1987 October 8

[LORIS J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

PHIVOS D GRIVA AND OTHERS,

Applicants,

v

THE MUNICIPAL COMMITTEE OF LIMASSOL,

Respondent

(Case No 399/86)

Time within which to file a recourse — Knowledge — Burden of proof as to when applicant came to have complete knowledge of the act in question — Lies on the party alleging that recourse is out of time — Doubt as to time when such knowledge was acquired — It should be resolved for the benefit of applicant

Administrative Law — Misconception of fact — Division permit to divide land into building sites — Condition that a road should be constructed — Such road affected neighbouring land belonging to third parties (applicants) — Decision annulled on ground of misconception

Streets and buildings — Division of land into building sites — Division permit — The division should not interfere with property of third persons

The interested parties sought and obtained a permit for the division of their land under plots 397 and 398 into building sites

It is admitted that one of the conditions of the permit related to the construction of a road, part of which affected neighbouring plot 399

As a result the applicants, who are the co-owners of plot 399 in undivided shares, filed this recourse impugning the validity of the aforesaid division permit

The respondents and the interested parties raised a preliminary objection that the recourse is out of time, because the sub judice act came to the knowledge of the applicants as early as January, 1986, whereas the recourse was filed on 21 6 86

Held, annulling the sub judice decision (1) It is common ground that the respondent Municipality took the sub-judice decision acting on the

application of the interested parties and that the applicants were neither called to state their views nor have they in any way taken part in the process which led to the sub-judice decision, furthermore, this decision was neither published nor communicated to the applicants The burden of proof that an applicant came to have complete knowledge of the act impeached rests on the party alleging that the recourse is out of time, and if there is doubt as to when the decision came to the knowledge of the persons filing the recourse, then such a doubt must be decided in favour of the applicants

In this case there are doubts whether anyone of the applicants had full knowledge of the nature and extent of the sub-judice decision prior to the 10th May 1986 It is clear from the case of *Kalogeropoulos v The Improvement Board of Mesayitonia & Another* (1969) 3 C L R 108 at p 110 that the proposed division of the property of the interested parties into building sites should not entail interference with property belonging to third persons The construction of the road in question affects applicant's land and such construction is a «sine qua non» of the division permit So in effect in this case the Respondent Municipality acting on the application of the interested parties granted a division permit (sub-judice decision) by virtue of which the property of the applicants was prejudicially affected without the participation or the consent of the applicants to that end

It is clear from the above that the Respondent Municipality failed to carry out a proper inquiry which resulted to a misconception of fact, notably the fact that the proposed division entails interference with applicants' land

Sub judice decision annulled
No order as to costs

Cases referred to

Neofytou v Republic, 1964 C L R 280,

Sa Engineering and Marketing Co v Republic (1984) 3 C L R 393,

Kalogeropoulos v The Improvement Board of Mesa Yitonia & Another (1969) 3 C L R 108

Recourse.

Recourse against the decision of the respondent to issue division permit No. 29239 to the interested party for the division of their property situated of Kapsalos area in Limassol town.

Ph. Pitsillides, for the applicants.

Y. Potamitis, for the respondent.

E. Theodoulou, for the interested parties.

Cur adv vult

LORIS J. read the following judgment. All eight applicants in the present recourse impugn the decision of the Respondent Municipality of Limassol, whereby a division permit under No. 29231 dated 6.7.84 was issued by the Respondent Authority for the division of immovable property situated at Kapsalos area, Limassol town, belonging to the interested parties, which permit allegedly entails interference with the property belonging to the applicants.

The undisputed facts of the present case are briefly as follows:

The interested parties, namely Maria Pantazi, Eleni Panayiotou and Martha Papachristoforou being the registered owners in undivided shares of 1/3 each of plots 397 and 398 of Sheet/Plan 54/50 I.IV, applied to the Respondent Municipality for the division of their aforesaid property into four building sites.

By way of parenthesis, it may be added here that the aforesaid interested parties applied in 1981 and obtained division permit under No. 26830 dated 17.3.82 for the division of the aforesaid properties into four building sites. The aforesaid division permit was not made use of, by the interested parties for a period of more than a year and therefore same expired according to Law. On 23.5.84 the interested parties applied to the Respondent Municipality for the renewal of the expired division permit altering this time the relevant plans accompanying their application, so that the position of the proposed four building sites would be demarcated on the land in a completely different way than the one provided in the expired division permit.

The Respondent Municipality granted a division permit under No. 29231 dated 6.7.84 to the interested parties, which is described by the respondent and the interested parties in the present proceedings as an altogether new division permit, whilst the applicants maintain that the latter division permit is a renewal of the expired one.

I shall have the opportunity of dealing with this matter later on in the present judgment; for the purpose of stating the facts I shall confine myself in saying that the division permit under No. 29231 dated 6.7.84 is being impugned by the applicants in the present case on the ground that the proposed division of the property of the interested parties into building sites entails interference with

the propety belonging to the applicants, covered by plot 399 of the same Sheet/Plan and which is registered in the name of the 8 applicants in undivided shares, applicant No. 1 owning 20/60 under registration No. 293 of 26.4.1984 (vide exh. X).

The respondent Municipality as well as the interested parties in their opposition and the written addresses filed subsequently, as well as viva voce before me on 23.9.87 at the clarification stage, raised a preliminary objection to the effect that the present recourse is out of time. It is the submission of both that the applicants were well aware of the sub-judice decision of the Respondent Municipality as early as January 1986 and that therefore the present recourse which was filed on the 21.6.86 was filed out of time as more than 75 days have elapsed from the day when the applicants came to know about the sub-judice decision.

Independently of the preliminary objection of the respondent and the interested parties, the time envisaged by Article 146.3 of our Constitution is of vital importance and goes to the root of the recourse and can be examined by the Court even acting ex proprio motu; therefore I shall proceed to examine this issue first, before going into the merits of the recourse.

It is common ground that the respondent Municipality took the sub-judice decision acting on the application of the interested parties and that the applicants were neither called to state their views nor have they in any way taken part in the process which led to the sub-judice decision; furthermore, this decision was neither published nor communicated to the applicants. At the same time as it transpires from the material before me and the evidence of applicant No. 1 given viva voce before me on 23.9.87 as well as the oral evidence of Panayiotis Tsangaris, an advocate, applicant No. 1 came to know about the sub-judice decision as early as the end of January 1986 and that he submitted an application on his behalf protesting against the aforesaid decision to the respondent on 8.2.26 (Vide Letter «C» attached to the reply of the applicants). The extent of the knowledge of applicant No. 1 as that of applicant No. 2 is not quite clear. It seems that they had some knowledge that the sub-judice decision might interfere with the property under plot 399 of which they were owners in undivided share (applicant No. 1, 20/60 and applicant No. 2, 8/60), but it is doubtful whether they had complete knowledge by the end of January

1986 so as to know with certainty and precision the damage they were to suffer as a result of the sub-judice decision. In respect of the remaining applicants - and it is before me that applicant No. 5 is residing in England and she comes to Cyprus once a year - perhaps the husband of applicant No. 6 might have knowledge of the alleged interference as early as the end of January 1986. There is no other precise evidence as to whether the remaining applicants were aware of the alleged interference by the end of January 1986, and it is clear from the evidence of Panayiotis Tsangaris that it was as late as the 10th May 1986 when even advocates acting on behalf of all applicants came to acquire complete knowledge of the facts pertaining to the sub-judice decision.

The burden of proof that an applicant came to have complete knowledge of the act impeached rests on the party alleging that the recourse is out of time; and if there is doubt as to when the decision came to the knowledge of the persons filing the recourse, then such a doubt must be decided in favour of the applicants (vide *Neofytou v. Republic*, 1964 C.L.R. 280 at p. 290, *Sa Engineering and Marketing Co., v. Republic (1984) 3 C.L.R. 393 at pp. 398-399.*

In view of the material before me I have doubts whether anyone of the applicants had full knowledge of the nature and extent of the sub-judice decision prior to the 10th May 1986; therefore, giving the aforesaid doubt in their favour, I am duty bound to resolve the matter in favour of the applicants. For the reasons stated above, the preliminary objection is hereby dismissed.

Turning now to the merits of the case; I do not intend to decide the subsidiary issue raised, notably whether division permit 29231 of 6.7.84 is a renewal of the expired permit 26830 dated 17.3.82 as alleged by the applicants or whether same is an altogether new permit. It is sufficient to note that it is admitted by the respondent Municipality (vide para. 3 of its opposition) that it was a condition of the permit aforesaid that a road should be constructed affecting plot 399 i.e. the property of the applicants. It is immaterial whether the respondent denies that the permit in question covers 8,000 sq.ft. of plot 399, but alleges that it covers a much lesser extent. The fact remains that it covers part of plot 399, the property of the applicants without the consent of the applicants being taken and without the applicants having taken any part whatever in the process of the issue of the sub-judice decision.

It is clear from the case of *Kalogeropoulos v. The Improvement Board of Mesayitonia & Another* (1969) 3 C.L.R. 108 at p. 110 that the proposed division of the property of the interested parties into building sites should not entail interference with property belonging to third persons, the applicants in this case, and it is apparent both from the admission of the respondent Municipality, as well as from the division permit and the plan attached thereto (vide attachment to the written address on behalf of the respondent, exh. 1 attached to the opposition of the interested parties and the administrative file which is exh. «Y» before me) that in view of the division of the property of the interested parties into four building sites as envisaged by permit 29231 of 6.7.84, the interested parties are bound to construct a road to the south of plot 398 which covers not only a small portion from 398, but also part of plot 399, the property of the applicants and in this connection I must say straight away that I do not agree with the submission of learned counsel for the interested parties that the only thing the interested parties have to do is to construct part of the road affecting only their own property i.e. plot 398 without constructing the whole road, thereby trespassing on plot 399 belonging to the applicants, because the construction of the road in question is a «sine qua non condition» for the granting of the sub-judice division permit which was being granted under s. 3 of the Streets and Buildings Regulation Law Cap. 96, and it is abundantly clear from the provisions of s. 11 of the same Law that «every street constructed by virtue of a permit granted under the provisions of s. 3 of this Law shall, as soon as the certificate of approval has been granted be deemed to be a public street».

So in effect in this case the Respondent Municipality acting on the application of the interested parties granted a division permit (sub-judice decision) by virtue of which the property of the applicants was prejudicially affected without the participation or the consent of the applicants to that end.

It is clear from the above that the Respondent Municipality failed to carry out a proper inquiry which resulted to a misconception of fact, notably the fact that the proposed division of the property of the interested parties into building sites would entail interference with the property belonging to the applicants who never applied for the division of their own plot of land into building sites.

For the reasons I have endeavour to explain above the sub judice decision, notably 29231 of 6.7.84 is hereby annulled.

Let there be no order as to costs.

Sub judice decision annulled. No order as to costs.