

1987 November 23

(TRIANAFYLIDIS, P. LORIS, STYLIANIDES, JJ.)

1. ERINI KYRIACOU KAKOULLOU
2. ANDREAS K. KYRIAKIDES,

*Appellants - Defendants,*

v.

SAVVAS KYRIACOU KAKOULLOU THROUGH  
HIS ATTORNEY IOANNIS KYRIACOU KAKOULLOU,

*Respondent-Plaintiff,*

*(Civil Appeal No. 7315).*

*Credibility of witnesses — Interference by Court of Appeal — Principles applicable — Onus on appellant to show that trial Court was wrong in evaluating the evidence — Kynacou v. Kortas and Sons Ltd (1981) 1 C.L.R. 551 at p. 553 cited with approval.*

- 5 *Civil Procedure — Pleadings — Fraud — The Civil Procedure Rules, Order 19, Rule 5 — Failure to prove some of the alleged particulars of fraud — Immaterial, if the particulars proved point unequivocally to fraud having been committed by the defendant against the plaintiff.*

The facts of the case appear sufficiently in the judgment of the Court.

- 10 *Appeal dismissed with costs.*

*Cases referred to:*

*Kyriacou v. Kortas and Sons (1981) 1 C.L.R. 551.*

**Appeal.**

- 15 Appeal by defendants against the judgment of the District Court of Nicosia (Kramvis, D.J.) dated the 22nd December, 1986 (Action No. 3269/81) whereby the registration of 1/6 undivided share of plot 394 under Sheet/Plan XXX/42 at Psimolophou village in the name of defendant No 1, effected in virtue of D.L.O. Declaration of Sale No D.S. 789/78, was cancelled.

- 20 Appellants appeared in person.

*N. HjiIoannou*, for the respondent.

*Cur. adv. vult.*

TRIANTAFYLLIDES P.: The Judgment of the Court will be delivered by Loris J.

LORIS J.: The present appeal is directed against the judgment 5  
of the District Court of Nicosia (Kramvis D.J.) in Nicosia Action No.  
3269/81, whereby the registration of 1/6 undivided share of plot  
394 under Sheet/Plan XXX/42 vill., at Psimolophou village, in the  
name of Appellant No. 1, (effected on 3.12.78 in virtue of D.L.O.  
Declaration of Sale under No. D.S. 789/78) was cancelled. 10

The salient facts of this case are briefly as follows:

Defendant No. 1 (Appellant No. 1) is the wife of Defendant No.  
2 (Appellant No. 2) and sister of the Plaintiff-Respondent.

Respondent who was residing abroad, visiting his village  
Psimolophou on occasions, executed on 20.8.1976 a general 15  
power of attorney, constituting appellant No. 2 his agent; the said  
power of attorney was filed with the D.L.O Nicosia under No. 61/  
78.

On 3.2.1978 appellant No. 2 presented himself to the District  
Lands Office Nicosia and on the strength of the aforesaid power of 20  
attorney, transferred by way of sale (D.S. 789/78) in the name of  
his wife (Appellant No. 1) the 1/6 undivided share in the property  
covered by survey reference: Sheet/Plan XXX/42 vill., plot No.  
394, at Psimolophou village, standing registered at the time in the  
name of the Respondent. 25

The sale price declared in D.S. 789/78 for the sale of 1/6 share  
in the said property was £55.-, but as the District Lands Office  
declined to accept the amount declared, assessing its sale price at  
£180.- as on 3.2.78, the sale price of £180.- was inserted in the 30  
said declaration form.

The respondent, who allegedly came to know about the  
aforesaid transfer considerable time after its occurrence,  
addressed, through counsel, a letter dated 28.5.1981 to appellant  
No. 1 calling her to re-transfer in his name his aforesaid share in the  
property in question and upon her refusal to comply, instituted the 35  
present action.

The respondent alleging in the statement of claim, that the said transfer in the name of appellant No. 1 was effected fraudulently by both appellants acting in concert, maintains inter alia, that he was induced by appellant No. 2 to execute the said power of attorney with a view to enabling him to issue in respondent's name (who was residing abroad) latter's hereditary share in properties inherited from his deceased father but in substance and in fact he never authorised appellant No. 2 to sell respondent's share in the property in question to anybody.

10 It was further alleged by the respondent that he was never informed by appellant No. 2, or anyone of the appellants, that his share in the property in question was transferred in the name of appellant No. 1. nor did he ever receive any money for the purpose.

15 Both defendants in their joint defence, drafted by counsel acting on their behalf at the time, deny the allegations of fraud set out in the particulars of the statement of claim, and allege inter alia, that the respondent executed the said power of attorney freely, without any inducement by the appellants and in fact authorised appellant No. 2 to sell respondent's properties in Cyprus to any person «at any price». The appellants state further in their defence, that appellant No. 2 acting on the strength of the power of attorney aforesaid sold the 1/6 share of the respondent in the property in question to appellant No. 1 at the sale price of £200.-, the said price being fair and reasonable according to the assessment made, by the District Lands Office, Nicosia.

It is further alleged in the defence that the respondent was informed of the aforesaid sale of his property to appellant No. 1, in August 1978 when the respondent «came to Cyprus again» and he (the respondent) ratified the said transfer.

In this connection it is significant to note that appellant No. 2 when cross-examined during the trial of the action, stated verbatim the following:

35 «Τα χρήματα τα εισέπραξα κατά την ώρα της μεταβίβασης... Επιμένω ότι εισέπραξα τις £200.- και τις έδωσα στον ενάγοντα όταν ήλθε το καλοκαίρι του 1979. Επήρα και απόδειξη, δεν την έχω μαζί μου, δεν την βρήκα ...».

(English Translation):

«I received the money at the time of the transfer ... I insist that I collected the £200.- and gave them to the plaintiff (respondent) when he came (to Cyprus) in the Summer of 1979. I obtained a receipt as well, I do not have same with me, I did not find it ...» 5

We shall confine ourselves at this stage in noting:

(a) That the transfer through D.L.O of the share of the respondent in the property in question was effected in the name of appellant No. 1 on 3.2.78. 10

(b) that in the defence it is stated that the respondent was informed of the said transfer in August 1978 when he visited Cyprus and he then ratified same; nowhere in the defence is mentioned that the sale price was paid over by the appellant No. 2 to the respondent. 15

(c) that appellant No. 2 when cross-examined at the trial insisted that he paid over the money to the respondent in the summer of 1979 and got a receipt from the respondent which he never produced to the trial Court.

During the hearing of this case in the Court below three witnesses were called by plaintiff's side: The plaintiff himself, the D.L.O clerk, who carried out a local enquiry on the basis of the pleadings and produced inter alia a sketch of the property in question and certain other documents connected with the transfer of the property in question in appellant's No. 1 name, including the power of attorney executed by the respondent on 20.8.1976, constituting appellant No. 2 his agent. Finally the brother of the plaintiff namely Ioannis Kyriakou Kakoullou, the present attorney of the plaintiff through whom the action was instituted and the present appeal was defended, gave evidence for the plaintiff-respondent. 20 25 30

The single witness called by the defence was appellant No. 2 the husband of appellant No. 1.

The learned trial Judge after hearing the evidence adduced, the addresses of learned counsel of both sides and examining the various documents produced before him, accepted the evidence adduced by plaintiff's side on the substantial issues and rejecting the evidence of the single witness called by the defence, notably 35

the evidence of appellant No. 2, as «absolutely incredible», gave judgment for the plaintiff as per paragraph A of the prayer ordering the cancellation of the registration of 1/6 share in the property in question effected in the name of appellant No. 1 on 3.12.78 in  
5 virtue of D.L.O. Declaration of Sale under No. D.S. 789/78.

Both appellants feeling aggrieved filed the present appeal in person.

The grounds of appeal may be conveniently summed up under two broad heads:

10 (A) Credibility of witnesses: apart from the general complaint that the judgment of the trial Court is against the weight of evidence (ground 6) there are certain other complaints connected with credibility of witnesses scattered in most of the remaining grounds of appeal.

15 (B) Deviation from the pleading.

At the hearing of the present appeal both appellants were not represented by counsel. Appellant No. 2 addressed us elaborating on the grounds of appeal.

20 His wife, appellant No. 1, confined herself in indorsing what her husband said in support of this appeal.

Appellant No. 2 referring to the complaints grouped under head (A) above maintained that the trial Court failed to evaluate his evidence and at the same time lost sight of the innumeral contradictions in the evidence of the plaintiff and his witnesses.

25 In connection with complaints under (B) above he drew our attention to the provisions of Order 19, rules 4 & 5 of the Civil Procedure Rules and invited us to find that the statement of Claim does not comply with Order 19, rules 4 & 5 obviously meaning that  
30 «in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, full particulars thereof shall be stated in the pleadings» (Rule 5).

Appellant No. 2 submitted further that whilst in the statement of claim the power of attorney executed by the respondent  
35 constituting him (appellant No. 2) as his agent, is referred to as having been made on or about 1977, it was in fact made on 20.8.76 as it appears from the evidence of D.L.O clerk and the document itself which was produced in the Court below as Exhibit 5.

After hearing the appellants we considered it unnecessary to call learned counsel appearing for the respondent to address this Court.

In connection with complaints under (A) above referring to the credibility of witnesses, sufficing to say that matters relating to credibility fall within the province of the Trial Judge who has the opportunity to see and hear the witnesses; and on appeal it must be shown that the Trial Judge was wrong in evaluating the evidence and the onus is on the appellant to persuade the Court that this is so. (Vide inter alia *Kyriakou v. Kortas and Sons Ltd* (1981) 1 C.L.R. 551 at p. 553). The Appellants failed to persuade us that the Judge was wrong in evaluating the evidence; it is crystal clear from the record that the trial Judge went carefully through the evidence before him evaluating same with utmost care. It is true that he noted the slightest contradictions in the evidence adduced by plaintiff's side, but it is equally clear that the only evidence adduced by the defence, notably the evidence of appellant No. 2 impressed the Court unfavourably and he rejected same as absolutely incredible.

In connection with complaints under (B) above, notably deviation from the pleadings in the sense that the evidence adduced did not coincide with the pleadings and the allegation of Appellants set out on appeal that the Court embarked on other grounds which were not pleaded, we have carefully gone through the record examining these complaints in the light of the address of Appellant No. 2 before us. In the first place we have noted that this action which is based on fraud was instituted under O.2, r. 1 and that the statement of claim which ensued contains sufficient particulars of the alleged fraud pursuant to O.19, r. 5 contrary to the allegations of the appellants. Now, if some of the allegations of fraud in the statement of claim were not proved, that is another matter. The allegations proved point out unequivocally to the fact that appellant No. 2 fraudulently transferred in the name of appellant No. 1 property belonging to the respondent, taking unfair advantage of a power of attorney executed bona fide by the respondent constituting appellant No. 2 his agent. It is sufficient in this connection to repeat what has been stated earlier on in the present judgment, that whilst the transfer in question was made through the DLO on 3.2.78 the respondent was never informed by either of the appellants to that effect, and the allegation of

appellant No. 2 to the effect that he received the alleged purchase money from appellant No. 1 and paid it over to the respondent some time during Summer 1979 was proved to be false.

5 We find no merit in the argument of the appellants that the power of attorney in question is being referred to in the statement of claim as having been executed on/or about 1977 whilst in fact it was made on 20.8.76 as it appears from exh. 5. In this connection it may be added that the appellant No. 2 who received the aforesaid power of attorney refers to it in the defence as having  
10 been executed on or about 1977 as well.

For all the above reasons we hold the view that there is no merit in the present appeal which is doomed to failure and it is accordingly dismissed with costs.

*Appeal dismissed with costs.*