

[O' BRIAIN, P., ZEKIA, VASSILIADIS and JOSEPHIDES, JJ.]

ANTONIS ANDREA AND 13 OTHERS

*Appellants-Plaintiffs,*

v.

SADI DOURMOUSH

*Respondent-Defendant.*

*(Civil Appeal No. 4341)*

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*Immovable property—Adverse possession—Acquisition of ownership thereby—Onus of proof—In claims of this kind the plaintiffs have to rely on the strength of their case, and not on the weakness of the defendant's case.*

*Immovable property—Registration—Registration obtained on the strength of a false certificate.*

The present dispute concerns the ownership of a field. This field is registered in the name of the respondent-defendant under Registration No. 1835 dated 27th May, 1958. But the appellants—plaintiffs claimed it was wrongfully recorded in this respondent's name. The appellants claimed that the deceased Andreas Hadji Andoni, had been in continuous uninterrupted, undisputed adverse possession of the field for a period well exceeding that of prescription until his death and after his death they continued in occupation and/or possession and that at the time of the General Survey it was recorded in their names.

Malachtos, D.J., found that the original ownership of the appellants—plaintiffs of the disputed field has been established and that the onus of proof shifted on the respondent—defendant to prove undisputed and uninterrupted possession of the field for the full prescriptive period prior to the action. Zihni, D.J., on the other hand, found that the evidence was so meagre that he could not possibly find that the heirs of Andreas Hadji Andoni had the plot in dispute in their possession for a period exceeding that of prescription.

The High Court in considering the evidence and dismissing the appeal :

*Held :* (1) We should observe that in a case of long undisputed and uninterrupted adverse possession the onus lies on the person alleging such possession to prove affirmatively his acts of undisputed and uninterrupted possession which en-

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titled him to registration, and one cannot be heard to say that there is any burden on the defendant to build up any case.

(2) But on the whole, we agree with Zihni, D.J., that the evidence adduced by the appellants in this case in respect of their alleged undisputed and uninterrupted adverse possession between the years 1918 and 1935 is very meagre on which to base such a claim. For this reason we hold that the appellants have failed to prove that they are entitled to be registered as owners of the field in dispute, and their appeal accordingly fails.

(3) We would, however, like to observe that, although the defendant pleaded possession for over twenty years, he only proved possession since 1954; and, although he did not plead it, on the evidence of the Land Registry Clerk, it appears that he is the registered owner of the land in dispute under Registration No. 1835 dated 27th May, 1958. Both trial Judges are agreed that the said registration was obtained on the strength of a certificate dated 4th March, 1958, signed by the Mukhtar and Azas of the village of Softades (one of them being the respondent's father), which certificate has been shown to be false, and that the registration was wrongfully obtained. But in these proceedings, as the appellants had to rely on the strength of their case, and not on the weakness of the respondent's case, and as they failed to prove that they are the persons entitled to be registered as the owners of the field in dispute, it is not possible for this Court to make any order with regard to the alleged wrong registration in the name of the respondent. We think, however, that the Director of Lands may consider whether that registration in respondent's name should be allowed to stand in the face of the finding of the trial Court that it is based on a false certificate issued by the village authority.

*Appeal dismissed.  
No order as to costs.*

### **Appeal.**

Appeal against the separate judgment given by Zihni, D.J., sitting as mixed Court Judge of the District Court of Larnaca, together with Malachtos, D.J., in Action No. 1448/58, whereby he dismissed plaintiffs' claim for a declaration that the property under registration No. 1835 dated 27.5.58 in the name of the defendant is the property of the plaintiffs by virtue

of inheritance and/or continuous and uninterrupted possession for the last 60 years and for an order cancelling any existing registration and directing registration of the said property in plaintiffs' names as per their hereditary shares.

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*G.M. Nicolaidis* for the appellants.

*M. Fuad Bey* for the respondent.

*Cur. adv. vult.*

The judgment of the Court was delivered by :—

JOSEPHIDES, J. : The present dispute concerns the ownership of a field at Softades village, Larnaca District. As the plaintiffs (appellants) and the defendant (respondent) belong to different communities the case was heard by a mixed bench of two judges who were equally divided and the plaintiffs' claim was accordingly dismissed. There was no counter-claim.

The appellants are the lawful heirs of one Andreas Hadji Andoni, late of Kiti, who died some 45 years ago. The respondent comes from Softades village. The land in dispute is a field 16 donums and 2 evleks in extent, situate at locality "Parasolia" in the area of Softades, under plot No. 94/1, sheet plan 50/54. Plots 94/1 and 94/2 formed originally one plot, No.94, which was 19 donums in extent and which was recorded in the General Survey in 1918 in the name of the heirs of Andreas Hadji Andoni of Kiti, i.e. the appellants. The land in dispute (plot 94/1) now stands registered in the name of the respondent under Registration No. 1835 dated 27th May, 1958.

The appellants in their statement of claim pleaded that the deceased Andreas Hadji Andoni had been in continuous uninterrupted, undisputed adverse possession of the field in dispute for a period well exceeding that of prescription down to his death ; that after his death the appellants continued in occupation and/or possession of the said field, and that at the time of the General Survey it was recorded in their names. They further alleged that their right of ownership and possession had not been disturbed until two years prior to the institution of the action when the respondent trespassed on the said field and cultivated it, alleging that in 1958 he became the registered owner thereof. The appellants finally contended that the respondent was not entitled to

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registration and that such registration was wrongfully recorded, and they claimed for a declaration that they were entitled to be registered as the owners of the property, an order directing the cancellation of any registration in respondent's name, and for an injunction and damages.

The respondent in his statement of defence denied that the deceased Andreas Hadji Andoni or any of the appellants ever cultivated, occupied or possessed the field in question, and he further alleged that he and his father had been in undisputed adverse possession of the field, ploughing and cultivating it for over twenty years until the day of the institution of the action.

The appellants, in addition to the Land Registry Clerk, called three other witnesses to prove long possession and ownership. They were Costas Christodoulou, son of appellant No. 2 (Panayiotou Andrea) ; Georghios S. Kaili, Rural Constable of Kiti ; and Demetris Kakoullis, farmer, of Kiti. The respondent called only one witness, but none of the appellants nor the respondent or his father gave evidence in this case.

After hearing evidence and the addresses of counsel the Court reserved its judgment and, subsequently, each judge delivered a separate judgment. Malachtos D.J., after reviewing the evidence made the following finding of fact :

“Now, on the evidence adduced, I find as a fact that the disputed piece of land originally belonged to Andreas Hadji Andoni who was cultivating it. After the death of the said Andreas the field in question was cultivated by his son-in-law the husband of plaintiff No.2 up to the year 1935. After 1935 the field in dispute remained uncultivated till 1952 when it was ploughed by Stavris Christodoulou a son of plaintiff No. 2. In 1953 the field in question was sowed with barley by the said Stavris. In 1954 it was cultivated by Hassan Mahmout the father-in-law of the defence witness. After 1954 the disputed piece of land was cultivated by the defendant up to the date of the institution of this action”.

And the learned judge went on to say :

“I hold the view that once the original ownership of the plaintiffs of the disputed field has been established by evidence which stands uncontradicted, and which evi-

dence I have accepted, the onus of proof was shifted on the defendant to prove undisputed and uninterrupted adverse possession of the property in dispute for the full prescriptive period prior to the institution of this action".

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And concluding his judgment he said :

"I must say that although the evidence on behalf of the plaintiffs presents some gaps, yet it has been accepted mainly due to the fact that the evidence given for the defendant did not build up a case at all".

Pausing there for a moment, we should observe that in a case of long undisputed and uninterrupted adverse possession the onus lies on the person alleging such possession to prove affirmatively his acts of undisputed and uninterrupted possession which entitled him to registration, and one cannot be heard to say that there is any burden on the defendant to build up any case.

The other judge, Zihni, D J., after reviewing the evidence, found that it was so meagre that he could not possibly find that the heirs of Andreas Hadji Andoni had had the plot in dispute in their possession for a period well exceeding that of prescription.

It was common ground that the said field had not been cultivated by the appellants or any of them between 1935 and 1952, that is to say, for a period of seventeen years. In 1952 Stavros, the son of appellant No. 2 Panayiotou, cultivated it with his tractor using metal discs. It was also common ground that since 1954 the field had been cultivated by or on behalf of the defendant.

The appellants in support of their claim of possession during the years 1918 to 1935 called two witnesses. They were, as already stated, the son of appellant No 2 Panayiotou, Costas Christodoulou and Demetris Kakoulli Costas Christodoulou, who is aged 52, lived all his life in Anafotia village doing farming there. He stated that between 1918 and 1935 his father, the husband of appellant No 2, used to cultivate the field in dispute, but he did not state that he ever accompanied his father to this field at Softades or that he ever cultivated or ploughed it himself. According to this witness, it was his brother Stavros who used to do the ploughing of their fields, and Stavros was never called to give evidence in this case. It was admitted that after the death of the

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husband of appellant No.2 in 1935 the said field was not cultivated. The cultivation done by him was with a conventional wooden plough.

The witness Demetris Kakoulli, who is aged 63 and a farmer of Kiti, stated that the husband of appellant No. 2 used to cultivate the field in question from 1917 until his death in 1935 and that the field was left uncultivated for seventeen years until 1952, and it became a mazeri, i.e. a field full of thorny bushes. In 1952 he saw Stavros, the son of appellant No. 2, cultivating the field with a tractor with metal discs. This witness further stated that he did not own any property nearby, but that he used to cultivate a field some two donums away, belonging to his godfather, who died some twenty or twenty-five years ago. This witness admitted that he sold his oxen in 1930 and that since then he had only one mule with which he used to cultivate his fields. In cross-examination this witness stated "I know that as from 1917 to 1935 the father of "witness No. 2 (Costas Christodoulou, son of plaintiff No. 2) was cultivating the disputed piece of land. I know how to read and write. I made a note of that".

Zihni, D.J. had this to say about the evidence of this witness :

"I have considered the evidence of this witness and found that his testimony was full of contradictions and unbelievable allegations.....His testimony appeared not to be a straightforward one and I disregard it giving it no weight at all".

Malachtos, D.J. did not comment specifically on the evidence of this particular witness, but he made the general finding which has been quoted earlier in this judgment.

The only witness called by the respondent, one Kemal Ibrahim, gave evidence only in regard to the cultivation of the field in dispute after 1953. This witness stated that he is the son-in-law of one Hassan Mahmoud, who was the partner of the respondent between the years 1952 and 1955. Both judges accepted his evidence with regard to the cultivation by or on behalf of the defendant as from the year 1954 onwards. No evidence was adduced by the respondent with regard to the period prior to 1954.

It is significant that all three witnesses called by the

appellants agree that the field in dispute is rocky and not fertile. And it may well be that this piece of property could not be cultivated with the conventional wooden plough prior to the advent of the mechanically propelled tractor in Cyprus; and it is possible that none of the appellants was interested to cultivate the field in dispute because it was rocky land and it could not be cultivated with a conventional wooden plough; and it was only in 1952 when Stavros, the son of appellant No. 12, who possessed such a tractor, decided to plough the field for the first time. Appellant No. 2 who is the virtual plaintiff in this case (because the other thirteen appellants do not seem to be interested at all in this property) is stated to have properties adjoining the field in dispute, and it is quite possible that, if her husband ploughed any property at that locality until 1935, he may have ploughed other plots of land, which could be cultivated and which were not rocky, adjoining the field in dispute. But on the whole, we agree with Zihni, D.J. that the evidence adduced by the appellants in this case in respect of their alleged undisputed and uninterrupted adverse possession between the years 1918 and 1935 is very meagre on which to base such a claim. For this reason we hold that the appellants have failed to prove that they are entitled to be registered as owners of the field in dispute, and their appeal accordingly fails.

We would, however, like to observe that, although the defendant pleaded possession for over twenty years, he only proved possession since 1954; and, although he did not plead it, on the evidence of the Land Registry Clerk, it appears that he is the registered owner of the land in dispute under Registration No. 1835 dated the 27th May, 1958. Both trial Judges are agreed that the said registration was obtained on the strength of a certificate dated 4th March, 1958, signed by the Mukhtar and Azas of the village of Softades (one of them being the respondent's father), which certificate has been shown to be false, and that the registration was wrongfully obtained. But in these proceedings, as the appellants had to rely on the strength of their case, and not on the weakness of the respondent's case, and as they failed to prove that they are the persons entitled to be registered as the owners of the field in dispute, it is not possible for this Court to make any order with regard to the alleged wrong registration in the name of the respondent. We think, however, that the Director of Lands may consider whether that registration in res-

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pondent's name should be allowed to stand in the face of the finding of the trial Court that it is based on a false certificate issued by the village authority.

For the reasons stated in this judgment the appeal fails and is dismissed. No order as to costs.

*Appeal dismissed.*

*No order as to costs.*