

1986 April 17

[KOURRIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ANGELIKI D SMIRLI,

Applicant,

v.

THE MUNICIPALITY OF PAPHOS,

Respondent.

(Case No. 614/85).

*Building Permit—Refusal to grant, on ground of proposed
Street Widening Scheme—Refusal annulled.*

5 *Constitutional Law—Constitution, Article 23.2, 23.4, 23.4(a)—
Building permit—Refusal to grant, on ground of proposed
Street Widening Scheme—In the circumstances of this case
(16% of area of plot left for building—Total area of plot
571 sq. ft.) sub judice decision amounts to deprivation of
property contrary to Article 23.2 and 23.4—Such depri-
10 vation could only be achieved by acquisition under the
Compulsory Acquisition of Property Law 15/62—The Streets
and Buildings Regulation Law, Cap. 96—It is not a law
coming within the ambit of Article 23.4(a).*

*The Streets and Buildings Regulation Law, Cap. 96, ss.(1)(e), 8,
12 and 13.*

15 The applicant's application for a building permit in
respect of her plot 680 Sh/Pl. 51/2.6.IV at Paphos was
rejected by the respondent Municipality on the grounds
that the proposed building encroached on a proposed
steet widening scheme and that the facade of a building
20 contravened the established practice for the area. During
the hearing of the recourse respondent abandoned the
second of the said grounds.

It should be noted that the area of the said plot is 571 sq. ft., that the area of a street widening scheme published in the Official Gazette is 345 sq. ft. and that the area of the proposed street widening scheme affecting the plot is 130 sq. ft., thus leaving an area of 95 sq. ft. for building, that is 15% of the whole area of the property. 5

Held, annulling the sub judice decision: (1) As the proposed widening scheme has not been published in the Official Gazette as provided by s.12 of Cap. 96, it had no legal force and, therefore, the respondent Municipality could not refuse the building permit on the ground that the building encroached on the area of such a scheme. 10

(2) In the circumstances of this case the sub judice decision amounts to deprivation of applicant's property contrary to Article 23.2, 23.4 of the Constitution and consequently the powers under ss.8 and 3(i)(e) of Cap. 96 were resorted to in an unconstitutional manner. The deprivation of applicant's property could only be achieved by means of compulsory acquisition under law 15/62 which is a general law envisaged by Article 23.4(a) of the Constitution. Cap. 96 is not a law coming within the ambit of Article 23.4(a). 15 20

Sub judice decision annulled.
Costs against respondent.

Cases referred to: 25

Orphanides and another v. The Improvement Board of Ayios Dhometios (1979) 3 C.L.R. 465.

The Holy See of Kitium v. Municipal Council of Limassol 1 R.S.C.C. 15;

Kirzis v. Republic (1965) 3 C.L.R. 46; 30

Thymonoullos v. Municipal Committee of Nicosia (1967) 3 C.L.R. 588;

Araonzos v. Republic (1968) 3 C.L.R. 287;

Koulounou and Others v. Municipality of Paphos (1984) 3 C.L.R. 1584; 35

Sofroniou v. Municipality of Nicosia (1976) 3 C.L.R. 124;

Municipality of Limassol v. Ayia Katholiki Church of Limassol and Others (1984) 3 C.L.R. 1562.

Recourse.

Recourse against the refusal of the respondent to grant applicant a building permit for the erection of a building on her property at Paphos.

5 *Chr. Georghiades*, for the applicant.

S. Kokkinos for *K. Chrysostomides*, for the respondent.

Chr. adv. vul'

10 KOURBIS J. read the following judgment. This is a recourse against the refusal of the Paphos Municipality to grant to the applicant a building permit for the erection of a building on her property at Paphos.

The applicant is the owner of Plot No. 680, Sh./Pl. 51/2.6.IV at the junction of Aphroditis and Fellahoglou Streets at Paphos and on 11/10/84 she applied to the Paphos Municipality as the "appropriate Authority" within the meaning of the Streets and Buildings Regulation Law, Cap. 96 for a building permit to erect a building on her property.

20 The respondent Municipality having received the views of the Department of the Town and Country Planning which did not recommend the issue of the building permit in view of the proposed street widening scheme of Aphroditis and Fellahoglou streets, convened on 4/2/1985 and decided to acquire compulsorily that part of the property of the applicant which was affected by the proposed street widening scheme.

30 The respondent Authority by a letter dated 24/4/1985 communicated to the applicant their decision to refuse to grant her a building permit on the ground that the building encroached on the proposed street widening scheme and that the facade of the building contravened the established practice for the said area (Appendix "A").

35 On 10/6/85 the applicant, through her counsel, addressed a letter to the Chairman of the Paphos Municipal Committee stating that the proposed street widening scheme amounts to deprivation of her property amounting to compulsory acquisition without the payment of compensation and was enquiring whether the Paphos Municipality intended

to acquire compulsorily the property (Appendix "B").

On 20/6/85 the respondent Municipality replied to the letter of the applicant and informed her that the Paphos Municipal Committee decided to acquire compulsorily part of her property which is considered to be necessary for the street widening scheme (Appendix "Γ").

It appears that by the end of June, 1985 the Paphos Municipality failed to acquire compulsorily the part of the property of the applicant which was necessary for the street widening scheme and the applicant on 2/7/1985 filed the present recourse which is based on the following legal grounds:-

(a) The refusal and/or decision of the respondents amounts to deprivation of the property of the applicant contrary to the provisions of article 23.2 and 4 of the Constitution.
 (b) The decision of the respondents is contrary to the provisions of Article 23.3 of the Constitution.

(c) The decision of the respondents is contrary to the provisions of the Streets and Buildings Regulation Law and particularly to the provisions of Articles 9 and 13.

(d) The decision of the respondents was taken in abuse and/or excess of powers, and

(e) The respondents in taking their decision failed to make the necessary enquiry.

It should be noted that during the hearing the respondent Municipality abandoned their claim that they refused the building permit also on the ground that the facade of the building did not comply with the established practice of the said area, and the only ground left for their refusal to grant the building permit was that the building encroached on the proposed street widening scheme.

In my opinion as the proposed street widening scheme of Aphroditis and Fellahoglou streets has not been published in the Official Gazette as provided by s.12 of the Streets and Buildings Regulation Law, Cap. 96, the respondent Municipality could not refuse the building permit on the ground that the building encroached on the area of the proposed street widening scheme because it had no legal force as it was existing only on paper.

The Court in the case of *Orphanides and another v. The Improvement Board of Ayios Dhometios* (1979) 3 C.L.R. 465, at p. 475, said as follows:-

5 "In my judgment the appropriate authority has no
right to require a person who applies for a permit
to erect a building on the land not affected by the
street widening scheme—to do, in connection with that
land, anything that is not required by a scheme
10 having actual legal force, as distinct from a scheme
existing only on paper; and since here the applicants'
property was not so affected, the requirement made in
the letter, exh. 2, was one that the authority had no
power to make."

15 With due respect I adopt what was said in this case
by the Court and as the facts of the case in hand are si-
milar to the *Orphanides* case. I am of the opinion that the
respondent Municipality had no power to refuse to the
applicant the building permit because the proposed street
widening scheme had no actual legal force because it was
20 not published in the Official Gazette as provided by s. 12
of the Streets and Buildings Regulation Law, 96, and in
these circumstances the respondent Authority acted con-
trary to the Law and in abuse and excess of powers and
therefore their decision is declared to be null and void and
25 of no legal effect.

I propose now to deal with the argument of counsel for
the applicant that the refusal to grant a building permit
amounts in the circumstances of this case, to deprivation
of the property of the applicant and as such is contrary
30 to the provisions of Article 23.2 and 4 of the Constitution
and that the provisions of the Streets and Buildings Regu-
lation Law, Cap. 96 were resorted to in a manner which
is unconstitutional.

35 This issue was dealt with by the former Supreme
Constitutional Court as far back as 1961 in the case of
*The Holy See of Kitium v. The Municipal Council of Li-
massol*, 1 R.S.C.C. 15 where the following were stated in
the judgment:

40 "(a) The requirement of applying for a building
permit under s. 3 of Cap. 96 is connected with the
right of property safeguarded by paragraph 1 of

article 23, which includes the right to possess and enjoy property.

(b) Paragraph 2 of article 23 provides that no deprivation or restriction or limitation of any such right shall be made except as provided in the said article and paragraph 3 thereof provides:-

'Restrictions or limitations which are absolutely necessary in the interest of public safety or the public health or the public morals or the town and country planning or the development and utilization of any property to the promotion of the public benefit or for the protection of the rights of others may be imposed by law on the exercise of such right.'

(c) In each case where a building permit is applied for it is a question of fact and of degree depending upon the circumstances of the particular case whether the decision of the appropriate Authority thereon amounts to a) 'deprivation' (within the meaning of the above provisions) and which can only be achieved under paragraph 4 of article 23, or whether it amounts to 'restriction' or 'limitation' (within the meaning of the above provisions) which can only be imposed under paragraph 3 of the said article, and in the particular case of an owner such as the applicant, only under the proviso to paragraph 9 thereof."

The decision of this case was followed in a number of cases thereafter among which are *Kirzis v. The Republic* (1965) 3 C.L.R. 46, *Thymopoulos v. The Municipal Committee of Nicosia* (1967) 3 C.L.R. 588, *Araouzos v. The Republic* (1968) 3 C.L.R. 287, *Sofroniou v. The Municipality of Nicosia* (1976) 3 C.L.R. 124 and *Municipality of Limassol v. Ayia Katholiki Church of Limassol and Others* (1984) 3 C.L.R. 1562.

In the case of *Thymopoulos* and others (supra) the Court decided that a street widening scheme may affect the property to such an extent as to render it totally unsuitable for the ordinary, in the circumstances, use.

It is common ground that the area of the property of the applicant is 571 sq. ft. and the area of the street widening scheme, which is legally enforceable as it was published in the Official Gazette in Supplement No. 3 under Not. 180/81 is 345 sq. ft. and the area of the proposed street widening scheme is 130 sq. ft. thus leaving an area of 95 sq. ft. for building that is the 16% of the area of the property.

The applicant was entitled under Not. 180/81 published in the Official Gazette, Supplement No. 3, to erect a building having an area of 240% of the area of her property, that is 1370 sq. ft. After the deduction of the area of the street widening scheme which is enforceable, the applicant will be entitled to erect a building of an area of 542 sq. ft., that is 828 sq. ft. less. But, the applicant would not be entitled to erect a building of 542 sq. ft. but only 95 sq. ft. after the deduction of the area covered by the proposed street widening scheme, in which case she will not be allowed to erect a building, more than one storey. Furthermore, the area left for construction is so little that in substance it cannot be used economically by the applicant.

To sum up the applicant will be entitled to erect a building on an area of 95 sq. ft. if it were to be held that the respondent Authority had power to impose upon her the restriction not to build on the proposed street widening scheme.

Bearing in mind the facts of this case I have reached the conclusion that the sub judice decision is contrary to the provisions of article 23.2 and 4 of the Constitution because in effect it amounts to deprivation of the property of the applicant and consequently the powers under ss. 8 and 3(1)(e) of Cap. 96 were resorted to in a manner which is unconstitutional.

In the circumstances of this case the deprivation of the property in question of the applicant could only have been effected by means of compulsory acquisition under the provisions of the Compulsory Acquisition of Property Law, 1962 (Law 15/62), which is a general law for compulsory acquisition envisaged by article 23.4(a) of the Constitution and not by

means of the application of the provisions of Cap. 96, which is not a law coming within the ambit of article 23.4(a) (*Kouloumou and Others v. The Municipality of Paphos* (1984) 3 C.L.R. 1584).

For these reasons the recourse again succeeds. 5

In the case of the *Municipality of Limassol v. Ayia Katholiki Church of Limassol and Others* (supra) the examination of ss. 8 and 3(1)(e) of the Streets and Buildings Regulation Law, Cap. 96 was left for a future suitable occasion because it became clear to the Court that the Legislative Provisions concerned could not be applied in a manner which resulted in deprivation of property in a way inconsistent with Article 23.4 of the Constitution, that is otherwise than through a compulsory acquisition effected under the said article 23.4 and the Compulsory Acquisition of Property Law 1962 (Law 15/62). 10 15

Having in mind the facts and circumstances of this case I have also reached the conclusion that irrespective of the extent of the powers under ss. 8, 9, 12 and 13 of the Streets and Buildings Regulation Law, Cap. 96, these cannot be applied in a manner which results in deprivation of the property in a way inconsistent with Article 23.4 of the Constitution that is otherwise than through a compulsory acquisition effected under the said article 23.4 and the Compulsory Acquisition of Property Law, 1962 (Law 15/62) and therefore, it is unnecessary in this case to examine what is the full extent of the powers of the respondent Municipality under the aforesaid sections. 20 25

For all the above reasons the decision of the respondent Municipality is declared to be null and void and of no legal effect. 30

The respondents to pay the costs of the applicant.

Costs to be assessed by the Registrar.

*Sub judice decision annulled.
Respondents to pay applicant's costs.* 35