1981 December 22

[LORIS, STYLIANIDES, PIKIS, JJ.]

ANDRIANI H. TOULOUMI AND ANOTHER,
Appellants-Plaintiffs,

v.

GEORGHIA MILTIADOU,
Respondent-Defendant.

(*Civil Appeal No.* 6013).

Construction of documents—Words ambiguous—Construction with reference to surrounding circumstances.

Immovable property—Right of way—Recognised by means of settlement in previous action—Words of settlement as to dimensions of right of way ambiguous—Dimensions defined by reference to surrounding circumstances.

Words and phrases—"Extent" ("ἔκτασις").

The appellants-plaintiffs brought an action against the respondent-defendant claiming, inter alia,

(a) An injunction restraining the defendant from interfering with their right of way "recognised" in Action No. 604/40;

(b) A demolition order in respect of the "building or wall" allegedly erected by the respondent in contravention of the terms of the settlement* in Action No. 604/40.

As the trial Judge did not find much assistance from the contents of the above settlement because the word "extent"

* The material part of the settlement reads as follows:
"From the edge of the land of Lefteris Pieri and his wife Christina, along the boundaries of the neighbouring lands of the parties an extent of 5 feet and on this part the plaintiff undertakes neither to build nor to cultivate it".

employed therein, by the author thereof was quite confusing he proceeded to ascertain the dimensions of the right of way in the light of the surrounding circumstances emanating from the evidence before him. He evaluated the evidence of the witnesses before him and after accepting the evidence called by the defence he found that the length of the right of way was 5 feet and the width thereof 1 1/2 feet and that there was no interference with the right of way as alleged by the plaintiffs.

Upon appeal by the plaintiffs it was mainly contended that the trial Judge erred in fixing the dimensions of the right of way as he did and erred in deciding that there was no interference with the right of way of the plaintiffs.

Held, that as the use of the word "extent" ("ἔκτασις") in the settlement in Action No. 604/40 created an ambiguity the trial Judge rightly resorted to evidence of surrounding circumstances in order to be enabled to define the length and the width of the right of way; that in so far as the length of the right of way is concerned the trial Judge was right in accepting the evidence as he did as such evidence was more consistent and direct to the point; that, furthermore, it was open to him to arrive at the conclusions he did, which were quite compatible with certain conclusions which could be deduced from thorough examination of the settlement (vide pp. 135–6 post); that it was open to the trial Judge to reach the conclusions he did both on the issue of the width of the right of way and the issue of interference with the right of way; accordingly the appeal should be dismissed.

Appeal dismissed.

Cases referred to:

Edmundsbury and Ipswich Diocesan Board of Finance and Another v. *Clark* (*No.* 2) [1975] 1 All E.R. 772.

Appeal.

Appeal by plaintiffs against the judgment of the District Court of Nicosia (A. Ioannides, D.J.) dated the 6th October, 1979 (Action No. 1412/74) whereby their claim for an injunction restraining the defendants from interfering with their right of way recognised in Action No. 604/40 and for a demolition

order in respect of the building or wall allegedly erected by the defendant in contravention of a settlement in Action No. 604/40 were dismissed and a declaratory judgment was given by the trial Judge fixing the dimensions of the right of way and ordering that same he registered through the D.L.O.

L. N. Clerides, for the appellants.

Ch. Velaris, for the respondent.

Cur. adv. vult.

LORIS J. read the following judgment of the Court. This is an appeal from the judgment of the District Court of Nicosia (Ioannides, D.J.) in Action No. 1412/74 whereby the appellants-plaintiffs were claiming, inter alia:-

(a) An injunction restraining the defendant-respondent from interfering with their right of way "recognised" in Action No. 604/40;

(b) A demolition order in respect of the "building or wall" allegedly erected by the respondent in contravention of the terms of settlement in Action No. 604/40.

The allegations of the litigants as emerging from the pleadings of the action under appeal are briefly as follows:-

The appellants-plaintiffs allege that the defendant-respondent had in May, 1973, interfered (by erecting a wall or earthbank) with the right of way through Plot 918 of Sheet/Plan XXXVIII/52 ceded by the predecessor in title of the defendant-respondent to the predecessor in title of plaintiff 1 by virtue of a settlement in Action No. 604/40 in favour of Plots 917 and 919 (as revised) of the same sheet/plan situated at Palechori village.

The respondent-defendant in her defence alleges that she never interfered with the aforesaid right of way and maintains that in fact the appellants in January, 1969, interfered with her (respondent's) property by demolishing part of the earthbank situated within her properties; for this demolition she instituted Action No. 672/69 (D.C. of Nicosia) which was disposed of by the Court on 16.2.1973 by a pronouncement in her favour in respect of the earthbank; in May, 1973—the respondent concludes—in order to protect her own property did restore her earthbank to its pre-1969 condition without having in any way interfered with the right of way of the plaintiffs.

At the hearing before the trial Court 5 witnesses testified for the plaintiff, including the D.L.O. clerk (P.W.1) who carried out a local inspection of the locus in quo and prepared a sketch thereof which is exhibit 1 in this case; plaintiff 2, husband of plaintiff 1, gave evidence as well (P.W.5).

The defendant gave evidence herself (D.W.7) and called 6 more witnesses in support of her case.

Several documents were also produced before the trial Court apart from exhibit 1; the most important one being the settlement in Action No. 604/40 (exhibit 4), by virtue of which the right of way was created on 30.4.1941.

The trial Judge went into the material before him in order to ascertain the length and the width of the right of way; in this respect it must be borne in mind always, that the sub-judice right of way was created by a grant, the terms of which were embodied in the settlement of Action No. 604/40 which was recognised and sanctioned by the judgment of the Court on 30.4.1941 (exhibit 4).

Obviously the trial Judge did not find much assistance from exhibit 4; the word "extent" employed therein, by the author thereof, was quite confusing; so, he proceeded to ascertain the dimensions of the right of way in the light of the surrounding circumstances emanating from the evidence before him; he evaluated the evidence of the witnesses before him, he preferred that of the witnesses called by the defence and, relying on the evidence as he accepted it, found:-

(i) That the length of the right of way was 5 feet and the width thereof 1 1/2 feet;

(ii) That the earthbank in question was reconstructed by the respondent-defendant in 1973 on the space it was occupying prior to the creation of the right of way in 1941, hence he found no interference with the right of way as alleged by the plaintiffs-appellants.

Having pronounced against the plaintiffs on the gist of their action, the trial Judge dismissed their claims for injunction and

demolition of the earthbank and gave a declaratory judgment fixing the dimensions of the right of way as established before him, ordering at the same time the registration of same through the D.L.O.

Against the judgment the plaintiffs appeal complaining that the trial Judge:-

(a) Erred in fixing the dimensions of the right of way as he did;

(b) Erred in deciding that the "earthbank" in question was not interfering with the right of way of the plaintiffs and that same was not constructed within the right of way;

(c) Erred in deciding that the said "earthbank" was built in 1973 on the same space it was occupying prior to 1940; and,

(d) Should find on the construction of exhibit 4 and the evidence adduced that the width of the right of way should be at least 5 feet and, therefore, the plaintiffs should be entitled to the claims which have been dismissed by the trial Judge.

In spite of the fact that in the fourth ground of appeal reference is made to the "true construction of the consent judgment in Action No. 604/40", all the grounds of appeal tantamount to an attack against the findings of fact made by the trial Judge; and all the complaints are directed mainly against the fixing by the Court of the width of such right to 1 1/2 feet.

The sub-judice right of way was created by the settlement in Action No. 604/40 between the predecessors in title of the properties of the defendant and plaintiff 1 in the present case.

This settlement, which is handwritten in Greek, is exhibit 4 in the present case.

At the preamble thereof it makes reference to sketchplan, exhibit 1; the said exhibit 1 in Action No. 604/40 is part of exhibit 6 in the present case.

The settlement in question consists of several paragraphs, six of which are numbered. At the end thereof it states: "Judgment as per settlement", and bears underneath the signature of the then Magistrate Soteriades.

Paragraph 2 thereof contains the particulars of the right of way so granted whilst paragraph 3 refers to the consideration for the grant.

The route of the right of way is thus stated in Greek:

" 'Απὸ τὸ ἄκρον τοῦ κτήματος τοῦ Λευτέρη Πιερῆ καὶ τῆς συζύγου του Χριστίνας, κατὰ μῆκος τῶν συνόρων τῶν γειτονικῶν κτημάτων τῶν διαδίκων, ἔκτασιν 5 ποδῶν καὶ εἰς τὸ μέρος τοῦτο ἡ ἐνάγουσα ἀναλαμβάνει οὔτε νὰ κτίοη οὔτε νὰ τὸ καλλιεργήση.".

("From the edge of the land of Lefteris Pieri and his wife Christina along the boundaries of the neighbouring lands of the parties an extent of 5 feet and on this part the plaintiff undertakes neither to built nor to cultivate it.").

The interpretation of a written document is generally speaking a matter of Law for the Court; the position is different, however, when there is an ambiguity in it. In *St. Edmundsbury and Ipswich Diocesan Board of Finance and Another* v. *Clark* (*No.* 2), [1975] 1 All E.R. 772, it was held that the words of a conveyance containing the reservation of a right of way were to be construed according to their natural meaning in the document as a whole in the light of the surrounding circumstances, such surrounding circumstances being a question of fact.

In the case in hand the unfortunate use of the word "extent" (ἔκτασιν) by the author of the document created an ambiguity and the trial Judge rightly resorted to evidence of surrounding circumstances in order to be enabled to define the length and the width of the right of way.

In so far as the length of the right of way is concerned we hold the view that the trial Judge was right in accepting the evidence as he did as such evidence was more consistent and direct to the point; furthermore it was open to him to arrive at the conclusions he did, which are quite compatible with the

following which can be positively deduced from the thorough examination of the document itself:–

(A) The word "extent" recurs twice in the text of exhibit 4.

It appears for the first time in line 4 of the document, in respect of the earthbank and it is being employed for a second time in respect of the grant of the right of way.

In the first instance the Greek text reads as follows:

"Συμφωνοῦν δὲ ὅτι ἡ χαλασθεῖσα δώμη εἶναι τὸ μέρος τὸ φαινόμενον ἐν τῷ προσαχθέντι σχεδίῳ μὲ κόκκινας γραμμὰς ἐκτάσεως 9 ποδῶν".

("They agree that the demolished earthbank is the part shown in red lines on the plan which was produced of an extent of 9 feet").

Here clear reference is made to the sketch-plan, exhibit 1 in the action of 1940; a mere glance of this sketch-plan will verify immediately that the red lines thereon, as well as number 9 in red ink, denote the length of the earth-bank.

Once the author of the whole document has employed the word "extent" meaning obviously "length", we see no reason why "extent" should not be held to have the meaning of "length" when used in the second instance in respect of the right of way.

(B) The second part of the second paragraph of exhibit 4 describing the route of the right of way granted reads as follows in the Greek text:

" 'Από τὸ ἄκρον τοῦ κτήματος Λευτέρη Πιερῆ καὶ τῆς συζύγου του Χριστίνας, *κατὰ μῆκος τῶν συνόρων* τῶι γειτονικῶν κτημάτων τῶν διαδίκων, *ἔκτασιν 5 ποδῶν* καὶ εἰς τὸ μέρος τοῦτο ἡ ἐνάγουσα ἀναλαμβάνει, οὔτε νὰ κτίση οὔτε νὰ τὸ καλλιεργήση".

("From the edge of the land of Lefteris Pieri and his wife Christina *along the boundaries* of the neighbouring lands of the parties an *extent* of 5 feet and on this part the plaintiff undertakes neither to built nor to cultivate it").

(The underlinings have been inserted by us).

In respect of the second underlining above it is to be noted that at the beginning thereof, immediately after the comma of

the previous phrase, there existed on the document the Greek preposition "εἰς"; hence the reason that the next word "ἔκτασιν" is met in the objective case; for some unknown reason this preposition was struck off; this is clear from the document itself.

One would remark though that the deletion of the preposition "εἰς" ought to have led the author in correcting the case of the word "ἔκτασιν" and converting same to the genitive, i.e. "ἐκτάσεως", in view of the fact that perusal of the whole document can lead to the conclusion that the author thereof seems to have had a fairly good knowledge of the Greek grammar and parsing. The answer to such a remark is that the time and the circumstances under which deletion of the preposition "εἰς" took place are unknown.

Nevertheless, in spite of the use of the word "extent", even in the objective case (ἔκτασιν), which is not clear and unequivocal, the second underlining above, immediately after the comma, qualifies the first words underlined, i.e. "κατὰ μῆκος τῶν συνόρων..... ἔκτασιν 5 ποδῶν.....", and points strongly towards construing the word "extent" as meaning "length".

The issue of the width of the right of way is interwoven with the "earthbank" in this respect: It was alleged by the plaintiffs –appellants that the respondent in May, 1973, interfered with their right of way by erecting an earthbank within their right of way, whilst the defendant–respondent alleged that she did restore her earthbank to its pre–1969 condition without having in any way interfered with the right of way of the plaintiffs. The trial Judge had to satisfy himself first as to the width of the right of way in order to be enabled to decide whether the construction of the earthbank was made within the space over which the right of way was to be exercised according to the grant in 1941.

As the document creating the grant, i.e. exhibit 4, was silent on the issue of the width of the right of way ceded, the trial Judge examined the surrounding circumstances in the light of the evidence adduced and, accepting the evidence as he did, found that the width of the right of way, which has been so exercised since the grant, was 1 1/2 feet, i.e. it was covering the space from the western boundary of Plot 919/1 (registered in the name

of plaintiff 1) upto the "earthbank", which is situated within Plot 918 (the property of the defendant). The width of this space as given by the D.L.O. clerk (P.W.1) is 1 foot 6 inches. (Vide exhibit 1 in this case).

The trial Judge on the evidence, as he accepted it, furthermore found that the "earthbank" marked A–B–Γ on exhibit 1 in this case existed in 1940 and that it was rebuilt when demolished in 1963 and reconstructed in 1973 after its partial demolition in 1969 on the same space it was occupying originally, prior to 1940.

We have examined the complaints of the appellants on these two issues as well and we must say that we are satisfied that it was open to the trial Judge to reach the conclusions he did both on the issue of the width of the right of way as well as that of the "earthbank".

Having given to the issue of costs our best consideration, we are disinclined to interfere with the relevant order of the trial Court.

In the result the appeal is dismissed with costs.

Appeal dismissed with costs.