 C.L.R. 10  
771.

**Appeal.**

Appeal by applicant against the judgment of the District Court of Limassol (Hadjitsangaris, P.D.C. and Artemis, S.D.J.) dated the 5th October, 1984 (Election Petition No. 51/84) whereby his petition seeking the annulment of the election of P. Demou as a member of the Village Committee of Erimi and for an order of the Court cancelling the election of the Chairman of the said Village Committee, was dismissed. 20

*Chr. Pourgourides*, for the appellant.

*A. M. Angelides*, Senior Counsel of the Republic, for respondent 1.

*Y. Agapiou*, for respondents 2 and 3.

*Cur. adv. vult.* 25

A. LOIZOU J. read the following judgment of the Court. The appellant filed in the District Court of Limassol, what purported to be a petition seeking inter alia, the annulment of the election of Pantelakis Demou, as member of the Village Committee of Erimi and also an order of the Court cancelling the election of the Chairman of the said Village Committee and/or the re-election of a new Chairman. 30

On the application of the Attorney-General of the Republic who was joined as the first respondent, the other two being the aforementioned Pantelakis Demou and the AKEL Party of Nicosia, the whole process was found by the Full Court of Limassol to be a nullity and the petition was set aside on the ground that the form of application used was the wrong one and could not as such commence the process and consequently no process was found to exist before the Court.

The petition filed was an application by summons as prescribed by Order 48, rules 1 and 2 of the Civil Procedure Rules and the question which arose and was indeed as already said decided against the appellant,—applicant in the Court below—was, as to which is the appropriate form of application that has to be used in proceedings for the annulment of an election as provided by section 9(3) (h) of the Village Authorities Law, Cap. 244, as amended on this point by Law No. 43 of 1983 and which provides that, “the competent for the trial of petitions for the annulment of elections or election offences, will be the competent District Court of the District in which lies the relevant village”.

Whilst on this point it may be pointed out that no Rules of Court regulating the procedure under this section have been made. But we shall deal with this aspect of the appeal later. Now it is useful to refer to section 9(3) (a) which in so far as relevant to the present proceedings provides:-

«(3) (α) Τηρουμένων των εφεξής διατάξεων, πάσα εκλογή είναι μυστική, διεξαγομένη συμφώνως προς τας διατάξεις του Εκλογικού Νόμου και των δυνάμει τούτου εκδοθέντων Κανονισμών, αναπροσαρμοζόμενας ως κατωτέρω προβλέπεται...»

In English it reads:

“3 (a) Subject to the provisions hereinafter, every election is secret, and conducted in accordance with the provisions of the Electoral Law, and the Regulations made thereunder adapted as hereinunder provided....”

The Regulations in question are the Election of Members of the House of Representatives (Election Petitions) Rules of Court 1981, made under the provisions of section 57 of the Election of Members of the House of Representatives Law 1979.

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The trial Court found that the expression in section 9 (3) (a) "every election is secret, and conducted in accordance with the provisions of the Electoral Law and the Regulations made thereunder" refer only to the manner of election and not to the procedure and the reference to "Regulations made thereunder" ("εκδοθέντας Κανονισμούς"), is not a reference to the aforementioned Rules of Court, of 1981 but to the Regulations made for the purpose of regulating the details of the conduct of elections of Village Authorities.

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Hence, they concluded that in the circumstances the Regulations applicable to the case of Election Petitions in Court proceedings are the Civil Procedure Rules. As a result an election petition has to be made on the basis of their provisions and not by virtue of the Rules of Court of 1981, hereinabove referred to.

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Under the Civil Procedure Rules one of the ways for commencing proceedings, is by Originating summons which is defined in Order 1, rule 2 of the said Rules as "any summons other than a summons in a pending cause or matter". Relevant is also the definition of "cause" in the same Order which "includes any action or other original proceedings between a plaintiff and defendant", a definition which is also to be found in section 2 of the Courts of Justice Law 1960, (Law No. 14 of 1960). In contrast to this, under Order 48, an application made is incidental to the cause in respect of which proceedings are pending before the Court.

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It appears from its definition that an Originating summons is a summons other than a summons in a pending cause or matter and it resembles to a writ of summons by which proceedings are commenced before the Court. If the matter is not incidental to pending proceedings already before the Court, then the cause cannot be brought

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before the Court in any other manner than that which is prescribed by the Rules, that is either by a writ or in exceptional cases by originating summons where provision to that effect exists in the Law or the regulations.

5 Since therefore section 9 (3) (h) of the Law provides for "Αιτησις" application or petition,—to use the better and more often used English equivalent,—for the annulment of an election the only summons which could under the Rules be used and have the proceedings properly commenced before the Court was an originating summons which as of  
10 its nature entails an entirely different procedure than the one prescribed for summonses issued under Order 48. Upon this we have come to the conclusion that the trial Court rightly found that it was not possible the application  
15 which was filed to have the proceedings commenced before the Court and that in substance no proceedings existed. Consequently the appearance entered by the respondent could not remedy it as the matter was not a mere irregularity but a nullity.

20 This distinction between a nullity and irregularity is a fundamental one under Order 64, rules 1 and 2 which order corresponds to Order 70, rules 1 and 2 of the Old English Rules that can be found in the Annual Practice of 1958 at pp. 1986 to 1989 where instances of proceedings  
25 which are a nullity and instances which are merely irregularities are set out by reference to decided cases.

The importance of this differentiation was dealt with by this Court in case of *Spyropoulos v. Transavia Holland N.V. Amsterdam* (1979) 1 C.L.R. 421 in which in delivering the judgment of the Court, I referred to *Re Pritchard* (deceased) [1963] 1 All E.R. 873, in which Upjohn L.J. said that it is not so difficult to draw a line between irregularities, which are defects in procedure which fall  
30 within R.S.C. order 70 and true nullities for which it can be said that the defect is fundamental to the proceedings and as a fundamental defect will make it a nullity, although he pointed out that Courts should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Order  
35 70 (in our case Order 64), when justice can be done as a  
40 matter of discretion.

A classification is then made on the basis of the authorities which establish one of two classes of nullity and he summed up the position by naming them as being the following:-

- “(i) Proceedings which ought to have been served out but have never come to the notice of the defendant at all... 5
- (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings; 10
- (iii) Proceedings which appear to be issued, but fail to comply with a statutory requirement...”

The distinction between void and voidable proceedings was discussed in two other decisions of the Supreme Court, namely *Lyssandrou v. Schiza* (1979) 1 C.L.R. 267, and *Evagorou v. Christodoulou and Another* (1982) 1 C.L.R. 771. In the case of *Lyssandrou* a probate action was held to be void for failure to comply with an indispensable procedural step, that is support the action by the affidavit provided for in Order 2, rule 13 of the Civil Procedure Rules. In *Evagorou* the Court made extensive reference to the distinction between void and irregular proceedings. In the judgment given by Pikis J., it is stated at p. 775 “Nullity arises whenever the defect is fundamental and goes to the root of the proceedings.” 20 25

In the present case the proceedings instituted by the applicant were rightly found to have never started in view of the fundamental defect of having been instituted by an entirely different process.

For all the above reasons the appeal is dismissed with costs. 30

*Appeal dismissed with costs.*