

1987 October 6

[SAVIDES, J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

MAROULLA ARISTOTELOUS LOUCAIDOU,

*Applicant,*

v

THE IMPROVEMENT BOARD OF KALAPANAYIOTIS,

*Respondent*

*(Case No 687/85)*

*Acts or decisions in the sense of Art 146 1 of the Constitution — Existence of an alternative civil remedy — Does not oust or limit in any way the jurisdiction under Art 146 1*

5 *Administrative Law — Constructing a road in a manner amounting to trespass — No formal decision recorded in the minutes of the respondents — Notwithstanding such a fact, in the circumstances there was a positive decision to construct the road, which can be impugned by a recourse for annulment*

10 By means of this recourse the applicant impugns the decision of the Improvement Board of Kalapanayiotis to construct a road through the immovable property of the applicant situated at the locality of Mega Laom at Kalapanayiotis

15 It is common ground that the respondent Board without exercising its powers under the Villages (Administration and Improvement) Law, Cap' 243, section 22(b) and the Compulsory Acquisition of Property Law, 1962 (Law 15/1962) proceeded with the construction of a road passing through the applicant's property without previously having obtained the consent of the owner or having set in motion the machinery of compulsory acquisition and requisition of the property. It is admitted by the respondent that by so doing it trespassed upon the property of the applicant

20 There is no formal decision of the Board and nothing is recorded in any minutes of the meetings of the Board, concerning the construction of the road

The respondents admitted by their written address that the road was constructed urgently as public funds were allocated for its construction by the

Government and such funds had to be utilised and there was no time to resort to compulsory acquisition

Counsel for the respondents argued that the sub judice act is in the domain of private law, that once a complete remedy exists under the Civil Law, the present proceedings are futile, and that the recourse is not maintainable because there is no decision of the Board recorded in the minutes 5

Held, *annulling the sub judice decision* (1) The contention that the recourse is not maintainable because there did not exist any record of any decision of the Board in the minutes is untenable. There is in the first place a positive act. Irrespective of the fact that there is no formal decision recorded in the minutes, all the facts of the case and the surrounding circumstances lead to only one inference that the act in question was the product of a decision of the respondent Board 10

(2) The answer to such argument is simple. When a case falls within the ambit of Article 146, the exclusive jurisdiction of the Supreme Court cannot be ousted or limited in any way by the mere fact that some other remedy is available before a civil Court (*Zavros v The District Officer of Paphos* (1986) 3 C L R 44 followed) 15

*Sub judice decision annulled*  
*Costs in favour of applicant* 20

*Cases referred to*

*Zavros v The District Officer of Paphos* (1986) 3 C L R 44

**Recourse.**

Recourse against the decision of the respondent to construct a road through the immovable property of the applicant at Kalapanayiotis. 25

A. *Xenophontos*, for the applicant.

K. *Michaelides*, for the respondent.

*Cur. adv. vult.*

SAVVIDES J. read the following judgment. At the beginning of July, 1985, the Improvement Board of Kalapanayiotis, the respondent in the present recourse, proceeded to and constructed an agricultural public road. For the construction of such road the Board entered upon and used part of the applicant's property. There is no formal decision of the Board and nothing is recorded in any minutes of the meetings of the Board, concerning the construction of the road. As it emanates from the facts set out in the 30 35

opposition and the written address of counsel for the respondent, the road had to be constructed urgently as public funds were allocated by the Government for its construction which had to be utilized and there was no time to resort to compulsory acquisition.

- 5 In fact till today there has been no suggestion that the part of the property of the applicant affected by the road, has been compulsorily acquired.

As a result the applicant filed the present recourse whereby she prays for:-

- 10 «A declaration of the Court that the act and/or decision of the Improvement Board of Kalapanayiotis to construct a road through the immovable property of the applicant situated at the locality of Mega Laoni at Kalapanayiotis (Plots 354/2 and  
15 364/2 Sheet/Plan XXXVII 18, Block 1/23) and/or its use for the public and/or any other use is illegal and/or null and void and of no legal effect whatsoever».

- A number of legal grounds were raised including, inter alia, that there was excess and/or abuse of powers; that the respondent Board acted in violation of Articles 23 and 28 of the Constitution  
20 and the Law (Cap. 243); that the respondent Board acted under a misconception of facts and its decision is not reasoned.

- The only objection raised by counsel for the respondent is that the act and/or decision complained of is in the domain of private law and cannot be made the subject-matter of a recourse under  
25 Article 146 of the Constitution.

- It is abundantly clear both from the opposition and the contents of the written address of counsel for the respondent that the respondent Board does not dispute the fact that the entry upon the property of the applicant was an unauthorized act not taken in  
30 accordance with the provisions of the Villages (Administration and Improvement) Law, Cap. 243 and the Compulsory Acquisition of Property Law, 1962 (Law No. 15/1962).

- Counsel for the respondent in his written address contends that «some of the organs or officers of the Board, took it upon  
35 themselves to trespass upon the applicant's property and construct an agricultural road serving the interests of the whole community». Such contention is, however, of no material relevance in view of his admission in the opposition that «at the beginning of July, 1985, the Improvement Board of

Kalapanayiotis proceeded to and constructed an agricultural public road passing through the property of the applicant» and in his written address that the road «was constructed urgently as public funds were allocated by the Government for the construction of the said road, which funds had to be utilized and there was no time to resort to a compulsory acquisition». Counsel for the respondent further submitted by his written address that «this state of affairs is unsatisfactory» and that once the construction of the road was made without the proper legal basis it amounted to the civil wrong of trespass to land, for which there is ample remedy under the civil law before a competent Civil Court.

In view of the admission that the act complained of amounted to trespass on the applicant's land and as such was a wrongful act any decision whether formal or informal to pursue such act was also wrongful. The case, therefore, boils down to the question as to whether such act and/or decision was an executory administrative act within domain of public law and as such amenable by a recourse under Article 146 of the Constitution or whether it is an act in violation of the civil law rights of the applicant which is within the exclusive domain of private law.

Counsel for the applicant submitted that the fact that the officers or employees of the Board proceeded to utilize funds made available to the Board by the Government, shows clearly that in so doing, they acted on behalf and on the instructions of the Board. Furthermore, the admission of the respondent that the act complained of was done on their behalf, leads to the inference that irrespective of the absence of a formal decision recorded in the minutes there was in any event a decision by the respondent Board to proceed with the commission of the act complained of. Counsel concluded that in the circumstances the applicant is entitled to pursue her claim by a recourse before this Court under Article 146 of the Constitution.

Under paragraph 1 of Article 146 of the Constitution a recourse lies before the Supreme Constitutional Court on a complaint that a decision, an act or omission of any organ, authority or person exercising any executive or administrative authority is contrary to any of the provisions of the Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person.

Under paragraph 2 for a recourse to be maintainable a person has to satisfy the Court that an existing legitimate interest of his is adversely and directly affected by such decision or act or omission.

5 There is no question in the present case that the respondent is an authority exercising executive or administrative authority and therefore its decisions, acts or omissions can be made the subject of a recourse, provided the prerequisites of paragraphs 1 and 2 of Article 146 of the Constitution are satisfied.

10 The first question therefore which arises is whether there was an act or decision taken by the respondent contrary to any provision of the Constitution or of any law.

15 It is common ground in the present case as earlier mentioned that the respondent Board without exercising its powers under the Villages (Administration and Improvement) Law, Cap. 243, section 22(b) and the Compulsory Acquisition of Property Law, 1962 (Law 15/1962) proceeded with the construction of a road passing through the applicant's property without previously having obtained the consent of the owner or having set in motion the machinery of compulsory acquisition and requisition of the property. It is admitted by the respondent that by so doing it 20 trespassed upon the property of the applicant. It is, therefore, abundantly clear that the respondent Board acted in violation of the aforesaid laws and also of Article 23 of the Constitution.

25 The commission of the wrongful act has never been disputed. Counsel for the respondent, however, raised the question that the recourse is not maintainable because there is no decision of the Board recorded in the minutes. I find such contention untenable. There is in the first place a positive act. Although counsel for the respondent alleges that the act complained of was made by 30 servants and/or agents of the respondent, the whole tenor of his address is to the effect that such act was authorized by the respondent Board and carried out on its behalf for the purpose of utilizing money which had already been made available by the Government for the purpose. Indeed I cannot see how anybody else other than the respondent could utilize such funds which were 35 made available to it by the Government or how could anybody use the said funds without authority from the Board. Irrespective of the fact that there is no formal decision recorded in the minutes all the facts of the case and the surrounding circumstances lead to only

one inference that the act in question was the product of a decision of the respondent Board.

In the result I have come to the conclusion that there is an act or decision of the Board which is contrary to the Constitution and the law entitling the applicant, whose existing legitimate interest, that of the right to free possession and enjoyment of her property safeguarded by Article 23 of the Constitution has been adversely and directly affected, by such act and/or decision, to file and pursue a recourse under Article 146. 5

I shall now deal with the contention of counsel for the respondent that once a complete remedy exists under the Civil Law the present proceedings are futile. 10

The answer to such argument is simple. When a case falls within the ambit of Article 146 the exclusive jurisdiction of the Supreme Court cannot be ousted or limited in any way by the mere fact that other remedy is available before a civil Court. Useful reference may be made in this respect to my judgment in the case of *Zavros v. The District Officer of Paphos* (1986) 3 C.L.R. 44 in which at pp. 49-50 the following are stated:- 15

«I wish to stress right from the beginning that this Court has exclusive jurisdiction over cases falling within the ambit of Article 146 and its jurisdiction cannot be ousted or limited in any way by the mere fact that another action is pending before another Court. The judgments of this Court are declaratory of the rights of a party who if successful may pursue any remedy for damages under paragraph 6 of Article 146, before any other Court. 20 25

In *Kyriakides v. The Republic*, 1 R.S.C.C. 66 the Supreme Constitutional Court, following the dicta in *Ramadan v. The Electricity Authority of Cyprus*, 1 R.S.C.C. 46 held the following at pp. 74-75: 30

‘Therefore, in the opinion of this Court, in respect of all wrongful acts or omissions referred to in Article 172 and which acts or omissions come within the scope of Article 146 an action for damages lies in a civil Court only under paragraph 6 of such Article, consequent upon a judgment of this Court under paragraph 4 of the same Article, and in such cases an action does not lie direct in a civil Court by virtue of the provisions of Article 172. 35

5           Objection (c): In its Judgment in Application 1/61 this Court has defined the limits between its administrative jurisdiction created by paragraph 1 of Article 146 and the jurisdiction of the High Court and inferior courts. In accordance with that judgment, in case of doubt on account of apparent or alleged conflict of jurisdictions, the decisive test is to look first at Article 146 in order to determine whether the particular matter is within the exclusive jurisdiction of this Court under such Article'.

10           The above decision was also followed in the case of *Solomou v. The Republic*, 1 R.S.C.C. 96 in which a submission made on behalf of the applicant that a parallel legal remedy existed under Article 172 of the Constitution and, therefore, no recourse could be made under paragraph  
15           1 of Article 146, was rejected by the Court.»

          For all the above reasons this recourse succeeds and the sub  
judice act and/or decision of the respondent which is illegal and  
was taken in excess and abuse of powers is hereby annulled with  
costs in favour of the applicant.

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*Sub judice decision  
annulled with costs  
in favour of applicant.*