

1988 April 4

(DEMETRIADES, LORIS, STYLIANIDES, JJ.)

MARIA M. FATSITA,

Appellant-Defendant,

v.

SOPHIA FATSITA AND ANOTHER,

Respondents-Plaintiffs.

(Civil Appeal No. 7068).

*Constitutional Law — Laws in force on Independence Day —
Modification of — Constitution, Art. 188.*

*Constitutional Law — Right of access to Court/Fair and Public
Hearing — Constitution, Art. 30.1 and 30.2 — The Immovable
Property (Tenure, Registration and Valuation) Law, Cap. 224,
section 80 — Repugnant and inconsistent with Articles 30.1 and
30.2* 5

*The European Convention for the Protection of Human Rights, ratified by
Law 39/62 — A public and fair hearing, implies a right of access
to Court — Art. 6.1.* 10

*Immovable Property — The Immovable Property (Tenure, Registration
and Valuation) Law, Cap. 224 — Director — Powers of —
Confined to technical matters, as opposed to adjudication on rights.*

*Contract — Specific Performance — The Contract Law, Cap. 149,
Section 76 — Codifies English Law (except as regards contracts for
the sale of land).* 15

*Constitutional Law — Determination of Judicial causes within a
reasonable time — Constitution, Art. 30 — What is a «reasonable
time» — Judges should not allow themselves to be drawn by counsel
or litigants.*

*Civil Procedure — Adjournment of trial — Principles applicable —
Constitution, Art. 30.*

The parties in this appeal are sisters. They, together with ex-
plaintiff 2, were the co-owners of a plot of land. Each held one third
share up indiviso. By a written contract made in 1966 they agreed to 25

divide it in an agreed way. As from the day of the contract the parties took possession of their respective plots.

5 As, however, the appellant refused to give her consent for the purpose of effecting the partition through the District Lands Office, the respondent and ex plaintiff 2 issued a writ for specific performance of the contract for partition. Appellant's defence was that ex plaintiff 2 failed to construct properly a road and a concrete channel, as agreed. The trial Court did not accept this allegation.

10 Ex plaintiff 2 withdrew the action as, at some time, he transferred his share in the land to the appellant.

The Court granted a decree of specific performance.

15 Hence this appeal. The issues raised are: (a) As partition of land is, under section 34 of Cap. 224, within the power of the Director, the Court had no jurisdiction to issue a decree of specific performance. (b) That the partition might be contrary to the provisions of section 27 of the same Law relating to division of immovable property. (c) Specific performance should not have been granted.

Held, dismissing the appeal:

20 (1) (a) The action is one for specific performance of a contract and a person is not precluded by the provisions of Cap. 224 to institute and prosecute such action before a Court.

(b) Furthermore, the provision of section 80 of Cap. 224 is repugnant to and inconsistent with Articles 30.1 and 30.2 of the Constitution.

25 The principle whereby a civil claim must be capable of being submitted to a Judge ranks as one of the universal «recognized» fundamental principles of Law.

30 This conclusion was reached by the European Court of Human Rights under Art. 6.1 of the European Convention for the Protection of Human Rights*. In Art. 30.1 - and it is significant that such a provision is not found in the Convention - the right to access is expressly mentioned.

35 The guarantee of the right of access to the Courts does not debar the legislature from providing for some sort of regulation of this right, provided that the regulatory provision is not arbitrary or unreasonable and does not labour as an infringement of the right of access to a Court.

(c) In this country, even before the coming into operation of the Constitution, the Court interpreted the powers vested in the Director

* Ratified in Cyprus by Law 39/62

as limited to rather technical matters and not matters of vindication of rights

(2) The second point was never raised before the trial Court

(3) Section 76 of the Contract Law, Cap 149, in a summary form, codifies the English Law on specific performance of contracts. However, in the case of sale of land this section does not apply. 5

As section 76 encompasses the principles of the English Law on specific performance it should be interpreted and applied accordingly, as, indeed, it was in this case

(4) Article 30 2 of our Constitution and Article 6(1) of the European Convention on Human Rights guarantee the right of a person to have his civil rights and obligations determined by a competent Court established by Law *within a reasonable time* 10

The reasonableness of the length of proceedings must be assessed in each case according to the particular circumstances, including the complexity of the case, the conduct of the applicants and the competent authority, and what was at stake for the former, in addition only delays attributable to the State are relevant (A passage from *MM Zimmermann and Steiner*, E.C.H.R., Series A, No. 66 cited with approval) 15 20

In this case numerous adjournments were granted on insufficient grounds. Judges should not forget that they are performing a public duty towards society, irrespective of whether they are called upon to adjudicate private rights between two members of the society

Appeal dismissed. 25
No order as to costs.

Cases referred to:

Lawless Case, E C H R Series A, Vol. 3, p. 52

Delcourt, E.C.H.R. Series A Vol 11 p 14 -15

Irrigation Division «Katzilos» v. Republic (1983) 3 C L R. 1068; 30

Golder Case, E.C.H.R., Series B, Vol. 16 p.42;

Ibrahim v Souleyman (1953) 19 C.L R. 237;

Hassidoff v. Santi and Others (1970) 1 C.L.R. 220;

Avgousti v. Papadamou and Another (1968) 1 C.L.R. 66;

Xenopoulos v. Makridi (1969) 1 C.L.R. 488. 35

Melaisi v. Georghiki Etena (1979) 1 C.L.R 748;

Georghalides v. Theodoulou, 1962 C.L.R. 115;

Tsiartas and Another v. Yiapana and Another, 1962 C.L.R. 198;

Antonίου v. Elmaz (1966) 1 C.L.R. 210;

Charalambous v. Kazanou and Another (1982) 1 C.L.R. 326;

- 5 *A.C.T. Textiles Ltd. v. Zodhiatis* (1968) 1 C.L.R. 89;

MM Zimmermann and Steiner, E. C.H.R. Series, A, No. 66.

Appeal.

- 10 Appeal by defendants against the judgment of the District Court of Nicosia (Ioannides, D.J.) dated the 3rd October, 1985 (Action No. 1700/72) whereby specific performance of the written contract between the parties dated 19.6.1966 and the registration in the name of the parties of the sub-plots of land which were allotted to each one of them was ordered but plaintiff's claim for damages was dismissed.

- 15 A. Scordis, for the appellant.

P. Frakalas, for the respondents.

Cur adv. vult.

DEMETRIADES J.: The Judgment of the Court will be delivered by Mr. Justice Stylianides.

- 20 STYLIANIDES J.: The parties in this appeal are sisters. They, with ex-plaintiff 2 - their brother, were co-owners of one third each up indiviso of land situate in the vicinity of Ayios Theodoros Soleas village, localitty «Kangelia», Plot 35, Sheet/Plan 28/54, under Registration No. 1335.

- 25 By a written contract, dated 19.6.1966, signed by all three co-owners, they divided the said land. The plaintiff-respondent undertook to open up a new road leading from the public road to the sub-plot allocated by the said agreement to the other contracting parties, and the construction of a concrete water
30 channel. By the said contract they undertook to take the necessary steps with the Lands Office for the implementation of the partition.

As from the date of such contract the parties were in possession of their respective sub-plots.

- 35 On 20th April, 1971, the respondent and ex-plaintiff No. 2 submitted an application to the District Lands Office of Nicosia for the implementation of the partition, i.e. the issue of separate title-deeds to each one of them. The defendant-appellant failed and/or

refused to sign the necessary consent requested by the Lands Office.

The plaintiffs filed action against the present appellant, whereby they claimed specific performance of the written contract of 19.6.1966 and registration in the name of the parties of the sub-plots of land which were allocated to each one of them, under the said contract. They, further, claimed damages. 5

The defendant in her statement of defence admitted the contract and that each one was possessing, without interference, his separate holding. She, however, alleged that the plaintiff did not construct and/or did not construct properly the road and the water channel to which reference was made above. The last paragraph of the statement of defence reads: «The defendant is ready to do anything for the performance of the contract of 19.6.1966 subject to the execution of the aforesaid conditions», meaning the construction of the road and water channel. 10 15

Local inquiry was carried out and plans were prepared by the D.L.O.

In the meantime the plaintiff 2 - Petros Fatsitas - sold and transferred his registered share in the name of the defendant. Thereupon plaintiff No. 2 withdrew the action, as he had no interest any more. 20

After many adjournments, to which we shall refer later in this Judgment, the action was heard by a Judge of the District Court of Nicosia. 25

The trial Judge found that the grounds, which the defendant raised for not giving the written consent for the registration of the separate holdings, as aforesaid, were unfounded, as the plaintiff had performed in toto her obligation contained in the contract.

He, then, directed his mind to the provisions of section 76 of the Contract Law, Cap. 149, the principles governing the equitable remedy of specific performance and, in exercise of his discretion, he issued Judgment ordering specific performance of the contract and registration of the separate holdings in the name of the parties, as per the contract of 19.6.1966. 30 35

The defendant being aggrieved took this appeal.

Counsel for the appellant argued:-

(a) That the trial Court had no jurisdiction to entertain this action and grant specific performance of the partition of land, as this is within the exclusive power under section 34 of The Immovable 40

Property (Tenure, Registration and Valuation) Law, 224 as amended, of the Director.

(b) That the partition might be contrary to the provisions of section 27 of the same Law, relating to division of immovable
5 property.

(c) Specific performance should not have been granted.

A. JURISDICTION:

Cap. 224 was in force on the date of the coming into operation of the Constitution.

10 Section 80 thereof provides, inter alia, that: «save by way of appeal as provided in this section, no Court shall entertain any action or proceeding on any matter in respect of which the Director is empowered to act under the provisions of this Law.»

The Director is empowered by section 29, on the application of
15 any co-owner, where immovable property is held in undivided shares, to cause a partition of the property to be made amongst the several parties entitled thereto and to register the holdings into which the property is divided in the names of the persons to whom the same are respectively allotted.

20 The owners in the present case partitioned their land, which was held in undivided shares, and two of them applied to the Director for the registration of the property so partitioned. As the defendant appellant did not give her written consent, the Director did not exercise his power to issue separate titles for the holdings into
25 which the property was divided in accordance with the terms of the contract of partition.

Every law in operation on Independence Day was saved subject to modification, as may be necessary to bring it into conformity with the Constitution. «Modification» includes amendment,
30 adaptation and repeal.

The action is one for specific performance of a contract and a person is not precluded by the provisions of Cap. 224 to institute and prosecute such action before a Court.

35 Furthermore, the provision of section 80, to which reference was made above, is repugnant and inconsistent to Article 30.1 and 2 of the Constitution which read:-

«Article 30.1. No person shall be denied access to the Court assigned to him by or under this Constitution.»

2. In the determination of his civil rights and obligations or of any every person is entitled to a fair and public hearing within a reasonable time by an independent, impartial and competent court established by law.»

Paragraph 2 of Article 30 is a replica of paragraph 1 of Article 6 of the European Convention on Human Rights, which was ratified by Law 39/62 5

The principle whereby a civil claim must be capable of being submitted to a Judge ranks as one of the universal «recognized» fundamental principles of Law The right of access constitutes an element which is inherent in the right stated in Article 30 of the Constitution and 6(1) of the Convention 10

The European Court on Human Rights reached the conclusion, without needing to resort to «supplementary means of interpretation» as envisaged in Article 32 of the Vienna Convention, that Article 6(1) secures to everyone the right to have any claim relating to his civil rights and obligations brought before a Court or tribunal In this way the Article embodies the «right to a Court», of which the right of access, that is the right to institute proceedings before Courts in civil matters, constitutes one aspect only To this are added the guarantees laid down in Article 6(1) as regards both the organization and composition of the Court, and the conduct of the proceedings In sum, the whole makes up the right to a fair hearing - (see Digest of Strasbourg, Case-Law relating to the European Convention on Human Rights, volume 2, pp 296-297) 15 20 25

It would be inconceivable that Article 30 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that, which alone makes it in fact possible to benefit from such guarantees, that is, access to a Court 30

The fair, public and expeditious characteristics of judicial proceedings are of no value at all, if there are no judicial proceedings - (see the Judgments of E.C.H.R in *Lawless Case*, Series A volume 3, p 52; *Delcourt*, Series A, volume 11, pp 14-15) 35

The guarantee of the right of access to the Courts does not debar the legislature from providing for some sort of regulation of this

right provided that the regulatory provision is not arbitrary or unreasonable and does not labour as an infringement of the right of access to a Court.

5 Where there are any limitations imposed by law on the Court's jurisdiction, it is the Courts themselves who should decide in the event of dispute (Jacobs - European Convention on Human Rights, 1975 p. 93, see, also, *Irrigation Division «Katzilos» v. Republic* (1983) 3 C.L.R. 1068).

10 It is significant that paragraph 1 of Article 30 of our Constitution is not found in the international documents, which form the basis of the Chapter of the Constitution relating to fundamental rights and liberties.

15 Paragraph 1 makes special mention of the right of access to the Court assigned to him by, or under the Constitution. This paragraph attracted comment on *Golder Case*, (see Series B, vol. 16, p. 42).

20 In this country, even before the coming into operation of the Constitution, the Court interpreted the powers vested in the Director as limited to rather technical matters and not matters of vindication of rights.

25 In *Sherife Moustafa Moulla Ibrahim v. Mehmet Souleyman* (1953) 19 C.L.R. 237, the Supreme Court expressed the view that section 56 (Now 58), regarding a boundary dispute, did not apply where there was a dispute as to whether the description in a deed or delineation in a plan was correct or not.

30 After the establishment of the Republic, in *Abraham Hassidoff v. Paul Antoine-Aristide Santi and Others* (1970) 1 C.L.R. 220, it was said that in a case concerning legal rights in land, the parties affected should be given full opportunity of vindicating their legal rights in a Court of Law for an action for a declaratory judgment as to title or otherwise, with all the safeguards as to proof and admissibility of legal evidence.

35 The plaintiff-respondent was not and should not be precluded by any provision in Cap. 224 from vindicating in a Court of Law the rights derived from a contract.

B. SECTION 27 OF CAP. 224:

Section 27 of Cap. 224 is a salutary provision introduced in 1946 to avoid the fragmentation of land into very small pieces.

Land irrigated or capable of being irrigated from a perennial source of water should not be divided into holdings of less than *one donum in extent of, if capable of being irrigated from a seasonal source of water, into holdings of less than two donums in extent.*

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There is no allegation in the statement of defence that the partition contravenes this statutory provision. The point was not taken up before the District Court.

The evidence before the trial Court indicates contrary to the argument of counsel. The whole land is over six donums; the evidence is to the effect that there are water channels and that the land is irrigated.

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For these reasons this point fails.

C. SPECIFIC PERFORMANCE:

Section 76 of the Contract Law, Cap. 149, in a summary form, codifies the English Law on specific performance of contracts. Only in the case of sale of land this section 76 does not apply - (*see Eleni Andrea Avgousti v. Niovi Papadamou and Another* (1968) 1 C.L.R. 66; *Xenis Xenopoulos v. Elli Isidorou Makridi* (1969) 1 C.L.R. 488; *Melaisi v. Georghiki Eteria* (1979) 1 C.L.R. 748).

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As section 76 encompasses the principles of the English Law on specific performance it should be interpreted and applied accordingly.

The trial Judge properly directed himself to the principles governing the matter. We need not in this appeal expound same. It suffices to say that, having regard to the principles and criteria pertaining to the matter, he rightly exercised his discretion in granting specific performance.

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For the foregoing, this appeal will be dismissed.

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DELAYS AND ADJOURNMENTS:

Before, however, concluding, we would like to observe that this case, which was filed in 1972, was finally determined at the District Court level after more than 14 years. The record speaks for itself. The litigants and especially the appellant, the advocates - it should be noted that counsel who appeared in the appeal stepped in the case at the final stage before the District Court - and some of the Judges who dealt with the case, were the cause of this unreasonable delay.

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Article 30.2 of our Constitution and Article 6(1) of the European Convention on Human Rights guarantee the right of a person to have his civil rights and obligations determined by a competent Court established by Law *within a reasonable time*. Society at large has an interest in the speedy determination by the Courts of the disputes. This is expressed in the Latin maxim «interest reipublicae ut sit litis finium».

The Supreme Court time and again expressed the need for speedy determination of cases and its disapproval for the delays in the hearing of cases.

In *Georghallides v. Theodoulou*, 1962 C.L.R. 115 at p. 125 it was said:-

«Finally, we would like to observe that, as it is the constitutional right of every person to have his case heard within a reasonable time, it is highly desirable that judgments reserved by Courts should, generally, be delivered without any delay.»

With regard to the undesirability of adjourning cases, in *Christodoulos St. Tsiarta & Another v. Kodros Kyriacou Yiapana & Another*, 1962 C.L.R. 198, at p. 208 it was said:-

«A further word needs to be said with respect to adjournments. They produce justifiable dissatisfaction by litigants and their witnesses, and statistical records of this Court confirm the opinion there are far too many. If an action can proceed the first time it comes on for trial so much the better. When adjournments are necessary there should not be more than one or two. After that there should be no more adjournments except in unusual circumstances, as to which the Judge has to decide. Having made these comments it must be added these will be very unusual circumstances in which there may be many adjournments but they should be few in number.»

In *Antonioniou v. Elmaz* (1966) 1 C.L.R. 210 at p. 213, the anxiety of this Court regarding the proper prosecution of trials which includes the litigant's right to a hearing of his case within a reasonable time by the appropriate Court, as declared in Article 30 of our Constitution, was once more reiterated - (see, also, *Nicodemos Charalambous v. Loukia Kazanou and Another* (1982) 1 C.L.R. 326 and *A.C.T. Textiles Ltd. v. Georghios Zodhiatis* (1986) 1 C.L.R. 89).

The European Court of Human Rights in the case brought by *MM Zimmermann and Steiner*, E.C.H.R., Series A. No. 66, where the applicants claimed that the length of proceedings ending by a decision of the Swiss Federal Court had exceeded the «reasonable time» stipulated by Article 6(1) of the Convention, observed that reasonableness of the length of proceedings must be assessed in each case according to the particular circumstances, including the complexity of the case, the conduct of the applicants and the competent authorities, and what was at stake for the former; in addition, only delays attributable to the State were relevant. The Court pointed out in the first place that the Convention placed a duty on the Contracting States to organize their legal systems so as to allow the Courts to comply with the requirements of Article 6(1), including that of trial within a «reasonable time».

In the present case most of the numerous adjournments were granted on insufficient grounds, on the application of one or other of the counsel of the parties.

The Courts should not allow themselves to be drawn in this undesirable situation by counsel or litigants. The function of the Court is not only of interest to a litigant or the advocate representing him; it is a public function of general interest. Judges are performing a public duty towards society, irrespective of whether they are called upon to adjudicate private rights between two members of the society.

For the foregoing, this appeal is dismissed, but, in all the circumstances, we make no orders as to costs.

*Appeal dismissed with
no order as to costs.*