

1986 April 26

[STYLIANIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

ELIAS CHARILAOS KIMISSIS,

Applicant,

v.

THE IMPROVEMENT BOARD OF DHALI,

Respondents,

(Case No. 927/85).

Revisional Jurisdiction—Constitution, Article 146.1—“Act” or “Decision” in the sense of said Article—Test to be applied—Immovable property—Possession of, by public organ or authority, not based on an act of acquisition or requisition—Such possession does not create an administrative dispute, but a dispute as to possession within the exclusive jurisdiction of Civil Courts—Widening a public road, thereby encroaching onto applicant’s land—The decision to take possession of such land is not executory—And it is not the product of exercise of executive or administrative authority. 5 10

Administrative act—Executory.

Words and Phrases: “Act” or “Decision” in Article 146.1 of the Constitution.

The applicant in this case complains that the servants or agents of the respondent Improvement Board widened a public road and encroached onto his land, Plot 604 situate at Dhali village. 15

Held, dismissing the recourse (1) An “Act” or “Decision” in the sense of Article 146.1 of the Constitution is an act only in the domain of public law. The respondent, being a corporation of public law, is an authority within the meaning of Article 146.1. The character of the organ, 20

authority or person is not the sole criterion. It is primarily the nature of a particular act or decision which determines whether or not such act or decision comes within the scope of 146.1. Such an issue is one which must be decided on the merits and the circumstances of each particular case.

(2) The sub judice act is not the product of the exercise of executive or administrative authority. It is not executory as it is not aimed at producing a legal situation concerning the applicant and entailing its execution by administrative means.

(3) Civil law rights in immovable property are as a rule matters in the domain of private law. Possession of immovable property by public organ, not based on an act of acquisition or requisition, does not create an administrative dispute, but a dispute as to possession within the exclusive jurisdiction of the civil Courts.

Recourse dismissed.
No order as to costs.

20 Cases referred to:

Cosma, v. Electricity Authority of Cyprus, (1980) 2 J.S.C. 350;

Papaphilippou v. The Republic, 1 R.S.C.C. 62;

Hji-Kyriacou v. Hji-Apostolou and Others, 3 R.S.C.C. 89;

25 *Valana v. The Republic* 3 R.S.C.C. 91;

Kolocassides v. The Republic (1986) 3 C.L.R. 542;

Pappous v. The Republic (1966) 3 C.L.R. 77;

Greek Registrar of Co-operative Societies v. Nicolaidis (1965) 3 C.L.R. 164;

30 *Stamatiou v. The Electricity Authority of Cyprus*, 3 R.S.C.C. 44;

Cyprus Floor Mills Co. Ltd. and Another v. The Republic (1968) 3 C.L.R. 12;

Charalambides v. The Republic (1982) 3 C.L.R. 403;

Galanos v. C.B.C. (1984) 3 C.L.R. 742;

Chiratis v. The Republic (1982) 3 C.L.R. 540;

Decisions of the Greek Council of State Nos. 813/57, 146/29, 1498/53, 1567/54, 69/41 and 1471/54.

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Recourse.

Recourse against the decision of the respondents where-
by they took possession of part of applicant's property si-
tuated at Dhali village for the widening of a public road.

L. Kaloghirou for X. Xenopoulos, for the applicant.

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F. Odysseos, for the respondents.

Cur. adv. vult.

STYLIANIDES J. read the following judgment. The appli-
cant is by virtue of title deed C. 746 the owner of a piece
of land situate at Dhali village, shown on D.L.O. maps as
Plot 604, Sheet/Plan XXX/64, E.2. The respondent is
the Improvement Board of Dhali, a corporation of public
law, established under the Villages (Administration and
Improvement) Law, Cap. 243, as amended.

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The applicant complains that the servants or agents of
the respondent Improvement Board widened the public
road and encroached into his aforescribed land. Part
of it was converted thereby into public road.

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By this recourse the applicant seeks a declaration that
the act and/or decision of the respondents for taking pos-
session of part of his property is void and of no effect
whatsoever.

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Objection was raised in the opposition that the act com-
plained of is not an executory administrative act but simply
an act of trespass which does not fall within the ambit of
the jurisdiction of this Court under Article 146 of the
Constitution. This point of law was set down for deter-
mination preliminary to the hearing of the case.

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Rival submissions were placed before the Court by

counsel appearing for the parties.

Learned counsel for the respondents submitted that the act complained of is not an executory act in the domain of public law; even if the allegation of the applicant is true, it amounts to an act of trespass to immovable property which is neither executory nor in the sphere of public law.

Counsel for the applicant, on the other hand, argued that the act complained of is an executory administrative act because the respondent Improvement Board under s. 22(b) of the Villages (Administration and Improvement) Law, Cap. 243, is vested with power to acquire immovable property within the improvement area for any public purpose which shall include the construction of new streets, the opening, widening, straightening or improving existing streets; that the respondent Board, though it did not set in motion the machinery for acquisition or requisition of the property under the relevant legislation, through its servants or agents it purported to exercise its powers under the Law. The act complained of is one in the province of public law and an executory one. He further relied on a judgment of Pikiis, P.D.C., as he then was, in *Cosma v. The Electricity Authority of Cyprus*, (1980) 2 J.S.C. 350.

A decision or act may be the subject of a recourse to this Court if it is the result of exercise of an "executive or administrative authority" in the sense in which such words are used in paragraph 1 of Article 146. An "act" or "decision" in the sense of paragraph 1 of Article 146 is an act or decision in the domain only of public law-- (*George S. Papaphilippou v. The Republic*, 1 R.S.C.C. 62; *Achilleas Hji-Kyriacou v. Theologia Hji-Apostolou and Others*, 3 R.S.C.C. 89; *Savvas Yianni Valana v. The Republic*, 3 R.S.C.C. 91). It is well settled that an act is an "act" in the sense of Article 146.1, only if it is an executory act-- (*Kolocassides v. The Republic*, (1965) 3 C.L.R. 542; *Antonakis Pappous v. The Republic*, (1966) 3 C.L.R. 77).

The respondent being a corporation of public law is an authority within the meaning of Article 146.1 of the Constitution.

The character of the organ, authority or person is not the sole criterion. The following test was laid down in the case of *The Greek Registrar of the Co-operative Societies etc. v. Nicos A. Nicolaidis*, (1965) 3 C.L.R. 164:-

“In the opinion of the Court it is primarily the nature and character of a particular act or decision which determines whether or not such act or decision comes within the scope of paragraph 1 of Article 146 of the Constitution. Such an issue is one which must be decided on the merits and in the circumstances of each particular case and having due regard to such relevant factors as the office and status of the organ, authority, person or body performing such act or taking such decision, as well as to the circumstances and context in which such act was performed or decision taken. As pointed out by the learned Judge in his Ruling the “same organ may be acting either in the domain of private law or in the domain of public law, depending on the nature of its action”. Ultimately, what is the important and decisive factor in this respect is the nature and character of the particular function which is the subject-matter of a recourse”.

See, also, *John Stamatiou v. The Electricity Authority of Cyprus*, 3 R.S.C.C. 44; *Cyprus Flour Mills Co. Ltd. and Another v. The Republic of Cyprus*, (1968) 3 C.L.R. 12; *Charalambides v. The Republic*, (1982) 3 C.L.R. 403; *Galanos v. C.B.C.*, (1984) 3 C.L.R. 742).

The act complained of is not the product of the exercise of executive or administrative authority. It is not an executive act as it is not aimed at producing a legal situation concerning the applicant and entailing its execution by administrative means—(*Conclusions from the Jurisprudence of the Council of State in Greece, (1929 - 1959)*, p. 237).

The civil law rights in immovable property are as a rule matters in the domain of private law—(*Savvas Yianni Valana v. The Republic*, (supra)).

The complaint of the applicant is for encroachment on his immovable property by the servants or agents of the respondent Board. This Court cannot entertain an application the subject-matter of which is recognition of right of ownership or possession of immovable property or any action of the Administration interfering with the possession or infringing the ownership of private property. Possession of immovable by a public organ, not based on an act of acquisition or requisition, does not create an administrative dispute but a dispute as to possession which is within the exclusive jurisdiction of the civil Court—(*Conclusions of the Jurisprudence of the Greek Council of State*, pp. 234-35; *Cases of the Greek Council of State* 813/57, 146/29, 1498/53, 1567/54, 69/41 and 1471/54).

The right of the owner of immovable property trespassed upon by a public authority, such as the respondent Board, may be vindicated before the civil courts, without the necessity of an annulling judgment of this Court under paragraph 4 of Article 146. Such a wrongful act does not come within the compass of paragraph 6 of the said Article. The case of *Cosma v. Electricity Authority of Cyprus* (supra) is clearly distinguishable both on its facts and the specific provisions of the Electricity Development Law. A case on all fours with the present one is *Chiratis v. The Republic*, (1982) 3 C.L.R. 540, where Malachtos, J. at p. 545, said:-

“In the present case the complaint of the applicant is for encroachment on his immovable property by the respondent authority and it is a clear case of trespass to land which, in my view, is in the domain of private law, and, therefore, the applicant should pursue his right in the District Court”.

In view of all the aforesaid, the acts complained of are not amenable to the jurisdiction of this Court.

Let this case be dismissed but in all the circumstances no order as to costs is made.

Recourse dismissed.
No order as to costs.