CASES

DECIDED BY

THE SUPREME COURT OF CYPRUS

IN ITS ORIGINAL JURISDICTION AND ON APPEAL FROM THE ASSIZE COURTS AND DISTRICT COURTS.

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

(March 12, 13, April 24, 1941)

ELENI K. CHRISTOFIDES, *Appellant*,

v.

MOUSTAFA AHMET ALIYE KADIS, *Respondent*.

(*Civil Appeal No.* 3693.)

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ELENI K. CHRISTOFIDES *v.* MOUSTAFA AHMET ALIYE KADIS.

Mistake—Rectification of written contract—Admissibility of parol evidence—Equitable remedies—Transfer of immovable property—Cancellation of registration—Refund of purchase money.

The appellant entered into an agreement in writing with respondent to sell to him certain pieces of land including a vineyard and tree under Registration No. 12844 which was duly transferred to the respondent. Nine years later the appellant brought this action against the respondent alleging that the property under Registration No. 12844 was transferred by mistake, that it was not intended to be transferred by the appellant nor had the respondent intended to purchase it, and claiming that the registration in respondent's name should be set aside.

Held: (1) Where a contract has been reduced into writing, in pursuance of a previous engagement, and the writing, owing to mutual mistake, fails to express the intention of the parties, the Court will rectify the written instrument in accordance with the true intent of the parties.

(2) In the application of equitable remedies for the rectification or cancellation of documents extrinsic evidence is admissible in order to arrive at the true facts.

(3) As there was evidence before the Magistrate that a mutual mistake had been made as to the subject matter of the agreement, parol evidence was admissible.

(4) As the appellant seeks equity in the way of the cancellation of the title-deed, he must do equity by refunding the purchase money paid to him for the land he wrongly transferred.

Judgment of the President of the District Court of Larnaca reversed.

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ELENI K. CHRISTOFIDES
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Appeal from a judgment of the President of the District Court of Larnaca reversing the judgment of the Magistrate of Larnaca (Action No. 1/39) in favour of the plaintiff-appellant.

G. Nicolaides for the appellant.

G. Achilles for the respondent.

The facts appear sufficiently in the judgments.

CREAN, C.J.: This is an appeal from the order of the President of the District Court of Larnaca allowing an appeal from the decision of the Magistrate.

The action was brought in the Magisterial Court of Larnaca by the appellant to set aside a title-deed No. 13392 of the 28th January, 1930, which deed transferred to the respondent 3 donums and 1 olive tree, the subject matter of a prior title-deed numbered 12844.

There was a contract in writing by the parties herein in which it was agreed to sell the vineyard and tree in Registration No. 12844 to the respondent; and in the same writing it was agreed to sell other property to the respondent. These properties were the vineyard of Katsari and a field at Marapsos of 12 donums; and the price agreed on was £125.

The Magistrate admitted parol evidence to prove that a mistake had been made in the writing of the agreement for sale, and on the oral evidence given before him he found that all the lands sold to the respondent had been shewn to him, and that such lands did not include the lands and tree mentioned in Registration No. 12844. It was held by the Magistrate that both parties were under the impression that this land and tree formed part of the vineyard known as Katsari containing 8 donums and 1 evlek.

Another reason given by the learned Magistrate for his finding was the proved fact that this vineyard in dispute was sold to one Ahmed Haji Mustafa on the 28th April, 1927, and has been in his undisputed possession ever since that date; and possession of it was never asked for by the defendant since 1930. No steps were ever taken by the respondent to eject Ahmed Haji Mustafa; and on these findings the Magistrate found for the plaintiff and set aside registration 13392 which transferred to the respondent the vineyard and tree mentioned in 12844.

The respondent appealed from this decision and the learned President of the District Court allowed the appeal. His reason for so allowing the appeal appears to be included in the last paragraph of his judgment which reads:—

> "Much evidence has been given on behalf of the respondent to show that the written instrument does not express the intention of the parties; but no evidence

has been given to show that there is any latent ambiguity in the language of the instrument. The instrument itself is therefore the only criterion of the intention of the parties and the respondent is bound by the terms of the written instrument. There can therefore be no grounds for setting aside title-deed No. 13392."

We gather from this paragraph that as there is no latent ambiguity in the language of the agreement for sale no parol evidence was admissible to shew that a mutual mistake had been made as to what was actually sold. We do not see, however, that there is any latent ambiguity in the language of the agreement for sale relied on in this case by the respondent, consequently are unable to agree with the ultimate view taken by the President of the District Court that parol evidence was not admissible to shew that the parties had made a mistake as to what was being bought and sold. An example of a latent ambiguity in a document is given in Stroud's Dictionary, but there is no resemblance between that example and what occurred in this case. In a will, if a testator bequeaths a legacy to his nephew John Thomson and he happens to have two nephews of the name of John Thomson then it is considered that there is a latent ambiguity in that document, and parol evidence would presumably be admissible to endeavour to find out which nephew it was intended to benefit.

But, in this case the facts are not at all similar, as the Magistrate found there was no real agreement between the parties, because the appellant never intended to sell the vineyard in dispute, never pointed it out to the respondent and the respondent's son who was carrying out the sale says he did not know the vineyard.

Where a contract has been reduced into writing, in pursuance of a previous engagement, and the writing, owing to mutual mistake, fails to express the intention of the parties, the law is that the Court will rectify the written instrument in accordance with the true intent of the parties.

It is said in the text books that in the application of equitable remedies for the rectification or cancellation of documents extrinsic evidence is more freely admitted. In this case the cancellation of registration deed No. 13392 is applied for, which is an equitable remedy and as there was evidence before the Magistrate that a mutual mistake had been made as to the subject matter of the agreement we think he was right in admitting parol evidence and that the view taken by the President of the District Court is wrong.

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From reading the evidence I think a mistake could very easily be made as to this vineyard of 3 donums with one olive tree on it, the subject matter of registration 12844. The evidence shews that it is situate two or three hundred yards from the piece of land of 8 donums and 1 evlek known as Katsari. But immediately adjoining Katsari is another small vineyard and strangely enough it is exactly 3 donums and has one olive tree on it, and they have the same boundaries. The respondent made an effort to cultivate this on the assumption that it was part of the farm Katsari that he had bought from the appellant, but was stopped by the occupiers and owners of it until he bought it from them for the sum of £30.

Following the written agreement for sale five certificates of registration were issued to the respondent, but the only one with which we are concerned is that one numbered 13392. It is about that registration this appeal is brought as it transfers the subject matter of registration 12844. In this certificate of registration the sale price is set out as 3,600cp. which is equivalent to £20.

In the evidence of respondent's son taken before the Magistrate it is said by him that he was informed by the appellant's representative and he believed that the Katsari field comprised 11 donums and 1 evlek. He was shewn two title-deeds, one for 3 donums and an olive tree and another for 8 donums, 1 evlek and 3 olive trees; but he was not shewn the vineyard mentioned in certificate of registration 12844, therefore it seems to me that was a reasonable ground for the Magistrate finding there was never any agreement between the parties as to this particular vineyard. The evidence would lead one to conclude that the sale of this land and tree in dispute was never contemplated by the parties, for the appellant never shewed it to the respondent's son as being part of the properties sold and the respondent's son says that he did not know this part.

Although the value of the land in dispute is small, this case is one that required careful consideration, and I am afraid some important facts in regard to it have been overlooked by the Magistrate, but that was not due entirely to his fault. It is quite apparent from the title-deeds that the respondent paid £20 to the appellant for this particular piece of land and if the appellant asks for the cancellation of the deed conveying it, naturally he must refund the purchase price that he was paid for it. One is inclined to think that the advocate for the respondent in his pleadings should have counter-claimed for that sum; but he evidently overlooked that aspect of the transaction, or it may be that he was not instructed to do so. At any

rate it appears to me that as the appellant seeks equity in the way of the cancellation of the deed he must do equity by returning the purchase money paid to him for the land comprised in it, and therefore I think he should be ordered to pay back that amount to the respondent.

I also think that as this appeal practically amounts to a rehearing of the whole case the costs up to the hearing of this appeal should be borne equally by both sides. I say so because it was found that there was a mutual mistake. That was a point at issue, and so I think in his pleading to the case, the respondent should have counter-claimed for the return of his purchase money in the event of it being held there was a mistake. In my view if he had done so, he was bound to have succeeded, and then in all probability there would have been no appeal.

This appeal was, however, necessary to shew that the learned President of the District Court erroneously applied a principle of law which had no bearing on the present case, therefore in my view the appellant should have his costs of appeal.

GRIFFITH WILLIAMS, J.: This is an appeal from a judgment of the President, District Courts, Famagusta and Larnaca, allowing an appeal from the Magistrate at Larnaca.

The action arose out of a dispute concerning the inclusion of a piece of land in a sale by appellant to respondent. On or about 17th January, 1929, the plaintiff acting through her husband entered into an agreement with respondent (in the form of a hire-purchase agreement) to sell to him certain pieces of land. These pieces of land were stated to be "field, vineyard and trees situated at localities 'Afentika' and 'Kotsinoyia' or 'Alaminio Road', and at 'Marapsos' at Kophinou", in accordance with title-deeds Nos. 12907, 12844, 12829 of 27th April, 1928. The piece of land whose inclusion is in dispute was the piece under title No. 12844 described as vineyard of 3 donums with an olive tree thereon. On or about the 28th January, 1930, the respondent having performed his part of the agreement by payment the appellant (acting all the time by her husband) by declaration of sale in the Land Registry Office transferred to the respondent the land registered under titles 12907 and 12844. The land under title 12828 was not then transferred; it referred to the piece of land at Marapsos and does not concern us.

On 13th January, 1939, the appellant brought this action against respondent alleging that the property transferred under title 12844 was transferred by mistake,

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that it was not intended to be transferred by the appellant nor had the respondent intended to purchase it, and claiming that the title No. 13392 under which new number it had been registered in the respondent's name should be set aside, and that the property should be re-registered in the name of the appellant. The appellant further alleged that she had in fact previously sold the property in question by an agreement of 28th April, 1927, to one Ahmed Haji Mustafa, and that he had been in possession of the property from that date up to the present without any interference by respondent.

When the case came on for hearing on 3rd February, 1939, before the Magistrate, oral evidence was brought by the plaintiff-appellant to prove that a mistake had been made and that the property held under title 12844 was never included in the sale. No objection seems to have been made at the time to the admission of the parol evidence; but the admissibility or not of this evidence was one of the main questions argued on appeal as the President of the District Court decided the appeal to him on this point alone.

The Magistrate held that the plaintiff (appellant) sold to defendant (respondent) only the vineyard (of 8 donums) known by name Katsari which was included in title 12907, and the field in the locality Marapsos, and that by mutual mistake title-deed No. 12844 was included in the Contract of Sale, both parties believing that it also was in respect of part of the vineyard "Katsari". On this judgment was given for the plaintiff with costs.

From this judgment defendant appealed, and his appeal was allowed by the President of the District Court on the ground that the right to have title-deed No. 13392 (12844) set aside and to have the property re-registered depended upon whether the plaintiff had a right to have the contract of 17th January, 1929, set aside or rectified. He held that the contract of 17th January, 1929, being in writing, parol evidence was not admissible to vary or contradict its terms; that the instrument itself was the only criterion of the intention of the parties; and that the plaintiff was bound by it. From this judgment he has appealed to this Court.

The question of whether or not parol evidence is admissible in this case has been fully argued before us. I am quite satisfied that in cases like the present, where there is a genuine question of mutual mistake, and when an equitable remedy is sought, a Court of Equity would admit oral evidence in order to arrive at the true facts.

In the leading case of *Craddock Bros. Ltd.* v. *Hunt*, 92 L.J. Ch.D. (at p.385), Lord Sterndale, M.R., stated the principle of law thus: "I think I am at liberty to express my opinion that at any rate since the Judicature Act, 1873, rectification can be granted of a written agreement on parol evidence of mutual mistake although that agreement is complete in itself and has been carried out by a more formal document based upon it." The Earl of Birkenhead in *United States of America and another* v. *Motor Trucks Ltd.*, 93 L.J. P.C., p.46, said: "It is, however, well settled by a series of familiar authorities that the Statute of Frauds is not allowed by any Court administering the doctrines of equity to become an instrument for enabling sharp practice to be committed; and indeed the power of the Court to rectify mutual mistake implies that this power may be exercised notwithstanding that the true agreement of the parties has not been expressed in writing."

The effect of these cases is to show that a Court of Equity will when mutual mistake has entered into a contract allow parol evidence to be given of such mistake, and will rectify the written contract (where writing is necessary by the Statute of Frauds) on parol evidence, so as to express the true agreement between the parties. In the present case the parties were not *ad idem* and parol evidence to prove the mutual mistake was admissible.

The preliminary negotiations regarding the sale of these pieces of land were made between Constantinos Christofides, husband of appellant, and Djemal Mustafa, son of respondent. It appears that the vineyard of Katsari which defendant wanted to buy was pointed out by appellant's husband. In his evidence he says, "To-day the vineyard of Katsari is described in 3 title-deeds, but on the day of the declaration I was erroneously thinking that the title-deed which was transferred by mistake formed part of the vineyard of Katsari." And at p. 8 of the record, "I showed these two properties to the defendant 3–4 days before the signing of the contract. He asked to buy the vineyard of Katsari and the fields of Marapsos. When signing contract at defendant's house I did not have title-deeds with me." And again, "I was under the impression that the title-deeds mentioned in the contract referred to the vineyard Katsari."

The defendant-respondent stated in evidence, "I bought from the husband of the plaintiff a vineyard of 11 donums and an evlek in extent and a field of 12 donums in extent at £125." That is to say the respondent intended

to buy, and thought he had bought, two separate pieces of land only—one the vineyard Katsari and one a field at Marapsos. By his evidence respondent did not oppose the appellant's allegation that the piece of land under title 13392 was not intended to be included. What he asserted was that the Katsari vineyard itself was sold to him as a vineyard of 11 donums. In fact the vineyard of Katsari transferred to him only amounted to 8 donums. A little later in his evidence respondent says: "As to the deficit of the vineyard, I disputed with Ibrahim and Sotiri who had leased the vineyard of Elia. I quarrelled with Ibrahim for an olive tree because I alleged that it belonged to me as being within my field."

This shows *clearly* that the defendant thought that the vineyard Katsari he had bought included the vineyard of Elia. Indeed his son Djemal says (at p. 15): "The vineyard of Elia was shown to me as being amongst those (properties) they sold to me." Then "Although I knew that my father had bought the vineyard of Elia, etc.". This vineyard was of *exactly* the same description and dimensions as the one wrongly transferred under title 12844, being 3 donums in extent and having on it one olive tree. Respondent knew that he had been given deeds to cover 11 donums of vineyard. The detached portion of 3 donums was never pointed out to him, but Elia's vineyard joining Katsari vineyard, of which within recent years it had formed part, made that vineyard up to 11 donums, the amount that respondent thought he had bought. Hence his quarrel with Ibrahim and Sotiri. From his evidence it is obvious that respondent never intended to buy the piece of land in dispute; but it is equally clear that he intended to buy and thought he was buying 11 donums of the Katsari vineyard; and that titles for 11 donums of vineyard were actually transferred to him.

Now appellant's husband must have believed that the extent of vineyard the appellant was selling was 11 donums. This amount was entered in the agreement, and title-deeds for this amount were handed over. From his evidence already quoted it appears that he thought Katsari vineyard was 11 donums, and that it was covered by titles 12907 and 12844. As a matter of fact there are two other title-deeds referring to Katsari vineyard besides title 12907, namely 12303 and 12304, and these titles were also later on transferred to respondent without extra payment. But they were in respect of a small piece of land of 3 evleks which though described as vineyard was in fact field with 10 cypress trees growing on it.

From the evidence it is reasonably certain, as Mr. Achilles pointed out to us, that appellant's husband misled the respondent into believing that the appellant owned 11 donums of vineyard at Katsari, and that the vineyard of Elia formed part of it.

It seems to me to have been innocent misrepresentation on the part of appellant that caused the mistake to be made. The transfer of the wrong title to the respondent must, as the Magistrate ordered, be set aside; but this should not be done without due compensation being paid to respondent. The respondent, about 4 years after the transfer of Katsari, himself purchased the vineyard of Elia for the sum of £30. He has never interfered with the possession by Haji Mustafa of the vineyard wrongly registered in his name.

The value placed by appellant on the piece of land transferred under title 12844 (now 13392) was £20. The whole sum of £125 would hardly have been paid by respondent for the properties unless he had thought that the vineyard of Elia was included among them. No doubt he thought he was getting a good bargain, as only 4 years later he had to pay half as much again for that same vineyard. Since an equitable remedy is claimed by appellant to put right a state of affairs for which she, through her agent, was largely, if not chiefly responsible, a Court of Equity could not allow her to make profit out of the mistake at the expense of the respondent. She should not be allowed to have the transfer by her set aside for land respondent paid for, and re-registered in her name without paying compensation to the respondent.

This Court, in granting such compensation to the respondent, cannot take into account the fact that through this mistake he had failed to make the good bargain he hoped by buying the land known as vineyard of Elia at two-thirds its value. All it can do is to order a refund to the respondent of the amount he actually paid for the land wrongly transferred to him. The amount fixed by appellant in the Land Registry Office Declaration of Sale as the amount paid to him in respect of land under title 12844 (now 13392) was £20. I think, therefore, that the transfer of the land under Registration No. 13392 should be set aside and the sum of £20 refunded by appellant to respondent.

Appeal allowed with costs.