[ZEKIA, J. and ZANNETIDES, J.]

NICOS MINA ELLINAS,

of Limassol now of Benoni, South Africa,

Appellant (Plaintiff),

v.

ATHANASIA YIANNI AND OTHERS,

of Ayios Athanassios,

Respondents (Defendants).

(Civil Appeal No. 4230)

1957
Nov. 7
1958
Jan. 11

NICOS MINA ELLINAS
v.
ATHANASIA YIANNI AND OTHERS

Evidence—Certificates of Village Authorities customarily issued for purposes of local enquiries by the Land Registry—Whether admissible in evidence. Evidence Law, Cap. 15, Sect. 3, Sect. 4—Inadmissible on the principle of hearsay where the facts recorded therein are not within the personal knowledge of those who issue the certificates—In a proper case certificates may be received in evidence when the Village Authority are personally familiar with the matters recorded and could not be called as witnesses for some good reason under the Evidence Law, Cap. 15 Sect. 4 (2)—Inadmissible document received in evidence without objection—Duty of the trial Court and, in default, of the Court of Appeal to reject it.

Practice—Appeal—Misreception of evidence—New trial—When new trial will be ordered—Civil Procedure Rules, 0.35, r.9. Costs. Costs disallowed to the successful Appellant because objections were not taken to the reception of the aforesaid two certificates—Observations of the Court as to receiving in evidence files in bundle of any department, including files of Law Courts.

The Appellant brought an action in the District Court of Limassol claiming that he was the owner of a plot of land with a house and trees standing thereon. In support of his claim he relied on uninterrupted and undisputed adverse possession of the land in question. The trial Court found that the Appellant built the house and planted the trees on the land in question by the licence of his mother, Defendant No. 8. Consequently, it held that the claim of adverse possession failed and dismissed the action. In arriving at its finding the Court was greatly influenced by two certificates given by the Village Authority of Ayia Zoni as it is usually done by the village Authorities for the purpose of the customary local enquiries held by the Land Registry. The two certifi-

cates in question were put in evidence by the Defendants without objection on behalf of the Plaintiff. The facts recorded therein were not within the personal knowledge of the Village Authority concerned. Sections 3 and 4 of the Evidence Law, Cap. 15, read as follows :

"*Section 3.* Save in so far as other provision is made in this Law or has been or shall be made in any other Law in force for the time being, every Court, in the exercise of its jurisdiction in any civil or criminal proceeding, shall apply, so far as circumstances may permit, the Law and rules of evidence as in force in England on the 5th day of November, 1914.

Section 4. (1) In any civil proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied ; that is to say—

(*a*) if the maker of the statement either—

(*i*) had personal knowledge of the matters dealt with by the statement ; or

(*ii*) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters ; and

(*b*) subject to sub-section (2) of this section, if the maker of the statement is called as a witness in the proceedings :
Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.

(2) In any civil proceedings, the Court may, at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order such a statement as is mentioned in sub-section (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence—

(*a*) notwithstanding that the maker of the statement is available but is not called as a witness ;

(*b*) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a

true copy in such manner as may be specified in the order or as the Court may approve, as the case may be."

Reversing the judgment of the District Court, the Supreme Court :

Held: (1) Certificates issued by Village Authorities for the purposes of the customary local enquiries carried out by the Land Registry, although useful for departmental purposes, cannot be held admissible in evidence unless they comply with the provisions of Section 4 of the Evidence Law, Cap. 15, (ante) or they fall under one or the other class of documents receivable in evidence, viz. (a) under the English Law and rules of evidence in force in England on the 5th November 1914 (see Section 3 of the Evidence Law, Cap. 15, *ante*) or (b) under the special provisions of a particular Law.

(2) The two certificates of the Village Authorities attached to Exhibits 2 and 5 respectively are inadmissible in evidence. They do not fall under the class of documents admissible in evidence either under the Evidence Law, Cap. 15, Section 4, or under the Law and rules of evidence in force in England.

(3) Section 4 of the Evidence Law, Cap. 15, (ante) deals with the admissibility of documentary evidence as to the facts in issue recorded therein and with the conditions attached before such documents are let in :

(A) The facts recorded in those certificates are not within the personal knowledge of those who issued them. Consequently, they do not come within the class of documents contemplated in Section 4 (1) (a) (i). They are, so far, inadmissible in evidence as being hearsay.

(B) Nor can they be regarded as certificates issued by public officers bound by Law to record facts in the course of their duties. In the first place Mukhtars and Azas cannot be said to be public officers and the law which empowers them to give certificates of movable or immovable property did not constitute them as public officers for the purposes of making such certificates. In the relevant laws nothing is said as to the evidential value, if any, to be attached to such certificates. Undoubtedly Mukhtars' certificates play a great part in the local enquiries carried out by the Land Registry Officials and consequently are material for the purpose of Land Registration and for the issue of certificates of registration of immovable property. However facts and events which might be embodied in such certificates are not matters which a Mukhtar or Aza is by virtue of his office bound to record. If there was an informal division of property among persons entitled to, or long undisputed possession of land by somebody, or unauthorised building by some person, these are not matters which a Mukhtar or Aza is bound to record ; consequently, as to such matters his certificate, being extra judicial, is merely an unsworn statement of a private person and will be, therefore, rejected.

(4) Although the aforementioned certificates were received in evidence without any objection by the Plaintiff - Appellant, still the lower Court ought to have rejected them and having failed to do so, this Court will reject them.

See : *Jacker* v. *International Cable Co.*, 5, T.L.R. 13 ;
cp. *Miller* v. *Babu Madho Das*, L.R. 23 Ind. App. 106 ;
and *Phipson on Evidence*, 9th edition p. 711.

(5) In the present case it is clear that the District Court accepted the contents of the certificates attached to exhibits 2 and 5, as evidence of the facts in issue. And inasmuch as the misreceived evidence appears to have immensely influenced the District Court, a new trial will be ordered.

Thrasyvoulos Ioannou and others v. *Papa Christoforos and others*, Privy Council Appeal No. 46 of 1950, reported in 19 C.L.R. 72 at p. 79, *followed*.

(6) There will be no order as to costs mainly in view of the fact that objections were not taken by the Plaintiff - Appellant to the reception of the evidence held to be inadmissible.

Cases referred to :

Jacker v. *International Cable Co.*, 5. T.L.R. 13.

Miller v. *Babu Madho Das*, L.R. 23, Ind. App. 106.

Thrasyvoulos Ioannou and others v. *Papa Christoforos Demetriou and others*, Privy Council Appeal No. 46 of 1950 reported in 19 C.L.R. 72.

Per curiam. (1) In a proper case certificates of the Village Authorities may be received in evidence when the Village Authority concerned are familiar with the matters recorded therein and could not be called as witnesses for some good reason under the Evidence Law, Cap. 15, Section 4 (2) (*ante*).

(2) Courts should be very chary in receiving files of any Department, including files of Law Courts, without specific reference to a particular document or documents.

(3) Undoubtedly documents might be received for multiple purposes : a document might also be admissible for one and inadmissible for other purposes. It is the duty of the trial Court in receiving such documents to ascertain for which purpose they have been admitted and to give weight and consideration to such documents only for, and to the extent of, the purpose for which they have been admitted.

APPEAL by the Plaintiff against the judgment of the District Court of Limassol (Zenon P.D.C. and Kakathymis D.J.), dated the 18.6.57 (Action No. 669/56) dismissing Plaintiff's claim for an order of the Court declaring him the owner of a certain piece of land with a house, trees and vineyards standing thereon at Ayia Zoni quarter, Limassol, the reference in the L.R.O. books being plan 54/58 2.II plot 103/5.

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ATHANASIA YIANNI AND OTHERS

Sir Panayiotis Cacoyiannis for the appellant.
G. Clerides with Chr. Talarides for the respondents.

Cur. Adv. Vult.

The facts sufficiently appear in the judgment of the Court read on the 11th January 1958 by:

ZEKIA, J.: The appellant-plaintiff, by his claim sought an order of the Court declaring him the owner of a certain piece of land with a house, trees and vineyards standing thereon at Ayia Zoni quarter, Limassol, the reference in the L.R.O. books being plan 54/58 2.11 plot 103/5.

The appellant alleged that he acquired the said piece of land by informal sale in 1934 and he built on it a house consisting of three rooms and kitchen and planted also trees and a vineyard, and he, uninterruptedly and without interference, possessed the said property up to the date he brought this action.

The respondents - defendants disputed the claim of the appellant and alleged that the mother of the appellant was entitled only to a share in the land and property claimed by him (the appellant) and that the remaining portion belonged to them and to some others, who do not appear as parties in the action, in their capacity as heirs of a certain Eleni Christofi Moustakoudi. The land in dispute is not and was not registered in the name of the said Eleni and the Land Registry records are of very little help in ascertaining the rights of the persons involved in the proceedings. The Court dismissed the claim of the appellant and found that it was by licence of his mother, defendant 8, who did not enter an appearance in the action, that he, appellant, built the rooms and planted trees on the land in question and it was for the benefit and use of her family that the house was built and the trees were planted. We read from the judgment of the lower Court (p. 37): "From the evidence before us we are satisfied that Defendant 8, Mariccou Yianni, gave a licence to her son, the plaintiff, who was about to get married, to build a room there in order to live in it with his wife, in that part of the field in which she Mariccou, had a share from her mother, Eleni Moustakoudi. Our belief is based on the fact that the plaintiff's sisters, Stella and Irene, made use of that house—the one

while the wife of the plaintiff was there and the other who moved in after the plaintiff and his family had left—so, to our mind, it was considered as a family house, built by the licence of the mother, for the use of her children, and this is strengthened by Exhibit 2 and by the village Certificate attached to Exhibit 5; the Village Authorities certified that all the buildings were erected by Defendant 8; that she was in possession up to the time those certificates were issued—that is to say, up to the 28.4.53, and that she planted the vines and the trees."

It is evident from the part of the judgment quoted that the trial Court was influenced by Exhibits 2 and 5 produced before them. Both exhibits contain certificates of the Village Authorities of Ayia Zoni quarter, Limassol, although the name of the Mukhtar and that of one of the Azas attesting the certificate are not legible, yet it is clear that the Mukhtar and one of the Azas who signed both certificates are the same persons. Exhibit 2 consists of an agreement of division of properties among persons purported to be interested. The Mukhtar and Aza certified the agreement of partition reached. Parties to the agreement are not parties in the present proceedings. The plots divided among the interested persons do not include plot 103/5 subject matter of the present action. The certificate does however refer incidentally to this plot as being property left to a certain Eleni Christofi Moustakoudi of Ay. Phylaxis by virtue of an informal division which took place 50 years ago. Exhibit 5 contains a certificate of the Village Authority and letters addressed by certain of the defendants in this case to the Land Registry Office and also the reply received from the Land Registry. The certificate in question is headed as follows:

> "We the undersigned Mukhtar and Azas of Ay. Zoni, Limassol, certify the following on the strength of evidence of the following reliable persons."

The certificate then proceeds to state that plot 103/5 was inherited by Mariccou Yianni of Ayios Athanasios by inheritance and that she possessed without dispute the said piece of land since the year 1938 and that the said Mariccou built rooms, wash-room, etc., on the said land and also

planted part of the said land with trees and vineyards in the year 1938. Mariccou Yianni is the mother of the appellant and she is defendant No. 8 in the action. Both Exhibits were produced from the custody of the Land Registry which, in pursuance of local enquiries held on 8.11.52 and 28.4.53 respectively, had obtained the certificates in question. From the contents of both certificates it appears that the Village Authorities i.e. the Mukhtar and the Azas of Ay. Zoni quarter, Limassol did not possess personal knowledge of the events and facts stated in both certificates. What they stated about plot 103/5, subject matter of the action, was what they learnt from persons named, and whom they described as reliable, at the end of their certificate. Neither the appellant nor any person who might be called as his privy in estate has taken part in the agreement of partition included in Exhibit 2 or in the local enquiry which resulted with the issue of the certificate included in Exhibit 5. The local enquiry which resulted in the certificate included in Exhibit 5 was initiated, it appears, by an application made by Mariccou, the mother of the appellant. The claim of the appellant, however, is not based on a right alleged to have been derived from his mother.

It is abundantly clear that the trial Court were affected in their decision by the contents of these two exhibits which, in our view, were wrongly admitted in evidence. In the first place the Courts should be very chary in receiving in evidence files of any department, including Law Courts, without specific reference to a particular document or documents. A file might indeed contain matter inadmissible and/or extraneous to the issues in dispute and the practice of producing files or other documents in bundle should be avoided unless all the documents contained are shown to be relevant and admissible for the purposes of the trial.

Village certificates prepared by a local inquiry clerk and signed by the Village Authorities, although useful for departmental purposes, are not admissible in evidence unless they conform to section 4 of the Evidence Law, Cap. 15, or they fall under one or the other class of documents receivable in evidence i.e. (a) under the English Law and rules of evidence, or (b) under the special provisions of a particular Law.

Section 4 of the Evidence Law relates to the admissibility of documentary evidence as to the facts in issue and to conditions attached before such documents are let in. What the Mukhtar and Azas have stated in their certificate in a proper case might be used as evidence provided the persons constituting the Village Authority are personally familiar with the facts stated and could not be called as witnesses. they being either dead or unfit or unable to attend the Court for some good reason. The Court is empowered under sub-section 2 of the said section, having regard to all the circumstances of the case and if satisfied that undue delay or expence would otherwise be caused, to dispense with the attendance of the maker of the statement embodied in the document. Apparently the preconditions for the admission of such statements do not exist in this case.

These certificates on the other hand cannot be regarded as certificates issued by public officers bound by law to record facts in the course of their duties. In the first place Mukhtars and Azas cannot be said to be public officers and the law which empowers them to give certificates of movable or immovable property did not constitute them as public officers for the purpose of making such certificates. In the relevant laws nothing is said as to the evidential value, if any, to be attached to such certificates. Undoubtedly Mukhtars' certificates play a great part in the local enquiries carried out by Land Registry Officials and consequently are material for the purpose of Land Registration and for the issue of certificates of registration of immovable property. However facts and events which might be embodied in such certificates are not matters which a Mukhtar or Aza is by virtue of his office bound to record. If there was an informal division of property among persons entitled to, or long undisputed possession of land by somebody, or unauthorised building by some person or persons, these are not matters which a Mukhtar or Aza is bound to record and, to quote Taylor, (p. 1123 12th Editon) "as to matters which he was not bound to record. his certificate. being extra judicial, is merely the unsworn statement of a private person. and will therefore be rejected." Undoubtedly, documents might be received for multiple purposes; a document might also be admissible for one and inadmissible for other purposes. It is the duty of the trial Court in receiving such documents

to ascertain for which purpose they have been admitted and to give weight and consideration to such documents only for, and to the extent of, the purpose for which they have been admitted. In the present case it is clear that the trial Court accepted the contents of these exhibits as evidence of the facts in issue and was greatly influenced thereby in its decision. "If inadmissible evidence has been received (whether with or without objection), it is the duty of the Judge to reject it when giving judgment; and if he has not done so, it will be rejected on appeal, as it is the duty of Courts to arrive at their decisions upon legal evidence only (*Jacker* v. *International Cable Co.*, 5 T.L.R., 13; cp. *Miller* v. *Babu Madho Das*, L.R., 23 Ind. App. 106" (*see* Phipson on Evidence, 9th Edition, p. 711).

O. 35 r. 9 of the Civil Procedure Rules empowers this Court to order a new trial. By O. 58 r. 10 of the Rules of the Supreme Court, the Court of Appeal is empowered to order a new trial if, owing to misreception of evidence, substantial wrong or miscarriage has been occasioned to either of the parties. In *Thrasyvoulos Ioannou and others* v. *Papa Christofi os Demetriou and others* reported in 19 C.L.R., 72, the Privy Council, after declaring that a document received in the trial Court which recorded the result of a survey or inquiry carried out under lawful authority by a Land Registry official was not admissible as a public document under section 4 of Law 14 of 1946, set aside the decisions of the trial Court and the Court of Appeal of Cyprus and remitted the action for a new trial to the District Court. Earlier in their judgment they said at p. 79: "Their Lordships have carefully considered the judgment of the District Court and the Supreme Court from this angle but have reached the clear conclusion that this document played a large part in the determination of the questions of fact and that it is, to say the least, open to considerable doubt whether in the absence of this document the trial Court would have arrived at the same conclusion. If, therefore, this document was not properly received in evidence a new trial cannot be avoided." For similar reasons, namely, due to wrongful admission of the documents included in exhibits 2 and 5 which documents, in the opinion of this Court, immensely influenced the trial Court in their decision, the judgment of the trial Court

should be set aside and the action should be remitted to the District Court for a new trial by a Court preferably composed of different judges.

It has transpired during the proceedings at the trial of this action that another action bearing No. 152/56 relating to the same subject matter is pending before the Limassol District Court. Some of the defendants in this action appear as plaintiffs in the said action and defendant No. 8 in the present action is a defendant in that action. We wish to draw the attention of the Court and the parties interested to Order 14, Rule 2, of the Civil Procedure Rules with a view to consolidate these two actions. If consolidation for one reason or another cannot be effected it is desirable that both actions should be heard one after the other by the same Court.

Each party should bear its own costs here and in the Court below. This is chiefly because objections were not taken to the reception in evidence of the certificates just mentioned.

Appeal allowed. New trial ordered. Each party to bear its own costs here and in the Court below.