1987 January 26

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

KYRIACOS GEORGHIOU PANAYI,
Appellant-Defendant,

v.

MARIA K. ZOUVANI,
Respondents-Plaintiff.

(Civil Appeal 6888).

Immovable property—De facto possession of—Gives right to retain possession and undisturbed enjoyment as against all wrongdoers, but not as against the lawful owners or persons deriving authority from such owner—Jus tertii—Not a defence to an action by the possessor, unless defendant can show that act complained of was done by the authority of the true owner.

Immovable property—Prescription—Prescriptive rights cannot be acquired through oral transfer.

Evidence—Secondary evidence—Immovable property—Loss of the records of D.L.O. Famagusta and of the certificate of registration by reason of the Turkish invasion and occupation—Secondary evidence admissible to establish registered title over a particular plot.

The trial Court found that the respondent was the registered owner of plot 312 Sh/Pl. 42/12 in the village of Sotera in Famagusta District, including the disputed portion, which was in the possession of the appellant and, consequently ordered the appellant to stop interfering with the said portion.

The sole ground argued on appeal was against the conclusion that the disputed portion was in the ownership of the respondent. The said portion was occupied by the father of the appellant some time after the Second World War and since 1976 by the appellant himself. It should be noted that by reason of the Turkish invasion and the occupation of a great part of the District of Famagusta neither the relevant records of the District Land Registry Office of Famagusta nor the certificate of registration of the said plot were available for use at the trial. As a result respondent's ownership was established by secondary evidence.

Held, *dismissing the appeal, Kourris, J. dissenting:* (1) A de facto possession gives to the possessor a right to retain his possession and undisturbed enjoyment as against all wrong doers, but it is not sufficient as against the lawful owner. He, who has such possession, may sue anyone who distrurbs his possession and in such a case jus tertii is no defence, unless the defendant can

show that the act complained of was done by the authority of the true owner. As in this case the appellant does not claim the disputed portion on the strength of ownership either registered or prescriptive, but only on the strength of his possession, the issues were rightly narrowed down to the one ground argued in this appeal.

(2) The loss of the records of the D.L.O. and in many cases, as in the present one, the loss of the certificates of registration themselves as well, permits one to invoke the rules as to secondary evidence in order to establish his registered title over a particular plot of property once the absence of the primary source has been satisfactorily explained. This course was the one open to and indeed followed by the parties to these proceedings.

(3) On the totality of the circumstances before this Court and in the light of the findings of fact made by the trial Judge and the conclusions drawn therefrom the conclusion is that the respondent proved her case in accordance with the standard required in a civil case, there being nothing to contradict her version that the whole of plot 312 was covered by her registration and without excluding the disputed portion over which none could have a title either registered or prescriptive as it should not be forgotten that the appellant could not have acquired through oral transfer any prescriptive right that his father might have acquired before the appellant took over.

Appeal dismissed with costs.

Cases referred to:

Adamou v. Christofi (1974) 1 C.L.R. 100;

Liassidou and Another v. Papademetriou (1975) 1 C.L.R. 122;

Papaloizou v. Themistocleous, 22 C.L.R. 177;

Papageorghiou v. Komodromou (1963) 2 C.L.R. 221;

Cyprus Asbestos Mines Ltd. v. Skoularis and Another, 1964 C.L.R. 6.

Appeal.

Appeal by defendant against the judgment of the District Court of Famagusta (Constantinides, S.D.J.) dated the 19th February, 1985 (Action No. 74/83) whereby it was found that the plaintiff was the registered owner of Plot 312, Sh/Plan 42/12 in the area of Sotera village and an injunction restraining the defendant from interfering with the above plot was issued.

G. Pittadjis, for the appellant.

Z. Mylonas, for the respondent. *Cur adv. vult.*

The following judgments were read:

A. LOIZOU, J.: This is an appeal against the judgment of a Judge of the District Court of Famagusta by which he, having found that the respondent was the registered owner of plot No.312 Sheet/plan 42/12 in the village of Sotera in Famagusta District, including the disputed portion, ordered the appellant to stop interfering with the said portion and adjudged him to pay £283.- costs of the action.

The sole ground argued before us is against the conclusion of the learned trial Judge that the disputed portion of which the appellant was in possession was the ownership of the respondent. Indeed one would expect to have the issue so narrowed down inasmuch as the appellant claims only on the strength of his possession that is the occupation or physical control of same but does not claim and rightly so in our view on the strength of ownership either registered or prescriptive as a de facto possession gives a right to retain his possession and undisturbed enjoyment as against all wrong doers. It is not, however, sufficient as against the lawful owner. He who has such a possession may sue anyone who disturbs his possession just as may the lawful owner, and in such an action it is no answer for the defendant to show that the title and right to possession is in another person; jus tertii is no defence to the action, unless the defendant can show that the act complained of was done by the authority of the true owner. (See *Adamou v. Christofi* (1974) 1 C.L.R. 100 and *Liassidou and Another v. Kyriakos Papademetriou* (1975) 1 C.L.R. 122 and *Clerk and Lindsell on Tort* 14th Edition paragraph 1321).

The plot in question abuts the State Forest of Ayios Nikandros in the area of Sotera village. The disputed portion is separated from the rest of plot 312 by a straight line of old cypress trees which must have been planted years ago - according to one version in 1926 - the rest of the portion of plot 312 has been occupied and cultivated by the respondent since the middle of the decade of 1960. Some time after the Second World War the disputed portion was occupied by the father of the appellant and since

1976, by the appellant himself. The dispute arose some time before the Turkish invasion. It appears, however, that the problems connected therewith have in so far proved by the litigants of relevant issues are concerned by the loss of, and nonaccessibility to, the records of the District Land Registry Office of Famagusta as a result of the occupation by Turkish forces of a great part of the said district, including the place where the records were last kept.

More so, this affects the proof of registered ownership in respect of land situated in that district. Hence the enactment of the Immovable Property (Transfer) (Temporary Provisions) Law, 1975 Law No.55 of 1975, as amended by Laws No.2 of 1979 and No.21 of 1982, making temporary provisions for the transfer of immovable property when L.R.O. records are lost.

Naturally the loss of these records and in many cases, as in the present one, the loss of the certificates of registration themselves as well, permits one to invoke the rules as to secondary evidence in order to establish his registered title over a particular plot of property once the absence of the primary source has been satisfactorily explained. This course was the one open to and indeed followed by the parties to these proceedings.

The respondent claimed to be the registered owner of plot 312 and a Land Officer Chr. Parpottas carried out a local inquiry in the presence of the parties or their representative, and a certain Soteris Zachariou, an Assistant Forest Officer and prepared a plan which was produced as Exhibit 1. This plan is a reproduction of the plan in use on Scale 1X2,500. He found that the disputed portion is covered by plot 312. In the plan in question there appears to be a line from west to east cutting through plot 312 separating the portion occupied by the appellant with the rest of the said plot. This line was the boundary line that appeared in the records of the Forest Department of 1912, Exhibit 4, delineating the boundaries of the aforementioned forest. If one looks at the plan, Exhibit 4, the boundaries of the said Forest as they were marked in 1912 were drawn in such a straight line all around that one cannot help thinking that these lines were drawn in a draftsman's office and not in relation to the irregular shapes that a forest of that extent would naturally have, particularly so when it comes to dividing or cutting off bits and pieces from surveyed plots of land as plot 312 and the rest of the plots abutting the said boundary line are.

On this point, the said witness said that as regards forest boundary lines, the Forest Department, as a matter of practice, does not follow the details and the protrusions of private lands abutting the forest but draws a straight line which does not represent with accuracy the extent of the forest. He also said that he found that his measurements in relation to the Land Registry Office Survey plans tally with those of the Forest Department as evidenced by a number of boundary marks placed in the area.

It appears, however, that whatever the postions was in 1912, in 1940, the Forest Department prepared and marked on Survey plans identical to those in use in 1912 the boundary line of the said Forest following the details as regards boundaries in relation to the boundaries of the adjacent privately owned plots of land moving more or less in a zig-zag manner and it is this plan of 1940, Exhibit 3, that is taken to day by the said Department into consideration in delineating the Forest land of the Republic. In that way and following the said zig-zag boundary line the disputed portion clearly falls within plot 312 and outside the forest land.

Also on the plans of 1940, Exhibit 3, there is clearly delineated and coloured yellow the extent of the land leased to the appellant by the Forest Department which does not include the disputed portion.

The learned trial Judge after summing up the evidence adduced and highlighting the significant aspect of it, said:-

> «....the inevitable conclusion that the disputed portion which was possessed by the defendant is part of plot 312. The existence of the straight line which goes through the property and the reference to the plans of 1912, cannot weaken the positive and clear evidence of the appropriate Lands Registry Officer who had the occasion to interpret the plans, and also to fix on the ground the boundaries of plot 312 in the context of the local inquiry which he carried out for the purposes of the present case. I feel that I can safely rely on the evidence of Chr. Parpotta.»

He then went on to say that the evidence of Yiamaki and Serghiou according to which, since 1940 until to - day on the basis of the plans in use by the Forest Department, the subject property

is not considered forest land cannot lead to a different conclusion. He then went on to say: «Consequently it cannot be accidental the fact that the same Forest Department when ceding to the defendant the right of use of part of the Forest followed as already mentioned, the boundaries of plot 312 as fixed by the Lands officer.» The learned trial Judge was not satisfied that in 1912 the situation was different, and that independently of the fact that even if he had reached the contrary conclusion that would not affect his aforesaid finding. He also noted that even the defendant in his defence invoked the Survey plans in use and he reminded himself that the plans of 1912 did not differ from the present ones, the only difference being the line drawn by the Forest Department and that even then beyond that line there existed the zig-zag line of the boundaries of the privately owned land.

The learned trial Judge concluded his elaborate judgment with the following: «In the present case I conclude that there is sufficient evidence establishing that the plaintiff is the registered owner of plot 312, the evidence of the plaintiff regarding the acquisition of the ownership of the property, the evidence of her husband regarding the existence of a certificate of registration for this property which, however, was left behind in Famagusta, the evidence for the possession as owners of the south part of the property since about twenty years without any questioning of the rights of the plaintiff by anybody, the claim of the north part of the property which was occupied by the father of the defendant as part of plot 312 which was manifested by a local inquiry which was carried out before the Turkish invasion when the Lands Office could ascertain who was the registered owner, the declaration regarding the ownership of the property to the Lands Office after the invasion and the nonsubmission of a corresponding declaration by anybody else, in my view substitutes the weakness of the Lands Office to refer to the contents of its books and establish for the purposes of this action that the plaintiff is the owner of plot 312.»

Learned counsel for the appellant very fairly stated that his case stands or falls depending on whether the disputed portion is covered by the registration of the plaintiff or not, and that he does not claim that part as belonging to the appellant but that he merely asserts that it does not belong to the respondent.

He based his argument in support of his contention that the disputed portion is not covered by the registration of the respondent, mainly to the fact that the extent of the property claimed by her is smaller than that of the two pieces put together. That the respondent described her property as being of an extent of one donum and one evlek, whereas the disputed portion being of an extent of one donum and 700sq. feet raises the whole lot to about 2 1/2 donums. On this point there is ample evidence that as regards the extent of plots they are not accurately given in old registrations.

On the totality of the circumstances before us and in the light of the findings of fact made by the learned trial Judge and the conclusions drawn thereon, I am satisfied that the respondents proved their case in accordance with the standard required in a civil case, there being nothing to contradict their version that the whole of plot 312 was covered by their registration and without excluding the disputed portion over which none could have a title either registered or prescriptive as it should not be forgotten that the appellant could not have acquired through oral transfer any prescriptive right that his father might have acquired before the appellant took over. (See *Papaloizou v. Themistocleous, 22* C.L.R.177; *Rodothea Papageorghiou v. Antoni Savva Komodromou* (1963) 2 C.L.R. 221.)

For all the above reasons this appeal should be dismissed with costs.

DEMETRIADES, J.: I have had the advantage of reading the judgment of my brother Judge Loizou and I fully agree with the reasoning given and the result reached.

KOURRIS, J.: This is an appeal against the judgment of a Judge of the District Court of Famagusta by which he found that the respondent was the registered owner of Plot No.312, Sh. Pl. 42/12 in the area of Sotera village in the District of Famagusta and he issued an injunction restraining the appellant from interfering with the disputed portion of land as forming part of the said plot.

The respondent by her Statement of Claim alleged that she is registered owner of Plot 312, Sh. Pl. 42/12 in the area of Sotera village of an area of one donnum and one evlek and she prayed for an injunction restraining the appellant from interfering with the said plot.

The appellant by paragraph (5) of his Statement of Defence makes a vague assertion that the disputed portion is part of the Ayios Nikandros State Forest but his main allegation is that the disputed portion does not form part of the certificate of registration of the respondent.

The learned trial Judge concluded that the disputed portion of land forms part of the certificate of registration of the respondent and the sole issue argued before us is against the conclusion of the learned trial Judge that the disputed portion of which the appellant was in possession, was covered by the certificate of registration of the respondent.

The facts as they emerge from the judgment of the learned trial Judge, shortly, are as follows:-

The plot in question adjoins the State Forest of Ayios Nikandros in the area of Sotera village. The disputed portion is separated from the rest of plot 312 by a straight line of old cypress trees planted years ago, presumably in 1926. The northern part was cultivated by the father of the appellant since 1947 when part of Ayios Nikandros Forest was leased to him. As from 1976 it is cultivated by the appellant. The southern part of the plot was possessed by the brother of the respondent when in 1968 he exchanged it with another piece of land belonging to his sister, who is the appellant in the present case, and it is cultivated by her husband ever since.

The dispute arose before the Turkish invasion of Cyprus and according to the Statement of Defence, this dispute was settled in an action before the District Court of Famagusta in 1969 but, the appellant abandoned this assertion during the hearing of the case. It should be noted that there is no counterclaim. The appellant does not claim that he is entitled to be registered as owner of the disputed portion by adverse possession or otherwise. He merely challenged the respondent to the strict proof of her claim.

Plot 312 is shown in the survey plans, exhibits 3 and 4, and there is no doubt that the disputed portion forms part of plot 312 and it is not claimed by the Forest Department.

The respondent in her Statement of Claim alleged that the area

of plot 312 is one donnum and one evlek. Also, the husband of the respondent, when he gave evidence before the trial Court, he said that he saw the certificate of registration at Famagusta and that the area of plot 312 was stated therein as one donum and one evlek. The certificate of registration was left behind in the town of Famagusta which is now occupied by the Turkish forces. The respondent and her husband were residents of the town and they fled away when the Turkish forces were advancing to occupy the town. In view of the fact that Famagusta town is still occupied by the Turkish forces the records of the District Lands Office could not be produced in evidence before the trial Court and the plaintiff had to prove that the disputed portion was covered by her certificate of registration by oral evidence.

There was in evidence before the District Court that the area of plot 312 was about two and a half donums and that the part of the plot occupied by the respondent was one donum and one evlek; so, the disputed portion occupied by the appellant was also about half the area of plot 312.

The learned trial Judge, when dealing with the evidence before him, he reached the conclusion that the disputed portion which was occupied by the appellant was covered by the certificate of registration of the respondent. In reaching this conclusion he had taken into consideration the evidence before him as well as the fact that the respondent after the Turkish invasion she submitted a declaration to the Lands Office, on the invitation of the Authorities, that she is the owner of plot 312 and he also took into consideration the non submission of a corresponding declaration by anybody else.

Learned counsel for the appellant very fairly stated that the appellant's case stands or falls depending on whether the disputed portion is covered by the certificate of registration of the plaintiff or not and he submitted that the respondent failed to prove her claim on the balance of probabilities. He based his argument in support of his submission that the disputed portion is not covered by the certificate of registration of the respondent, mainly on the fact that the area of the property claimed by the respondent is one donum and one evlek whereas the area of plot 312, as shown in the survey plans, is about two and a half donums. On this point there is evidence that the area of plots of land are not accurately stated in old registrations.

In reviewing decisions based on inferences from facts not in controversy, the Appellate Court is in as good a position as a trial Court to evaluate such facts as no question of credibility arises (See *The Cyprus Asbestos Mines Limited v. Theocharis Loizou Skoufaris and another*, 1964 C.L.R. 6 at p.12).

In the present case the proper inference to be drawn is that the registration is not old because the said plot was transferred in the respondent's name in 1968 by way of exchange with another property. If we presume that the registration is old, then, one should expect that the actual area of a plot should be more or less the area stated in the certificate of registration. I am of the view that a certificate of registration could not state the area as being half of the actual area of the plot as in the present case. Further, the fact that the learned trial Judge took into consideration that the respondent declared to the Lands Office, after the Turkish invasion, that she is the owner of plot 312 and that there has been no corresponding declaration by anybody else, does not carry weight, to my mind, because the appellant never claimed that he was either the owner of the disputed portion or that he was entitled to be registered as the owner by way of prescription or otherwise. Furthermore, the plaintiff did not exercise any acts of ownership in some form or other over the disputed portion of land. She merely asserts that the disputed portion is covered by her brother or father, who were the predecessors in title did not bring their claim to the Court before the occupation of Famagusta town by the Turkish forces when the records of the District Lands Office could be made available and the dispute could be resolved satisfactorily.

I would conclude that the learned trial Judge went wrong in reaching the conclusion, on the totality of the evidence as found by him, that the respondent proved her claim. My conclusion is that the respondent failed to prove her case on the balance of probabilities because of the great difference of the area of the plot and the area stated in the certificate of registration and her failure to prove any acts of ownership in some form or another such as occupation and cultivation of the disputed portion.

For the above reasons I would allow the appeal with costs here and in the Court below.

A. LOIZOU, J. In the result, the appeal is by majority dismissed with costs.

Appeal dismissed by majority.