[CREAN, C.J., GRIFFITH WILLIAMS AND HALID, J.J.]

STAVROS LOUCAIDES & CO., OF NICOSIA, *Plaintiffs*,

v.

THE PRINCIPAL OFFICER FOR LAND REGISTRATION FOR THE DISTRICT OF NICOSIA, *Defendant.*

(*Civil Application No.* 2 *of* 1939.)

PRACTICE—APPEAL—JUDGMENT DISMISSING ACTION—EXPIRATION OF TIME ALLOWED FOR APPEAL—EX PARTE APPLICATION FOR ENLARGEMENT OF TIME—ORDER BY ONE JUDGE OF THE SUPREME COURT—APPLICATION TO REVIEW THE ORDER AND SET ASIDE THE APPEAL—RULES OF COURT, 1938 TO 1940, ORDER 35, RULE 2; ORDER 57, RULE 2.

On the 5th June, 1939, *the District Court of Nicosia gave judgment dismissing an action for mandamus* (*No.* 593/39) *but no appeal was brought within the six weeks allowed by Order* 35, *rule* 2. *On the 19th July, viz., two days after that period expired, plaintiffs' counsel asked for defendant's consent to appeal after time, but was refused. On the 26th July plaintiffs' counsel applied* ex parte *under Order* 57, *rule* 2, *and Order* 48, *rule* 8 (1) (qq), *for enlargement of time, on an affidavit of his own stating that he believed there was a good case for appeal and a proper case for exercise of the discretion to extend the time, the delay in bringing the appeal being due to the difficult nature of the action and to a mistake on his part in thinking that time did not run during the summer vacation. He obtained an order giving him leave to appeal after time expired, from one Judge of the Supreme Court, and brought his appeal on the 1st August. On the 11th August,* 1939, *defendant filed an application praying the Court to review that order and set aside the appeal, on the ground that (apart from the delay being inexcusable in the circumstances of the case) one Judge of the Supreme Court cannot make an order of this nature, and that an application for enlargement of the time limited for appeal should not be made without notice to the other side.*

HELD: *That an application for enlargement of the time limited for appeal should be brought under Order* 35, *rule* 2, *and cannot be made without notice to the opposite party.*

HELD, *also: That a Judge of the Supreme Court sitting alone cannot make an order extending the time for bringing an appeal.*

V. R. Bairamian for applicant (defendant).

C. Glykys for respondents (plaintiffs).

The facts of the case and points of law involved appear sufficiently from the judgment of the Court.

The judgment of the Court was delivered by the Chief Justice.

CREAN, C.J.: An action was instituted on the 20th April, 1939, in which Stavros Loucaides & Co. were the plaintiffs, and they claimed a mandamus commanding the Principal Officer of the Land Registry for the District of Nicosia to proceed and sell several properties at Yerolakkos standing registered in the name of Christodoulos Petrou in execution of the amount due to plaintiffs by the said Christodoulos Petrou on foot of a judgment of the Nicosia District Court dated the 10th of March, 1930.

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The parties agreed to state certain questions of law for the opinion of the District Court, and, in doing so, set out the facts agreed on by the parties. These facts are set out in the special case, and, as the wording of it was evidently agreed to by both sides, it may be well to give the *ipsissima verba* or exact words which are:—

"1. The plaintiffs obtained, in respect of a debt incurred after 1919, "a judgment against Christodoulos Petrou of Yerolakkos on the "10th of March, 1930.

"2. The plaintiffs registered this judgment against certain properties "of the judgment debtor on the 21st day of July, 1937; these "properties appear in a schedule to a Memorandum No. 467/1937, "lodged at the L.R.O. on the 21st day of July, 1937.

"3. On the 14th day of January, 1939, the plaintiffs issued a notice "to the debtor for payment of £101 15*s.* 6*p.* plus 9% p.a. in default "of which they would proceed to a sale. The notice was duly "served on the judgment debtor on the 20th day of January, 1939.

"4. On the 3rd day of March, 1939, the plaintiffs swore an affidavit "which was served on the L.R.O., Nicosia, on or about that day.

"5. On the 18th day of April, 1939, the L.R.O. applied *ex parte* "to the Court for directions in regard to exemption of house "accommodation and land for the debtor who is a farmer and the "Court (namely Halid, D.J.) gave directions as follows: 'As "the judgment debtor is a farmer the judgment creditor must "apply to Court for a writ of sale.'

"6. On the 20th day of April, 1939, the Court's directions were "communicated by letter to plaintiff's advocate.

"7. On the 20th day of April, 1939, Mr. Costakis E. Glykys, one of "the plaintiff's advocates, demanded orally the sale of the proper-"ties in question and was told by the Assistant Director of the "L.R.O. that the sale would not, in view of the Court's directions, "be carried out.

"8. The questions for the opinion of the Court are:—

"(*a*) Is it competent to judgment creditor to have under section "101 of the Civil Procedure Law, 1885, a sale in execution of a "judgment debt without exemption of house accommodation "and of land under section 21 of that Law in the case of a "farmer, which the judgment debtor admittedly is ?

"(*b*) Are the plaintiffs entitled to the mandamus sought upon the "facts set forth above ?

"(*c*) Does an action for mandamus lie against the Principal "Land Registry Officer or must an action be brought against "the Attorney-General ?

" If the Court shall be of opinion in the affirmative of the said questions " then judgment shall be entered for the plaintiff.

" If the Court shall be of opinion in the negative of the said questions " then judgment shall be entered for the defendant."

The case came before the full District Court on the 10th and 11th May, 1939, and judgment was given on the 5th June, 1939, for the defendant with costs. The judgment deals mainly with the interpretation of the two sections referred to in the Special Case, and in effect the Court held that if one section of a statute confers a privilege on a particular class of persons, a subsequent section in the same act cannot be read or interpreted in such a way as to deprive the favoured class of the privilege already conferred on them.

In other words, it cannot be argued, from reading sections 21 and 100 in their contexts, that the legislature with one hand intended to give a farmer some benefit by section 21, and with the other hand immediately took it from him again by section 100.

By Order 35, rule 2, of the Rules of Court, 1938, the plaintiffs had six weeks within which to appeal from this judgment. Their appeal was not filed within that time and an application was made to a Judge of the Supreme Court to extend the time for appealing. This application was grounded on the affidavit of the plaintiffs' counsel in which he says that he had not been able to prepare the notice of appeal within the time prescribed by Order 35, rule 2, of the Rules of Court, 1938, that is by the 17th of July, 1939.

The reason given by counsel for the plaintiff for the delay in not filing his notice of appeal was, that a most careful study of all the points was necessary and that this study was not completed till after the 17th July, 1939, the last day for filing appeal. A further reason given was, that the counsel for the plaintiffs thought that the time mentioned in Order 35, rule 2, stopped running against the plaintiffs during the summer vacation. Counsel for the plaintiffs further says in his affidavit that plaintiffs have a good case for appeal and that this is a proper case for the exercise of the discretion conferred upon this Court by Order 57, rule 2.

Order 35, rule 2, of the Cyprus Rules of Court of 1938 is worded precisely in the same way as Order 58, rule 15, of the English Rules. And Order 57, rule 2, of Cyprus is the same as the English Order 64, rule 7. And as plaintiffs say they brought their application in this case *ex parte* under the authority of Order 48, rule 8, it is as well to mention that this rule sets out what applications can be made *ex parte*.

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It may be accepted that Orders 35 and 57 of Cyprus Rules of Court have been taken or copied from the English Rules of Court; consequently any English authorities on the interpretation of the similar English Rules are helpful in construing the Cyprus Rules. It seems to us that counsel for the plaintiffs tacitly admits in his affidavit grounding his application that the rule applicable to the filing of notice of appeal is Order 35, rule 2, for in para. 6 of that affidavit he says that he was not able to prepare the notice of appeal within the time prescribed by that rule. And in the same affidavit he says that he thought the time mentioned in Order 35, rule 2, stopped running against the plaintiff during the summer vacation. And then the affidavit concludes by seeking for the exercise of the discretion of the Court under Order 57, rule 2.

The two real questions in this application we apprehend are:—

1. Can an application to the Supreme Court such as was made in this case be made *ex parte*?
2. Can a judge of the Supreme Court sitting alone grant an order extending the time for bringing an appeal?

If the application were properly brought under Order 57, rule 2, then Order 48, rule 8, apparently empowers such an application to be made *ex parte*. But if it should have been brought under Order 35, rule 2, then there does not seem to be any provision for such an order being made *ex parte*.

To decide under which of the two orders the application herein should have been made, it is necessary to look at the English Rules of Court which are similar to the above and the notes and authorities in reference to them.

Order 64, the analogous order to our Order 57, deals generally with applications for extension of time, and Order 58, the same as our Order 35, in our opinion deals exhaustively and exclusively with the time within which leave to appeal can be given, and how, and by what Court such time can be extended.

The distinction between the two is a fine one, but we think the judgment of Sir Wilfrid Greene in *Gatti v. Shoosmith* (All England Law Reports, Vol. 3, 1939, p. 916) has made the position fairly clear. The decided cases bearing on these two orders are referred to, and from them, it can be seen how the Court of Appeal was fettered in its discretion on an application for leave to extend time for appeal under Order 58. Whereas when an application such as was made in *Baker v. Faber* (Weekly Notes, Jan. 4, 1908) for an extension of time with regard to a new trial such application was made under Order 64, and the Court considered it had discretion and was justified in extending the time.

As Order 58, rule 15, was worded prior to its amendment in 1909, the Court of Appeal considered it had no power to extend the time within which to appeal in a case where, for instance, counsel made a mistake and did not file his application within the time set out in the rule. Under Order 64, rule 7, the same Court of Appeal considered that it had power and frequently granted an extension of time where the delay was due to a genuine mistake.

This position was evidently thought an anomalous one for the Court to be in, and consequently Order 58 was amended and part of that amendment was to delete the words " except by special leave of the " Court of Appeal." The case of " *Re Coles v. Ravenshear* " (1 K.B., 1907, p. 1) is an illustration of how the Court of Appeal thought it was hampered by the above words. In that case counsel had misconstrued the rule and as a result of the advice given the appeal was out of time and it was there held that the fact that the delay was due to a mistake of a legal adviser did not constitute a ground for giving the special leave the rule required.

Since the amendment, the Court of Appeal appears to have as full a discretion in an application for extension of time for appeal under Order 58 as it had under Order 64 when it was hearing applications generally for enlargement of time.

In the judgment of the Master of the Rolls in *Gatti v. Shoosmith*, he draws attention to the introductory remarks to this amendment which is worded in this way:—" Subject and without prejudice to " the powers of the Court of Appeal under Order 64, rule 7," and says they put the matter of enlarging the time under Order 58, rule 15, under Order 64, rule 7, as the governing rule. And we think it has been submitted by counsel for the plaintiffs this dictum is very much in his favour as it would tend to shew that even if Order 58 is the correct rule to work under, anything done under Order 64 is equally efficacious and regular as it is the governing rule. But we are unable to accept this interpretation of the amendment. In our opinion these words really mean, that once the application is before the Court of Appeal, that Court's discretion is not now restricted, as it formerly was, by the wording of Order 58 from exercising a discretion in the case of a genuine mistake having been made, or in cases where there are present proper grounds for an extension of time for appeal.

Shortly, the position now appears to be that: Order 64 is in regard to the enlarging of time generally; Order 58 is exclusively in regard to the time within which to appeal. But even under Order 64 the Court of Appeal alone has jurisdiction to extend time—p. 1369, Yearly Practice, 1939.

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The notes to Order 64 set out in what type of case the time is enlarged. But when appeals are mentioned it is significant that the reader is directed to see Order 58, rule 15, and other orders, but not Order 64.

There is no doubt that an *ex parte* application can be made under Order 48, rule 8, for enlargement of time under Order 57, rule 2. But it is not set out in Order 48 that an application to extend the time for appealing under Order 35, rule 2, can be made *ex parte*. And it is important to notice that this order sets out seven different cases coming under Order 35 in which an application *ex parte* can be made, but an application under rule 2 is not one of them.

And it is specifically said in rule 2 of Order 35 that an application to enlarge such time shall be made to the Court or Judge which made the order, or to the Court of Appeal and not to a single judge of the Court of Appeal. And if the application for enlargement of time can be made to either the Court which made the order, or Court of Appeal, then it must be made in the first instance to the Court or Judge below, according to rule 19 of this same Order. This rule may apply to appeals from orders only.

From Order 35 it appears to be imperative that an application to enlarge time for appealing must be made to the Court or Judge who made the order or the Court of Appeal. The application in this case was made to neither; then, if Order 35 is the proper and exclusive rule under which such application can be made, no order except made by the Court below or the Court of Appeal is regular, for it is not said anywhere in this Order that it can be made by a judge of the Supreme Court, nor is it said in any of the English authorities bearing on this rule that a Lord Justice of the Court of Appeal sitting alone has jurisdiction to make such order.

It is submitted by counsel for the plaintiffs that the long vacation had begun when he filed this application and consequently it would have been difficult to make the application to the District Court which made the order. There may be some merit in this contention, or there may not be, as we are not prepared to say that it was impossible to bring this matter before the Court when all the members of it were in the Colony. Even if it were impossible, one must ask if that is a good reason for disregarding the law as enacted, and having recourse to a law or rule which was not made for the particular purpose of extending time within which to appeal.

It seems to us that Order 57 cannot be the proper order under which to being an application of this sort. The case of *Wood v. Manchester Corporation* (Yearly Practice, 1940, p. 1295) was cited to us and it has a slight bearing on this appeal. There, the time for appeal was extended

and Scrutton and Atkin, L.JJ., said in their judgment that the " vested" interest argument no longer carried the same weight as hitherto. In former cases " vested interest " evidently meant that a person who held the Court's decision in his favour, was possessed of a tangible right, and to deprive him of that, by allowing a person to appeal against it after the time for appealing had expired, was depriving that person of his right, and the fact that the intending appellant had not filed his application for leave to appeal in time, even by a genuine mistake, was not accepted by the Court of Appeal as a good ground for extending the time and thereby depriving the other party of his vested right or interest.

It must be admitted, we think, that a person who holds the judgment of a Court of first instance has a right. It may be thought by some as a somewhat shadowy one until the time for appeal has expired, still it is a right vested in him, and if an application is going to be made to the Court to extend time within which to appeal from the order which conferred upon him that right, surely he is entitled to be present at that application and so given an opportunity of shewing why he should not be deprived of his right, even if it is not a very tangible one.

It is very often argued in applications for an enlargement of time to appeal that it would result in a denial of justice if leave be not given. We cannot see there would be such a position in this case for the order appealed from was dated the 5th June and between that date and two days after the latest time for filing an appeal counsel for the defendant herein informed plaintiff's counsel that he would not agree to an extension of time within which to file an appeal. If the application for enlargement of time for appealing could be made under Order 57 and *ex parte*, as argued by counsel for the plaintiffs (applicants), there does not appear to have been any need for such consent; consequently we are at a loss to know why it was asked for if the plaintiffs' counsel really thought it was unnecessary.

Having come to the conclusion that there is no authority for making an application of this nature *ex parte* as plaintiffs' counsel did in this case, the next matter for consideration is the power of a judge of the Supreme Court to make such an order sitting alone.

In the case of *Wood v. Manchester Corporation* the application was made to the Court of Appeal. The applications in *Kevorkian v. Burney* and in *Gatti v. Shoosmith* were both made to the Court of Appeal, and not to a Lord Justice sitting alone. In fact, in no case which is cited to us as an authority on this point is the application for leave to extend time for appeal made to a single Lord Justice of Appeal.

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With these cases before us and the case of *Sellar v. Bright*, 91, L. T. 9, which definitely says that the Court of Appeal cannot assent to the proposition that a single judge can impose upon the Court of Appeal the obligation to hear an appeal which is out of time, we think that we ought to hold that the application in this case should not have been made in the way it was, and that the order made thereon cannot stand.

Following the above findings the order of the 26th July, 1939, made *ex parte* and extending the time for giving notice of appeal is reversed. And the notice of appeal and the service of such notice under such order are set aside. Costs to defendant of this application agreed on at £8 8*s*.

The order of the 26th July, 1939, made ex parte and extending the time for giving notice of appeal is reversed, and the notice of appeal and the service thereof under such order set aside.

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[CREAN, C.J., AND GRIFFITH WILLIAMS, J.]

THE AYIA MARINA CHURCH, OF DHIORIOS, BY ITS COMMITTEE, *Plaintiffs-Respondents*,

v.

IBRAHIM HALIL AGHA AND ANOTHER, *Defendants-Appellants*.

(*Civil Appeal No.* 3672).

POSSESSION OF ARAZI-MIRIE (STATE LAND) BY ECCLESIASTICAL CORPORATIONS—RIGHT TO SUE—REGISTRATION IN NAMES OF TRUSTEES—ARTICLE 122 OF THE OTTOMAN LAND CODE—SECTION 12 OF THE IMMOVEABLE PROPERTY REGISTRATION AND VALUATION LAW, 1907, AND SECTION 3 OF THE ECCLESIASTICAL PROPERTIES LAW, 1935.

Appeal by the defendants from a judgment of the District Court of Kyrenia in an action brought by the plaintiff Church for encroachment by the defendants on a piece of land of Arazi-Mirie category standing registered in the name of a person as trustee for the Church.

HELD: (*By Crean, C.J.*) :—

(1) *An ecclesiastical corporation, to maintain an action for trespass on state land claimed by them, must prove by evidence* :—

(i) *That the annexation of the land in dispute is recorded in their name in the Imperial archives at Constantinople; or*

(ii) *That the land belongs to them* ab antiquo, *and is registered in the Central Office of Land Registration at Nicosia; or*

(iii) *That the land passed into their possession by lawful means, and is registered in the name of a person as trustee for the Church; or*

(iv) *That they were in possession of the land for ten years prior to the year* 1891.

(2) *That the evidence adduced by the plaintiff Church did not prove any of the above requirements.*