

1987 June 25

[PIKIS J]

IN THE MATTER OF ARTICLE 155 4 OF THE CONSTITUTION AND
SECTIONS 3 AND 9 OF THE COURT OF JUSTICE (MISCELLANEOUS
PROVISIONS) LAW, 1964

AND

IN THE MATTER OF AN APPLICATION BY PANICOS EFTHYMIU
OF NICOSIA FOR AN ORDER OF CERTIORARI,

AND

IN THE MATTER OF AN ORDER AND/OR JUDGMENT OF THE RENT
CONTROL COURT NICOSIA/LARNACA/FAMAGUSTA, NICOSIA
PART, DATED 10 12 1986, IN APPLICATIONS NO E 43/85
AND E 308/86

(Application No 33/87)

*Constitutional Law — Fundamental rights — Interpretation and application of —
Cannot be undertaken in isolation of the purpose they are designed to serve
or divorced from the legal framework with which they can be exercised —
Efficacy of judicial process is also a fundamental constitutional objective — If
5 a right is interwoven with such efficacy, it must be interpreted in a way
harmonizing concurrent constitutional objectives — A witness in a case is
disqualified from acting as an advocate too — Constitution, Art 30 3(d) and
Art 30 3(c) — The right to choose an advocate and the right to call witnesses
in judicial proceedings — Disqualification of the advocate chosen in exercise
10 of the right under Art 30 3(d) is the result of the exercise of the right to call
witnesses under Art 30 3(c)*

*Advocates — Position of, in our legal system — An advocate is disqualified from
acting in a case, if he is, also, a witness in such case*

15 The advocate of one of the respondents in this case swore two affidavits in
support of the opposition of his client. The applicant served upon him a notice
to cross examine him. Counsel for the applicant drew the attention of the
Court to what he perceived as an anomaly, namely the advocate's continued
appearance as an advocate in the case. The advocate concerned informed the
Court that his client in exercise of the right vested in her to choose and appoint
20 an advocate of her choice to represent her (Art 30 3(d)) of the Constitution
wishes no one else to represent her and that, therefore, he will not
abandon the brief, considering his paramount duty towards his client.

Thus the question that arises for determination in these proceedings is whether an advocate who is a witness in judicial proceedings is incapacitated from acting in the same case as an advocate too

Held (1) It is the bounden duty of every State power to secure in its province the efficient application of the provisions of Part II of the Constitution safeguarding fundamental rights and liberties. Fundamental rights cannot be curtailed except as provided in the Constitution and subject to the constraints envisaged therein. 5

(2) However fundamental rights too cannot be examined in isolation from the purpose they are designed to serve or be divorced from the legal framework within which they can be exercised. The efficacy of the judicial process is a fundamental objective of the Constitution. Where fundamental rights are interwoven with such efficacy they must be interpreted and applied in a way harmonizing concurrent constitutional objectives. It follows that examination of the right of Art 30 3(d) must be made within the framework of the position of an advocate in the judicial process. 10 15

(3) The freedom safeguarded by Art 30 3(d) is absolute as far as the chooser is concerned, but its implementation depends on the acceptance of the brief on the part of the advocate and absence of any disqualification for him to appear in a particular case. The Constitution does not impose any duty on the advocate chosen to accept the brief*. 20

(4) Under our legal system an advocate occupies a unique position. He is in every respect a functionary of the administration of justice. He is under concurrent duties to his client and the Court. He must stand aloof from the factual merits of his client's case. The incompatibility of the position of an advocate with that of a witness in the same case has been highlighted in *Ahapittas v Rock-Chik Ltd* (1968) 1 C L R 1 at pp 2 and 3. An advocate who is a witness cannot at the same time be an officer of justice. A witness is himself subject to the judgment of the Court. It would be an antinomy if he had the freedom to raise submission on the judgment to be passed on him as an officer of justice. 25 30

(5) The client of the advocate in this case cannot complain about the ineffectiveness of the exercise by her of the right under Art 30 3(d) because his disqualification was the result of the exercise by her of another fundamental right namely the right to call witnesses, safeguarded by Art 30 3(c). 35

Cases referred to

Mavrovouniotis v Nicolaidis, 14 C L R 272,

Erotokntou and Others v Soutsos (1965) 1 C L R 162,

Order accordingly

* See In re I A an Advocate (1987) 1 C L R 319

Ousmianis v Nicolaou (1981) 2 J S C 314

Andreou v Andreou then Valene Burns (1969) 1 C L R 533

Ahapittas v Roc-Chik Ltd (1968) 1 C L R 1

Police v Georghiades (1983) 2 C L R 33,

5 *Police v Ekdotiki Etena* (1982) 2 C L R 63

Republic v Demetriades and Another (1982) 2 C L R 33,

Pingouras v The Police (1987) 2 C L R 1

Application for directions.

10 Application for directions as to whether respondent’s advocate who is a witness in an application for an order of certiorari is incapacitated from acting as her lawyer also

A Erotocntou for respondents E Nicolaidou, R Kreon and G Panayiotou

15 *C Themistocleous*, for respondent A Elia

Chr Clendes, for the applicant

Cur adv vult

20 PIKIS J read the following judgment Before the commencement of the hearing Mr Clendes drew my attention to what he perceived to be an anomaly the continued appearance of Mr Themistocleous as an advocate, notwithstanding the fact that he swore two affidavits in support of the opposition of his client And invited the directions of the Court in a matter affecting the regulation of the proceedings before me Counsel informed us that notice to cross-examine Mr Themistocleous had been served
25 on the respondent indicating to the Court that it is contemplated to cross-examine counsel on the contents of his deposition Thereupon I sought to elicit the position of Mr Themistocleous, first the reactions of his client and secondly his personal response in a matter affecting his status as a member of the Bar and the
30 conflict, if any, arising from the dual capacity in which he appears, as a witness and as an advocate

I brought to his notice some of the decisions of the Supreme Court bearing on the matter, readily available to me as they were reviewed in a recent decision of the Full Bench, notably
35 Disciplinary Appeal 1/87* At the request of Mr Themistocleous

* Judgment given on 19th May 1987 reported in (1987) 1 C L R 319

there was a short break to enable him to look into the caselaw and reflect on the duality of his position.

At the resumption of the hearing Mr. Themistocleous informed the Court that his client wishes to retain his services in exercise of the right vested in her to choose and appoint an advocate of her choice to represent her in the proceedings; his client wishes no one else to represent her, as he told the Court. As for himself, although recognizing that it is an undesirable practice, he will not abandon the brief of the respondent considering the paramountcy of his duty to his client and more importantly the support of the right of his client to have the advocate of her choice to represent her in the proceedings.

Although the practice of an advocate giving evidence in a case in which he appears in a representative capacity has been condemned* as unacceptable, unprobative to the ends of justice, in none of the decided cases has this practice been held to be illegal or prohibited by law. The practice of an advocate giving evidence must be avoided, unless indispensable for the ends of justice**. Such need may arise if a matter arises as ex improviso and the testimony of an advocate is deemed necessary for the elicitation of the truth.

In none of the decided cases was the Court concerned to decide the compatibility of the functions of an advocate with the duties of a witness, nor was the Court required to answer the question in the context of or by reference to the right conferred by Art. 30.3(d) of the Constitution that vests in every litigant in judicial proceedings a right «to have a lawyer of his own choice». The question has not been explored from that angle or in juxtaposition to the exercise of another fundamental right vested by Art. 30.3(c): «to adduce or cause to be adduced his evidence and to examine witnesses according to law». Under the European Convention for the Protection of Human Rights (ratified by Law 39/62), the right conferred by Art. 30.3(d) is confined only to persons facing an accusation in criminal proceedings.

* See, *inter alia*, *Mavrovouniotis v Nicolaidis* 14 C.L.R. 272, 290, *Mani N Erotocritou and 2 Others v Nicos Costi Soutsos* (1965) 1 C.L.R. 162, *Ousmanis v Nicolaou* (1981) 2 J.S.C. 314 (a decision of the District Court); *Panayiotis Andreou v Valene Panayiotis Andreou, then Valerie Burns* (1969) 1 C.L.R. 533

** See *Michael Ahapittas v. Roc-Chik Ltd* (1968) 1 C.L.R. 1

Put in its contextual perspective, the question we must resolve is whether an advocate who is a witness in judicial proceedings is incapacitated from acting in the same case as a lawyer too. In the process we must identify the nature of the right given by Art. 5 30.3(d) and examine the implications of its exercise on our judicial system.

To begin it is the bounden duty of every State power to secure in its province the efficient application of the provisions of Part II of the Constitution safeguarding fundamental rights and liberties 10 (Art. 35). By the nature of the powers vested in the judicial authorities, the judiciary is trusted to safeguard fundamental rights in the interest of the authority and respectability of the law. The principle underlying fundamental rights is that they inhere in every individual and as such no law, authority or person can deny them 15 to anyone. We had occasion to proclaim the sanctity of fundamental rights in *Police v. Georghiades** and debate the prerequisites for their entrenchment. In another equally consequential decision, namely, *Police v. Ekdotiki Eteria*** we 20 ruled that fundamental rights cannot be curtailed except as provided in the Constitution and subject to the constraints envisaged therein.

However, fundamental rights too cannot be examined in isolation from the purpose they are designed to serve or be divorced from the legal framework within which they can be 25 exercised. Thus it has been decided that whereas no law or authority can deprive the individual of a fundamental right, there is no constitutional prohibition to the coexistence of a fundamental right with a duty to exercise it; provided the duty does not neutralize the right and is defined in harmony with the 30 objectives of the Constitution***. An individual right may be coupled with a duty. The efficacy of the judicial process is a fundamental objective of the Constitution. The unimpeded flow of the stream of justice[†] is no less important a constitutional objective than the safeguard of fundamental rights. Where fundamental 35 rights are interwoven with the efficacy of the judicial process, they must be interpreted and applied in a way harmonizing concurrent constitutional objectives. Consequently examination of the

* (1983) 2 C.L.R. 33.

** (1982) 2 C.L.R. 63.

*** *Republic v. Demetriades and Another* (1983) 2 C.L.R. 33; *Pingouras v. Police* (1987) 2 C.L.R. 1.

exercise of the right safeguarded by Art. 30.3(d) cannot be undertaken but within the framework of the position of an advocate in the judicial process.

The freedom safeguarded by Art. 30.3(d) is absolute as far as the choser is concerned. He can choose anyone to represent him who is registered as an advocate. The implementation of his choice is necessarily subject to (a) acceptance on the part of the advocate of the brief, and (b) absence of any disqualification from appearing in the particular case. The Constitution does not impose a duty on the advocate chosen in exercise of the right given by Art. 30.3 (d) to represent the litigant in the case. Mr. Themistocleous has accepted the brief and expressed readiness to continue to represent his client in the case. The sole question remaining to be answered is whether he is disqualified from so doing because he is a witness in the case. Aloofness of an advocate from the factual merits of the case of his client is, as may be inferred from the recent decision of the Full Bench in Disciplinary Appeal 1/87 (supra), a prerequisite for the performance of the duties of an advocate.

An advocate is not the agent of his client in the commercial acceptation of the term. He occupies a unique position under our legal system. He represents his client from the stand point of an officer of justice* and is in every respect a functionary of the administration of justice. He is under concurrent duties to his client and the Court. The discharge of these duties can only be reconciled by an advocate distancing himself from the factual merits of the case of his client. The Advocates Rules of Etiquette** are fashioned to this reality confining the role of a lawyer to that of an adviser and advocate of the cause of his client in Court. The incompatibility of the position of an advocate and a witness in the same judicial proceedings is highlighted by the following passage from the decision in *Michael Ahapittas v. Roc-Chik Ltd.****: «The Court has had occasion to deprecate more than once the practice of affidavits sworn by the parties' advocates in support of their clients' case. The reasons why such steps in Court proceedings are undesirable, unless indispensable, are so obvious that we find it unnecessary to say more about it».

In my judgment an advocate who is a witness in the case cannot at the same time be an officer of justice. He does not fulfil the

* Section 15 of the Advocates Law, as amended by s 7 of Law 40/75

** 1966 Official Gazette, Supplement 3, 17.11 1966, No 839

*** (1968) 1 C.L.R. 1, pages 2 and 3

necessary attributes of an officer of justice. an aid in the elicitation of the truth sufficiently distant from the facts to raise pertinent submissions relevant to the objective implications of the evidence. A witness is himself subject to the judgment of the Court. It would be an antinomy if he had the freedom to raise submissions about the judgment to be passed on him, as an officer of justice

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10 His client, Androulla Elia, cannot complain either about the ineffectiveness of the exercise of the right given her by Art 30 3(d) for the disqualification of her advocate has come about in virtue of the exercise of another fundamental right vested in her by the Constitution. The right to call witnesses in the judicial proceedings under review (Art 30 3(c))

15 I conclude that Mr Themistocleous is incapacitated from representing his client as an advocate in the case

Order accordingly