

1979 December 14

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

ANDREAS N. ELEFThERIOU,

Appellant-Plaintiff,

v.

ANDREAS MICHAEL IPSOU,

Respondent-Defendant.

(Civil Appeal No. 5127).

Civil Procedure—Execution—Stay of execution—Judgment—Consent judgment—Settlement—Undertaking to transfer building site part of bigger plot and in default to pay £1000 damages—Judgment debtor offering to transfer whole plot—Offer not a variation of the settlement on which consent judgment was based—Trial Court's discretion rightly exercised in granting stay of execution. 5

The appellant-plaintiff instituted an action against the respondent-defendant for an order directing transfer in his name of a building site, the subject matter of a contract of sale between them, which was part of a larger plot. The action was settled* on June 18, 1971 when judgment was given for the appellant in the sum of £1000.—together with stay of execution until the 15th August, 1971. By the terms of the settlement it was provided, *inter alia*, that: 10

“ On the 15th August, 1971, the plaintiff will pay to the defendant £40, agreed amount which the defendant incurred and will incur irrespective of the actual amount which will be necessitated for the issue of title deed for plot 618/2, as shown on the map in Application DL 17/67 of the District Officer of Morphou Office, *exhibit* 18 before this Court, that is the plan in respect of which the division permit in that application was issued. 15 20

If on the 30th June, 1972 or ten and a half months after the plaintiff pays to defendant the amount of £40.—which-

* See the whole text of the settlement at pp. 634-5 *post*.

ever day is the latest, the defendant transfer in plaintiff's name the aforesaid plot, then the judgment debt including the costs will be considered satisfied".

5 Following the above settlement the respondent took steps to separate the above plot into building sites; but as the appropriate authority in granting the permit required the construction of a road 20 feet wide over a hilly and rocky area, the respondent gave it up and instead he offered to transfer in the name of the appellant the whole of plot 618/2 without any extra charge or incumbrance. The appellant turned down respondent's offer and insisted on the transfer in his name of only part of the property as per the terms of the settlement reached. There followed proceedings, initiated by the appellant, with a view to levying execution and the respondent applied for a stay of execution. The trial Court granted the application for stay having held that the respondent's offer to transfer in the appellant's name the whole plot in question did not amount to a variation of the settlement.

On appeal by the plaintiff against the order granting stay:

20 *Held*, that having regard to all the circumstances of the case, the offer by the respondent of the site agreed along with the rest of the plot cannot reasonably be said to constitute a departure from the terms of the consent judgment and that it does not in substance amount to a variation of the settlement of which the consent judgment was based; that, therefore, this is not a case in which this Court could interfere with the exercise of the trial Court's discretion in granting a stay; and that, accordingly, the appeal must be dismissed and the stay of execution granted by the trial Court be upheld.

30 *Appeal dismissed.*

Cases referred to:

Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board [1945] K.B. 394;

35 *Mousoulides Trading Co. and Others v. Kypronics* (1971) 1 C.L.R. 209.

Appeal.

Appeal by plaintiff against the ruling of the District Court of Nicosia (Stavrinakis, Ag. P.D.C.) dated the 11th November,

1972 (Action No. 3543/69) whereby execution of a consent judgment was granted on certain conditions.

G. Ladas, for the appellant.

K. Michaelides, for the respondent.

Cur. adv. vult. 5

L. LOIZOU J. read the following judgment of the Court. This is an appeal from the ruling of the District Court of Nicosia in an application in Action No. 3543/69 for stay of execution.

The facts that led to this application are briefly as follows:

By an agreement in writing entered into between the parties on the 18th December, 1968, the appellant—respondent in the application—undertook to sell a building site at Moutoullas village abutting on the asphalted main road to the respondent which was part of a larger plot (plot 618/2, sheet plan XXXVII. 18) belonging to the respondent for the sum of £450.— 10
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For reasons which are of no consequence for the purposes of the present proceedings the appellant instituted Action No. 3543/69 against the respondent praying for:

(a) An order of the Court directing the defendant to transfer in plaintiff's name an approved building site part of plot 618/2, abutting the asphalted road and 20

(b) in the alternative, £2,000.— damages.

In the course of the hearing that action was settled. The terms of the settlement as recorded by the trial Court are as follows: 25

“ At this stage, both counsel state that the action has been settled as follows:—

There will be judgment for plaintiff in the sum of £1,000.— with £190 costs.

There will be a stay of execution until the 15th August, 1971. 30

On the 15th August, 1971, the plaintiff will pay to the defendant £40, agreed amount which the defendant incurred and will incur irrespective of the actual amount which will be necessitated for the issue of title deed for Plot 618/2, as 35

shown on the map in Application DL 17/67 of the District Officer of Morphou Office, exhibit 18 before this Court, that is the plan in respect of which the division permit in that application was issued.

5 If the plaintiff pays to the defendant the sum of £40, then there will be a further stay of execution until the 30th June, 1972. If the plaintiff does not pay the said amount of £40 then the stay of execution will be for an indefinite period and will be a further period of stay of execution
10 for ten and a half months from the date that he pays the amount of £40.

If on the 30th June, 1972 or ten and a half months after the plaintiff pays to defendant the amount of £40 whichever day is the latest, the defendant transfer in plaintiff's name
15 the aforesaid plot, then the judgment debt including the costs will be considered satisfied.

Plaintiff entitled to lodge a memo forthwith, at his own expense, on all the immovable property of the defendant at Moutoulla, except Plots G17 and G18 on Sheet Plan
20 XXXVII/18. If the defendant at any time intends to transfer any of his properties at Moutoulla on which this judgment will be registered, then he may apply to the Court for the discharge of the memo for that property, as the Court may direct in the circumstances.

25 If the defendant is ready and willing to transfer the aforesaid plot in plaintiff's name and the defendant does not attend to accept the transfer, then again the stay of execution will continue to be inoperative.

30 *Court:* Judgment for plaintiff against the defendant for £1000 with £190 costs. Stay of execution as per statement of counsel: Judgment as per statement of counsel with stay of execution accordingly."

In fact steps were taken with a view to having respondent's plots 618/2 and 617 separated into building sites so that the
35 site agreed, the whole frontage of which abuts on the main asphalted road, could be transferred in appellant's name. The appropriate authority in granting the permit required the construction of a road 20 feet wide over a hilly and rocky area, the respondent gave it up and instead by letter dated the 23rd

June, 1972 i.e. within the time limited by the consent judgment based on the terms of the settlement reached, he offered to transfer in the name of the appellant the whole of the plot 618/2 without any extra charge or incumbrance instead of only part of it and called upon the appellant to fix the date for such transfer. The appellant by a letter dated 27th June, 1972 turned down respondent's offer and insisted on the transfer in his name of only part of the property as per the terms of the settlement reached. He further informed the respondent that if until the 30th June, 1972, he did not comply with the terms of the consent judgment then he would have to pay to him the agreed sum of £1000 plus £190 costs.

The appellant in fact initiated proceedings with a view to levying execution for satisfaction of the consent judgment debt and as a result on the 11th September, 1972, the respondent filed the application for stay of execution.

The learned trial Judge in granting the application for stay had this to say:

"I considered the arguments from both sides and I am of the opinion that the applicant's offer to transfer in the respondent's name the whole plot in question is not contrary to the spirit of the settlement. The defendant-applicant did not undertake to transfer an approved building site but part of the plot which can be separated from the whole. The defendant-applicant now offers more to the plaintiff-respondent than what he bargained for, without any extra charge and there is evidence to the effect that the offered plot can be used as a building site. The respondent's refusal to accept the offer is to my mind unjustified and in no way affects the settlement. On the contrary by his unjustified refusal he is exercising an option which he did not have by the terms of the aforesaid settlement. The offer of the applicant-defendant refers to that part of the settlement dealing with the consideration of the plaintiff foregoing the judgment debt and the consideration as offered now is more beneficial to the respondent. If part of a plot was good enough consideration I do not see why the whole plot should not be so, especially when the whole includes the part subject matter of the action.

The facts of the present case are different from the facts

of the case of Mousoulides Trading Co. and others v. Kypronics, (1971) 1 C.L.R. 209, where it was held that the Court should not grant a stay of execution the result of which would amount to a variation of a settlement. Here there is no variation but simply the applicant prays for a stay on the ground of the respondent's unreasonable refusal to accept the transfer of the whole instead of part of the plot in satisfaction of the judgment debt.

In the exercise of my discretion I consider this an appropriate case to give the required stay. The stay of execution is therefore granted on the following conditions.

- (a) That the applicant does, within one week from today, call upon the respondent to fix the day for the transfer, and
- (b) That the applicant upon transfer returns to the respondent the amount the latter paid for the separation of part of the plot and which had not been done.

Regarding costs, under the circumstances, I make no order."

The appellant has appealed against this ruling on the following grounds:

1. The learned trial Judge erroneously found that 'the defendant-applicant, did not undertake to transfer an approved building site, but part of the plot which can be separated from the whole'. On the contrary, the defendant-applicant undertook to comply with the conditions imposed to him by the District Officer of Morphou in Application DL. 17/67 with the attached map, *exhibit* 18 before the Court, i.e. 'the plan in respect of which the division permit in that application was issued' and issued the relevant title-deed, against the cost of which defendant-applicant collected £40.- on or about the 15/8/71.
2. The learned trial Judge erroneously found that the transfer of the whole of plot 618/2 'is not contrary to the spirit of the settlement' and 'that the respondent's refusal to accept the offer is unjustified, and in no way affects the settlement', and that 'the consideration as

offered now is more beneficial to the respondent'. On the contrary, this offer constitutes a substantial amendment of the said settlement in that by it, the defendant-applicant, throws on the shoulders of plaintiff his difficulties for complying with the Morphou District Officer's conditions attached to *exhibit* 18 and the relevant expenses against which he collected £40.— 5

3. The learned trial Judge erroneously decided that the 'plaintiff by his unjustified refusal he is exercising an option which he did not have by the aforesaid settlement'. On the contrary: After the 30/6/72 it is plaintiff's right to insist on the execution of his judgment for £1,000.— and £190.— cost. 10
4. In an application for a stay of execution the Court has a discretion to stay or not the execution of a final judgment of the Court but not to amend the judgment of the Court. 15
5. There is no evidence before the Court of any fact justifying the exercise of the Court's discretion in favour of defendant-applicant." 20

We consider it pertinent to single out here certain undisputed facts.

The whole extent of the plot which the respondent offered to transfer in appellant's name in satisfaction of the consent judgment is much larger than the building site he agreed under the terms of the settlement but includes such agreed site. 25

It is common ground that in rural areas if a plot of land has access on the public road it is building land and that the appellant in the present case could have built on the whole plot so offered without dividing it into building sides. 30

The road which, under the terms imposed by the appropriate authority, the respondent had to construct in order to be given a permit to divide his plots into building sides—and which he refused to construct—was behind his plot 618/2 i.e. on the side of the plot opposite the site abutting on the asphalted main road and that there was no access from the main road to this proposed road except on foot. 35

In the course of the hearing of the appeal learned counsel for

the appellant mainly contended that the offer to transfer in the name of his client of the whole of the plot instead of the agreed site which was part of it is contrary to the settlement reached and amounts to a variation of the settlement on the basis of which the consent judgment was given; and that such a variation whether it is beneficial to the appellant or not cannot be effected in an application for stay of execution but only by special procedure. Learned counsel further submitted that there are no special circumstances and no valid grounds in the present case justifying the trial Court to exercise its discretion in favour of granting a stay and thereby deprive the appellant of the benefits of his judgment.

In support of his submissions learned counsel cited the cases of *Marine and General Mutual Life Assurance Society v. Feltwell Fen Second District Drainage Board* [1945] K.B. 394 and *Mousoulides Trading Co. and Others v. Kypronics* (1971) 1 C.L.R. 209.

In the former case the plaintiffs, who were the holders of four mortgages granted by the defendants' predecessors in title in 1888, recovered judgment for £1,490.-. The defendants were a statutory body under certain private Acts and the Land Drainage Act, 1930, charged with the duty of draining an area of fen lands, and given the right of levying drainage rates on those lands. The plaintiffs proposed to levy execution and the defendants applied for a stay on the following grounds: (1) That execution on their property would make it impossible for them to perform their duty of draining the land; (2) that they were insolvent, and ought to be treated as an insolvent company in liquidation; and (3) that the levying of execution would result in giving to the plaintiffs a preference over other creditors of the same class, and that this was contrary to the terms of the Judgment. It was held that the plaintiffs could not properly be deprived of their right to levy execution on any of the grounds put forward by the defendants.

In dealing with the first ground Evershed, J., as he then was, said at p. 397:

"The defendants are a statutory body having the duty, under a number of statutes, to drain what is called the Feltwell Fen Second District, in the county of Norfolk, and it was suggested, particularly having regard to the

financial embarrassment or the insolvency of the board, that the Court would exercise its jurisdiction, if such jurisdiction it has, to restrain execution on the assets of such a body. Assuming, for a moment, that I have jurisdiction, my view is that there is no ground in principle why a successful plaintiff, who has recovered judgment against a body of this character, should not be entitled to the fruits of his judgment according to the law of the land, albeit that the levying of execution may have the effect of bringing to a standstill the operations of this statutory body. It seems to me that *Worral Waterworks Co. v. Lloyd*, establishes the proposition that the remedy of execution is available against a body of this character, and the Court will not stay such an execution on that ground.”

With regard to the second ground the judgment reads as follows:

“ It is suggested that the fact of insolvency in a body of this kind is a material consideration, because where there is insolvency there are no means of administering the assets of the insolvent body such as are available in the case of corporations or individuals. It does not seem to me that that is any ground for saying that a plaintiff should be deprived of his rights as a judgment creditor to levy execution.”

As to the last point the Court was clearly of the opinion that the obtaining by the plaintiffs of any payment in satisfaction of their judgment, as a result of levying execution, would not be, or involve, a preference of any one creditor over another.

On the other hand, in the *Mousoulides* case this Court dismissed an appeal by the applicants-defendants against the ruling of the District Court of Nicosia whereby their application for stay of execution of a judgment which was given against them was dismissed, on the ground that if the application of the appellants for a stay of execution had been successful it would, in effect, have amounted to a variation of the agreement which was concluded between the parties in relation to the settlement of the action for which the judgment, of which the execution was sought to be stayed, was given.

The only assistance we can derive from the above cases is

from the general principles involved, with which, with respect, we agree. But each case of course has to be decided in the light of its own facts and circumstances.

- 5 In the present appeal having given the matter our best consideration we find ourselves in agreement with the conclusions reached by the learned trial Judge. In our view, having regard to all the circumstances of the case, the offer by the respondent of the site agreed along with the rest of the plot cannot reasonably be said to constitute a departure from the
- 10 terms of the consent judgment and that it does not in substance amount to a variation of the settlement on which the consent judgment was based. We do not, therefore, think that this is a case in which we could interfere with the exercise of the trial Court's discretion in granting a stay.
- 15 In the result this appeal cannot succeed and is hereby dismissed. The stay of execution granted by the trial Court is, therefore, upheld on the conditions stated in the Court's ruling. The time limit given by the Court within which the respondent in the appeal is to call upon the appellant to fix the
- 20 date for the transfer will run as from today. In all the circumstances, like the trial Court, we have decided to make no order as to costs in the appeal.

Appeal dismissed. No order as to costs.