

BOVILL,
C.J.
&
SMITH, J.
1884.
—
July 18.

[BOVILL, C.J. AND SMITH, J.]

A. MOZERA

Plaintiff,

v.

THE DIRECTOR OF THE LAND
REGISTRY OFFICE

Defendant.

MANDAMUS—GOVERNMENT OFFICIAL—LAND REGISTRY OFFICER—
OFFICER OF COURT—ORDER FOR SALE OF MORTGAGED PRO-
PERTY—EXECUTION—WRIT OF EXECUTION—CYPRUS COURTS
OF JUSTICE ORDER, SECTIONS 17, 44 AND 46.

In an action claiming that defendant should be ordered to carry out an order of the Court directing the sale of mortgaged property, and which order disposed of a claim in an action for the sale of the property to which the defendant was no party :

HELD : That the action being an action against a Govern-
ment official acting in his official capacity would not lie.

HELD also, that such an order as above mentioned cannot
be regarded as a writ of execution.

APPEAL from the District Court of Larnaca.

The claim in the action was, that the defendant should be ordered to carry out a judgment of the District Court of Larnaca. The facts were, that the plaintiff brought an action against one Hadji Mustapha, claiming the sum of £900 due on a promissory note and also the sale of certain property mortgaged to him as security for the payment of the money.

The Court gave judgment ordering Hadji Mustapha to pay the sum of £900 to the plaintiff and a separate order was at the same time made directing the sale of the mortgaged properties. No writ of execution was issued but a copy of the order was delivered to the Principal Officer of Land Registry in the District of Larnaca and certain portions of the property were sold. The Officer of Land Registry refused to sell the remainder on the ground that it had been registered in the name of Hadji Mustapha by the fraud of one Behaeddin Bey, as arazié mirié, whereas in fact it was part of a vacouf chiftlik and belonged to one Halil Razi Bey.

The plaintiff thereupon brought this action.

The Queen's Advocate, for the defendant, objected that the order of the Court for the sale of the mortgaged property was not an order of execution, and that no order of execution had ever been issued which the defendant could carry out. Evidence was heard as to the circumstances under which the property in question came to be registered as arazié mirié and to be sold to Hadji Mustapha. The facts in connection with this are not material to the present report.

The District Court held that so long as the registration of the property as arazié mirié in the name of Hadji Mustapha subsisted the defendant was bound to carry out the sale. As to the objection that the order for the sale of the mortgaged property was not an order for execution the District Court decided as follows :

“ The Queen’s Advocate did raise a preliminary objection, which was, that the order for sale was not an order of execution because it was appended to the judgment, and also because it was not addressed to the Sheriff of Larnaca. As to the first objection, the original claim was on a promissory note for £900 and also for leave to sell certain immoveable property mortgaged as collateral security for such debt, judgment was given by the District Court for the plaintiff on the promissory note for £900 interest and costs, and an order made at the same time that the mortgaged properties should be sold. Where a substantive claim is made to sell property, we see no reason why, in the absence of any Rule of Court to the contrary, such order for sale should not be appended to a judgment on a debt for security of which the property to be sold has been mortgaged. This order for sale having been made a second order for sale would be superfluous We consider therefore that the order for sale appended to the judgment for £900 was an order of execution. As to the second objection, the Cyprus Courts of Justice Order distinctly says (Sec. 46, sub-sec. E.), ‘ the order for execution in case of immoveable property shall be delivered by the Court to the Officers of the Land Registry Office without transmission through the Sheriff of the District or other executive officer.’ We are of opinion that we should have been acting in breach of the Order in Council if we had directed this Order to the Sheriff. The directions of the Order in Council were exactly carried out as the order for execution was delivered directly to the Land Registry Office. The order is not formally addressed to any one and we consider that as the Order in Council says only that the order for execution is to be delivered to the Land Registry Office, it is unnecessary to address it specifically to the Land Registry Office.”

Judgment was given for plaintiff.

The defendant appealed.

Collyer, Q.A., for the appellant.—The action will not lie ; it must be brought against the Government. Such an action must be brought against the Queen’s Advocate and after the leave of the High Commissioner has been obtained. The Director of Survey was no party to the original action, nor is he an officer of the Court. No writ of execution was issued ; the order spoken of is an order

BOVILL,
C.J.
&
SMITH, J.
—
A. MOZERA
v.
THE
DIRECTOR OF
THE LAND
REGISTRY
OFFICE.
—

BOVILL, C.J. & SMITH, J. If a writ of execution has been issued the defendant could have made a proper return to it by saying that there was no land of the category mentioned in the writ.

A. MOZERA
v.
THE
DIRECTOR OF
THE LAND
REGISTRY
OFFICE.

Rossos, for the respondent, contended that no objection had been taken by the officials of the Land Registry Office to sell some of the property mentioned in the order, and that the defendant was therefore precluded from taking the point that no writ of execution had been issued.

July 19.

Judgment: This is an action claiming execution of a judgment by the defendant (the Director of the Land Registry Office), and the Court below, on grounds stated in their judgment have directed the defendant to execute the judgment. The defendant broadly objects to this that he is no party to the action, and that he is not an officer of the Court and that he is under no obligation to execute a judgment of the Court when no writ of execution has ever been issued from the Court or received by him. A somewhat lengthy argument has been addressed to us with the object of persuading us that the plaintiff's titles are regularly issued, that if there is any error in them this is due to the Land Registry Office and not to any default of the plaintiff and that this same office has power to amend any such error; also that the mortgagor is willing to treat certain property of his which is really *vacouf* as mortgaged and to allow it to be sold in payment of the debt due from him to the plaintiff. With these considerations we have nothing to do, the only question for our decision in this action is, whether the claim in the action is one which can be sustained in a Court of Law—and we do not consider that it is.

The action is brought against Mr. Grant, as Director of the Land Registry Office. Now if it be intended to be an action against the Chief Officer of a Department of Government in his official capacity it is an action which, under Section 44 of the Order in Council, should have been instituted against the Queen's Advocate after permission had been obtained from the High Commissioner, for it is in fact a claim against the Government of Cyprus.

If, on the other hand, this is an action against Mr. Grant in his personal capacity, in this case he has no right or power to execute the judgment, so that in either case the action is wrong in form, and, in our opinion, this question of form is not a mere technicality as it goes to the root of the principles laid down in Section 44 of the Order in Council.

Were we, however, of opinion that the form of the action constituted no impediment to its being heard *we should come to the conclusion that the relief asked for could not be granted.*

Prior to the establishment of the existing Courts, judgments were in all cases handed to the Caimacam or Mutesarif, or, after the days of the occupation, to the Commissioner or High Commissioner, as the case might be, and were carried into effect without any formal order on his affixing his signature in testimony of his approval of the judgment. The Order in Council was designed to amend this procedure and it enacts that the High Commissioner may appoint a Sheriff, and that in default of any such appointment the duties of Sheriff shall in each District be discharged by the Commissioner. It also lays down that the duties of the Sheriff are "to receive writs and processes and to execute the same and make returns thereto." Further it enacts that a judgment may be executed at any time, and in the same manner as heretofore save that an order of the Court directing execution shall be delivered by the Court in case of execution by sale of immoveables to the Officers of the Land Registry Office without transmission through the Sheriff or other executive Officer (evidently meaning the Commissioner in case no Sheriff were created) and immediately after this it lays down what form of order (viz. an order addressed to the Sheriff) shall be sufficient authority for any Officer of Land Registry for doing anything thereby directed to be done.

In the case before us it is contended and it was held by the Court below that the judgment which the plaintiff has obtained against his debtor is a judgment for £900 with an order directing execution added to it. If the Court below intended their judgment in the action between Mozera and his debtor to be to this effect we cannot see that they have carried out their intention. In that action there was a substantive claim for the recovery of a mortgage debt and for the sale of the mortgaged property; and the entire judgment as it stands is necessary to dispose of the claim made in the action. *There is nothing in this judgment to oblige the Sheriff or any other person to carry it out* and any person giving effect to it unless he does so under an order of execution does so at his own peril. We say at his own peril, for the judgment does not enable any stranger to decide what is the property to be sold, nor could any person who was invited to execute the judgment say that the Court had not determined to stay execution of it. No doubt the judgment according to the provisions of the Order in Council may be executed at any time but only under the authority of an order of the Court directing execution of its own judgment. The Director of the Land Registry Office is nowhere said to be an officer of the Court. His intervention or that of his subordinates or representatives is, no doubt, necessary in every case of execution by sale of immoveables; but it does not appear

BOVILL,
C.J.
&
SMITH, J.
—
A. MOZERA
v.
THE
DIRECTOR OF
THE LAND
REGISTRY
OFFICE.
—

BOVILL,
C.J.
&
SMITH, J.
—
A. MOZERA
v.
THE
DIRECTOR OF
THE LAND
REGISTRY
OFFICE.
—

to us that the Court has any power to compel him to carry out a judgment or order in any action to which he is not a party. The Order in Council provides that an order addressed to the Sheriff is sufficient authority for any officer of the Land Registry Office for doing anything thereby directed to be done, and we must assume that if such an order had been made in the action between Mozera and Mustapha it would either have been executed or have been returned to the Court with a statement of the reason why it could not be executed, and on this statement the plaintiff or the Court could have taken any proceedings they might think well to enforce the plaintiff's right. We do not, however, see that the refusal of an officer of the Land Registry to execute a judgment of a Court gives any right to such relief as is claimed in this action. The relief can be practically obtained by applying for a writ of execution in the first action and the action against Mr. Grant is, in our opinion, as frivolous in substance as it is mistaken in form.

We have not dealt in detail with the arguments raised by the advocate for the respondent because, as will be seen from the observations already made, we consider they do not bear on the question at issue in this action. With reference, however, to some of the arguments we will observe that it is no very unusual occurrence that a judgment cannot be executed in full. The fact that Mr. Grant has consented to sell a portion of the land mortgaged without an order of execution does not turn the judgment into an order of execution or preclude Mr. Grant from refusing to incur further responsibility than he has already done in executing a judgment of his own authority.

We do not lose sight of the fact that Mr. Mozera has actually advanced a considerable sum of money and we do not wish to interfere with the principle that there is no wrong without a remedy, but we cannot support Mr. Mozera when he makes a claim which is untenable, and the fact of his having advanced money on mortgage and being unable to recover it does not constitute a wrong unless he did so without notice of the supposed fraud in the title of the land pledged to him. This is a question not before us and which it would not be convenient to raise or dispose of in such an action as the present. If Mr. Mozera be the victim of a fraud it is possible he may lose some of the money he has advanced, but he will not be the first victim of fraud who has suffered a similar loss. Under the circumstances we must reverse the decision of the Court below and dismiss the plaintiff's action and the defendant's costs of this action and appeal must be borne by Mr. Mozera.

Appeal allowed.