CASES

DECIDED BY THE

SUPREME COURT OF CYPRUS

AND BY THE ASSIZE COURTS.

[FISHER, C.J. AND GRIMSHAW, P.J.]

FISHER, C.J. & GRIMSHAW, P.J. 1924

June 25

SAVAS HAJI PANAYI AND OTHERS

v.

PAPA MICHAEL KATHOMOUTA AND OTHERS.

RIVER—PUBLIC OR PRIVATE—DAAVI COURT JUDGMENT—PRESCRIPTION.

Appeal of defendants from the judgment of a District Court by which the defendants were ordered not to interfere with a river called "Kouti."

The facts appear from the judgment of the District Court which runs as follows:—

Judgment: This is a dispute between the villages of Arediou and Klirou about water rights. The subject of dispute is the water of the "Kouti" or "Xeropotamos" river which starts from the village of Figardou and flows down to the village of Arediou, passing on its way land owned by inhabitants of the village of Klirou. The inhabitants of Arediou, who are the plaintiffs in this action, complain that the inhabitants of Klirou have cut the water before it reaches Arediou in derogation of their rights of ownership. The inhabitants of Arediou claim the ownership of all the waters of this river by virtue of a judgment given by the old Turkish Daavi Court in 1867. The defendants on the other hand deny that this judgment gave the waters of this river to the inhabitants of Arediou or that it has any legal effect as far as this Court is concerned. They further contend that assuming this judgment was given in favour of the plaintiffs it was never acted upon, and hence has lost its legal effect. They further say that they have acquired a prescriptive right to take water from this river, by user between the years 1867 and 1900. The plaintiffs contend that the judgment was respected by the defendants up to 1903, in which year they began to interfere with the water.

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This interference by the defendants was met by the plaintiffs by the immediate institution of legal proceedings in the District Court. The file of the proceedings has been produced showing that this action was instituted. For some reason or other which evidence has failed to elucidate, the case did not come to trial.

In 1917 the writ was amended, and in 1918 apparently a new action was commenced which also failed to fructify in a decision by the Court, as in 1921 by the consent of both parties it was struck out. The defendants contend that if the Court is not satisfied that they acquired a prescriptive right to take water from this river between 1867 and 1903, they acquired this right by their user of the water between 1903 and 1922.

The plaintiffs on the other hand contend that their rights in respect of the water were kept alive by the institution of their actions in 1903 and 1918.

Now the case is one of considerable difficulty, but the Court have had the advantage of viewing the *locus in quo* and also hearing the arguments of advocates who have placed before them every fact tending to bear on the issues that they have to decide.

The first point is whether the judgment of the old Daavi Court is binding in law on this Court. The defendants argue that it is not, because the procedure adopted was not English procedure, and the manner in which the case was conducted was not in accordance with English principles. The Daavi Court, however, was the predecessor of the District Court and its counter-part in Turkish times. It obviously had the jurisdiction to try the matter in dispute and the question of the procedure adopted during the course of trial is not one into which this Court can enter.

In *Sadyk v. Papa Michaili Yanni* 6 C.L.R., p. 45, the following dictum appears:—

" As a general rule of law it is clear that rights of irrigation are " governed by *ab antiquo* user, but we doubt whether user which had " been discontinued for a substantial length of time would be such " user as the law contemplates. And, taking into consideration the " statutes of Turkish tribunals in olden times, we doubt whether ancient " Hutjets, which have not been acted upon, are sufficient to establish " rights which they purport to confer."

This dictum clearly recognises that the judgments of Turkish tribunals are binding under certain conditions, and is authority for saying that their judgments, if acted upon, are in law binding upon us to-day.

Applying the reasoning to this case we have to satisfy ourselves that the judgment is one of the Daavi Court and that it has been acted upon. With regard to the first point we are satisfied that the original judgment which has not been produced has been lost and every effort has been made to procure it. A more diligent search could not have been instituted. In the circumstances the Court have allowed proof, by a copy, certified by the Assistant Registrar of the Court—Mr. Yannakis—on the 3rd March, 1904. We are therefore of opinion that the judgment was a valid one. The construction of the judgment and the questions as to whether it was acted upon I will leave for the moment, as I think of necessity that we should first consider what type of river it is with whose rights of irrigation we are concerned.

The Mejellé contemplates two classes of rivers (*a*) public, (*b*) private. The first class are defined by Art. 1238. The second class are defined by Art. 1239 which sub-divides them into two classes. The first class which are also known as public rivers flow on desert places, that is to say on unowned land, and are not exhausted entirely in the land of their owners the surplus being free to be used by the public. These rivers are distributed and divided amongst the shareholders.

The second class is a private river the water of which is spread over the land of a limited number of persons, and being exhausted at the boundary of their lands does not flow to unowned places. Having sub-divided rivers into classes and sub-classes and obtained a definition of each let us now consider the river " Koudi," and determine into what class it is to be placed.

This river starts from Figardou and is fed mainly by rain water, though on the evidence we are satisfied that during its course it is fed also to a certain extent by springs. It is clear, however, that as the river is practically dry during summer that the main source of supply is rain water. The river flows in a natural channel and has not been reduced into possession by a limited number of persons in an artificial channel. After passing Arediou the surplus flows to another village and the evidence is that it is free to the use of the public. The Koudi river is therefore clearly not within the scope of the definition of Art. 1238 of the Mejellé which refers to rivers like the Nile. In fact it is doubtful if any river in Cyprus will come within the terms of that definition. It is also clearly not within the second class of private rivers which, in the opinion of the Court, only refer to those which run in artificial channels made by the proprietors in order to reduce the water into their possession. The Koudi river therefore falls within the definition of the first part of Art. 1239 being a private river to which the name " public " is also given.

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Support is lent to this by the footnote in the Digest on p. 119 referring to the case of *Louka v. Nicola* 5 C.L.R. p. 82. The words of C. J. Smith in *Loizo v. Ahmed Vehim* 1 C.L.R. at p. 99, also tend to the same conclusion.

Having decided what type of river we have to deal with, we have next to consider the judgment of the Daavi Court and decide what rights it conferred, if any, upon the plaintiffs. It was brought by five persons, two of them Moslems and three of them Christians, who are described as being from the inhabitants of the village of Arediou. These persons brought an action against all the inhabitants of the village of Klirou, two persons being appointed to represent the latter. The complaint was that the defendants had opened without right a channel which took the water of the Koudi river to Klirou.

The defendants contend that this action was brought by a few persons and therefore cannot operate for the benefit of the whole village. We, however, are of opinion that the proper construction of the judgment is that the claim and action were brought by the whole village of Arediou and not by a few independent villagers. They are led to this conclusion by the fact that Moslems and Christians both appeared as plaintiffs and also by the wording of the judgment at line 21 of the translation where it runs as follows: " and the inhabitants of the said village of " Arediou having agreed." If this action had not been lodged on behalf of the whole village the wording would have been " the said inhabitants " of the village of Arediou having agreed." We therefore think that the judgment ensures for the benefit of the whole village of Arediou and not for the benefit of a few individuals. Looking at the decision of the Court we are of opinion that the judgment decided that the people of Klirou had no rights in the water of the Koudi river at all, basing their decision on the *ab antiquo* user of the water. It transpired at the enquiry that the inhabitants of Klirou had not been irrigating their lands from this water. The closure of the channel opened by the Klirou people was ordered.

We are therefore of opinion that the Court decided that the people of Arediou had by *ab antiquo* user the sole right to irrigate from the waters of this river.

The next point for consideration is whether this judgment was acted upon or whether by abandonment or non-insistence on their legal rights the plaintiffs have lost the rights which were conferred on them by this judgment. The defendants contend that they have acquired by prescription rights to take water from this river, and we must first consider

whether such a right can be acquired by prescription. In this connection Art. 1675 of the Mejellé seems to be relevant. This article runs as follows:—

" No attention is paid to the lapse of time in actions about lands, " the benefit from which concerns the public, like a public road, a river " and a common pasture land."

Looking at the Turkish text it would appear that a river in this connection includes all public rivers and those that are the common property of the inhabitants of one or more villages. We have already decided that the Koudi river is the property of the inhabitants of Arediou, and hence the article we have cited above would apply, and no action concerning its rights would be barred by lapse of time. The reasoning of this article seems to be that several of the owners of this water would at all times be under disability and hence action in respect of their rights could never become statute barred. The case of *Haji Michaili and Georgiades* 7 C.L.R., 1, is also an authority for this proposition that prescriptive rights cannot be acquired in respect of public rivers, and that when the rights of two separate parties are in issue only *ab antiquo* user will be considered. In this case therefore when for the purpose of the law the river with which we are dealing is a public one only *ab antiquo* user will be considered. In these circumstances the defendants cannot set up a prescriptive right to the waters of the river. In any event whether such a prescriptive right can or cannot be set up we think on the facts that the defendants have not proved to our satisfaction that they ever enjoyed fifteen years uninterrupted user. In 1867 their wrongful user was stopped by action before the Daavi Court, and on the evidence we do not think that they attempted to take the water again until 1903, when the plaintiffs instituted a fresh action.

It is true that this action was discontinued in 1917 and a fresh action brought in 1918 only to be discontinued in 1921. If time could run against the plaintiffs in respect of the claims they are now putting forward we think on the authority of *Cirilli v. Kyprianou Christodoulou* 10 C.L.R., p. 12, it is doubtful whether the actions instituted by the plaintiffs between 1903 and 1922 could serve to keep them alive. As time, however, does not run against them this point does not arise for decision.

Few other points remain for decision. The plaintiffs have dropped their claim for damage in view of the difficulty of assessment. The

defendants have argued that the Turkish judgment is limited to particular lands belonging to the plaintiffs and they can only claim water sufficient to irrigate those particular lands. With regard to this point we are of opinion that this is a matter which affects only the plaintiffs and any other persons who may have an interest in this water.

The defendants, we have already decided, have no rights in this water and hence the question as to what trees and lands the plaintiffs irrigate with this water is no concern of theirs. We further think that in view of the fact that the defendants constructed their artificial channel with a view to taking the water to the village of Klirou 1½ miles away from the river, that they irrigated no land abutting on the banks of the river and that another stream flows through the village, they were not at any time exercising the rights of riparian ownership or rights to which they became entitled by operation of law.

The injunction asked for will be granted together with costs of two advocates on the highest scale.

Judgment accordingly.

Appeal No. 3000.

COPY OF THE JUDGMENT OF THE DAAVI COURT OF NICOSIA.

On the joint petition of Hussein Ibrahim, Ahmed Ibrahim, Hussein Mehmed, Haji Petro the son of Koumi, and Haji Christofi the son of Yanni being from the inhabitants of the village of Arediou in the District of Kythrea and in the Nahieh of Dagh attached thereto, and which petition having been referred to the Daavi Court, and the complaint therein being that the Klirou people have created (opened) a new channel from above their village, and they propose to irrigate their lands as well as their trees from the rain water which accumulates during the winter and other seasons in the dry river or " Kourou Dere," and with which water they (petitioners) have been properly irrigating from time immemorial the lands and trees held by them in common, and the boundaries of which are defined (fixed), and they having instituted an action that they should be restrained from interfering with their rights, and Papa Kyriako and Haji Theodossi and Haji Kyriako for and on behalf of the inhabitants of the village of Klirou having been sent for and examined about the matter, they have stated that they have opened a new channel because they were shareholders in the said water, and requested that the Court should appoint two persons to examine the matter locally, and the inhabitants of the said village of Arediou having agreed thereto, Yannaco Aga, one of the members of Mejlis Idaré and Refik Eff. the Daavi Court clerk went to the place where the new channel had been opened by the said village

of Klirou, and enquired equitably (justly) into the said matter from the inhabitants of other villages in the neighbourhood of the spot in question, and it having been found out (proved) locally that the inhabitants of Klirou have not been irrigating their fields from the water mentioned, and besides all this they having admitted and confessed before our Court that they had not been irrigating their lands from the said water, therefore, Papa Kyriako and Haji Theodossi and Haji Kyriako, inhabitants of the said village, have been ordered in accordance with the Religious and Civil Laws to close the channel they have opened.

The execution of this order is hereby referred to your Honour, the Kaimakam.

Dated, 6th July, 1287.

(*Sd.*) AHMED RASHID,
Judge-Substitute.

(*Sd.*) SAID AHMED,
Member.

(*Sd.*) MARCO TRIANTAFYLLIDES,
Member.

(*Sd.*) IACOVOS GABRIEL,
Member.

Translated by H. FIKRI, *Acting Registrar District Court.*
Certified true copy.
Registrar Supreme Court.

For Appellants *N. Chrysafinis* and *N. Paschalis.*

For Respondents *Theodotou* and *Pavlides.*

Judgment: Upholding the judgment of the District Court and dismissing the appeal with costs.