[ZEKIA, J. and ZANNETIDES, J.],

1959
June 30
Oct. 31

ELENI
PANAYIOTOU
IORDANOU
v.
POLYCARPOS
NEOPHYTOU
ANYFTOS

ELENI PANAYIOTOU IORDANOU,
Appellant (Defendant),

v.

POLYCARPOS NEOFYTOU ANYFTOS,
Respondent(Plaintiff).

(Civil Appeal No. 4285).

Contract—Breach of—Sum named as damages—Or as penalty—In either case no greater amount can be awarded for the breach—Other distinct causes of action unaffected—The Contract Law, Cap. 192, s. 74(1).

Sale of land—By the co-owners—Sum stipulated as damages or penalty in the contract—Refusal by one of them to transfer his share—In the absence of express provision in the contract to the contrary, such co-owner is liable to pay a sum up to the full amount stipulated therein, and not merely an amount proportionate to his share in the property.

Sale of land—Specific performance—It can be ordered only under the Sale of Land (Specific Performance) Law, Cap. 238—The Contract Law, Cap. 192, section 76, not applicable to cases of sale of land—Section 76 (2), saving clause, of Cap. 192 (supra).

Immovable property—Sale of land jointly held to outsiders—Rights of co-owners—Option to purchase—Whether option open to co-owner who is one of the vendors—The Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, section 24.

Immovable property—Mistake by Director—Correction of—Procedure—Cap. 231 (supra) section 59.

Practice—Issue not pleaded—The Courts should not entertain such issue.

The appellant was one of the co-owners, five in number, of certain pieces of land. In the year 1951 all of them agreed to sell those lands to the respondent by two contracts in writing. Amounts of £10 and £15, respectively, were named in the contracts by way of pre-estimated damages in case of breach by any of the contracting parties. In 1955 four of the co-owners transferred their respective shares in the properties to the respondent and title-deeds relating to the 4/5ths of the lands in question were issued accordingly in the name of the respondent: The appellant however, declined to transfer her share (viz. 1/5) and, instead, sought to exercise her purported right of option to purchase the shares of the other vendors pursuant to section 24 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, by depositing the purchase price with the Land Registry Office. But she was not allowed to do so as there was no advertisement

of the sale as provided by section 24 (1) (b) of Cap. 231 (*supra*). On February 6, 1957, the Director gave notice to the respondent under section 59 of that Law to the effect that the registration in the latter's name, referred to hereabove, of the 4/5ths of the lands in dispute was made by mistake, (apparently because the provisions of section 24 had not been complied with), and that he, the Director, intended to correct the mistake by the cancellation of the title-deeds already issued to the respondent. As the latter filed no objection within the prescribed period of thirty days after service of the said notice on him, the title-deeds were ultimately cancelled. It appears that shortly after the signing of the contracts in 1951 the respondent was given possession of the lands in dispute and continued to possess them wholly since that date. In the meantime the respondent incurred considerable expense in improving the lands, the value of which went up so that at time of the trial the lands in question, bought for the price of forty five pounds, were worth nearly one thousand pounds.

The respondent brought in 1957 the present action against the appellant claiming: (a) specific performance in respect of the 1/5th share in the name of the defendant-appellant, (b) if that was impossible, two hundred pounds damages for breach of contract. The defendant, *inter alia*, claimed that she was not liable, in view of section 74 (1) of the Contract Law, Cap. 192, (the sub-section is set out in full in the judgment of the Court, *post*) to pay more than her share (viz. 1/5th) in the sums so stipulated in the contracts (i.e. £10 and £15, respectively). She further counterclaimed that she was entitled under section 24 of Cap. 231 (*supra*) to exercise the right of option to purchase the shares of the other vendors at the agreed price.

The trial Judge dismissed the claim for specific performance inasmuch as the provisions of section 2 of the Sale of Land (Specific Performance) Law, Cap. 238 had not been complied with, holding that section 76 of the Contract Law, Cap. 192 has no application to cases of sale of land. With regard to the claim for damages, the trial Judge held that he was not bound by the stipulated sum which, in his judgment, was not a genuine pre-estimate of damages and, relying on certain authorities (*v. post* in the judgment), awarded damages over and above the sum named, assessed at £183, that amount being the compensation payable to the plaintiff-respondent by the defendant-appellant for the latter's share (*viz.* 1/5th). The learned Judge made also a declaration, although the issue was never pleaded, that the cancellation of the title-deeds in the name of the plaintiff-respondent by the Director, referred to above, was *ultra-vires* and of no effect. Lastly, the trial Judge dismissed the counterclaim whereby the appellant-defendant claimed to exercise a right of option to purchase the shares of the other co-owners under section 24 of

Cap. 231 (*supra*), on the ground that she,—the appellant-defendant, being one of the vendors must be taken to have consented to the sale.

On appeal by the defendant, it was argued on her behalf, *inter alia*, that the trial Judge could not award damages: (a) in excess of the stipulated sum and (b) in excess of her share in the properties viz. in excess of the 1/5th of the stipulated sum, and that she was entitled to the option to purchase the shares of the other co-owners under section 24 of Cap. 231 (*supra*).

Held: reversing the judgment of the trial Court,—

(1) It is clear from the wording of section 74 (1) of the Contract Law, Cap. 192 (Note: That part of the section is set out in full in the judgment of the Court, *post*) that whether the sums stipulated are in the nature of a genuine pre-estimate of damages or in the nature of penalty, that makes no difference as to the discrection of the Judge to award as reasonable compensation to the party entitled thereto a sum not exceeding the amount stipulated. No doubt when the amount named in the contract is in the nature of pre-estimated damages, that will carry weight with the Judge in fixing the amount of damages but in either case a Court is precluded from awarding damages beyond and in excess of the amount named in the contract. There might be other distinct causes of allowing damages in a transaction but the present case is clearly one of estimated damages for the breach of certain contracts in which the amount has been fixed.

Polykarpos v. Despina Zenonos 18 *C.L.R.* 133, *distinguished; Tseriotis v. Chryssi Christodoulou* 19 C.L.R. 216, *followed.*

(2) In some old cases in England where the amount fixed in the contract was merely penal the plaintiff was not precluded from seeking damages for breach of contract and recovering a greater sum than the amount of the penalty named. See Chitty on Contract, last edition, at page 430. But the relevant section in our Contract Law makes no distinction between damages pre-estimated and penalty in respect of limiting the liability of the contracting parties at the figure stated in case of a breach.

The specific sum mentioned whether in the nature of pre-estimated damages or penalty is the maximum amount payable when the contract is broken.

(3) No doubt the respondent-plaintiff after having entered into possession, relying on the performance of the contracts, incurred considerable expenses for improving the lands in question. Unless there is an additional distinct cause of action enabling the prospective purchaser to reimburse himself of his expense made on the lands under contract, over and above or in addition to the sum stipulated for da-

mages in the said contract, we do not think that the respondent was entitled to compensation exceeding the sum fixed in the contracts. Such distinct cause of action was not pleaded and damages under a separate cause were not claimed.

(4) The respondent is entitled, however, to the whole of the sum fixed in the contract for an anticipated breach. Unless all co-owners act together a transfer in the name of the purchaser cannot be effected. A co-owner has got the right to purchase the shares of the other co-owners who agree to sell their shares to an outsider, thus rendering possible the transfer of the land in the name of the purchaser. Unless the contract of sale expressly apportions the sum stipulated as damages in case of a breach between co-owners we are of the opinion that any of the co-owners who does not keep to his promise in such contracts is liable to pay the full amount if the full amount mentioned in the contract represents a reasonable compensation in the circumstances of the case.

(5) The result is that the damages awarded are hereby reduced to the sums stipulated in the contracts sued on (i.e. to £25).

(6) The trial Court made a declaration that the cancellation by the Director of the Land Registry of the title-deeds in the name of the plaintiff-respondent was *ultra vires* and of no effect. Without going into the merits of the arguments and into the powers of the Director to cancel existing registrations we would like to point out that this question was not, at the close of the pleadings, in issue and that the Director as an interested party was not joined or notified of such proceedings. There was nothing in the pleadings and no amendment was sought in order to add an issue on the validity of the order of the Director to cancel his title deeds relating to the 4/5ths of the properties involved in the case.

A Court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest.

Held, affirming, though not on the same grounds, the judgment of the trial Court, -

The appellant-defendant claimed the right of option under section 24 of Cap. 231 (*supra*) to purchase the shares of the other co-owners at the price of the contract. The Court below dismissed her claim on the ground that she being one of the vendors must have been taken to have consented to the sale of the shares of the other co-owners to a stranger. Again without going into the merits of this argument we do not think that the appellant can press this part of her claim. It is highly questionable whether the pre-conditions to exer-

cise a right of option under section 24 of the Immovable Property etc. Law, Cap. 231 (*supra*) exist in this case.

Appeal allowed to the extent as aforesaid. The judgment of the Court below to be varied accordingly. Each party to pay his own costs of the appeal and the appellant-defendant to pay the costs of the respondent in the trial Court, on the scale between £25—£50.

Cases referred to:

Polykarpos v. Despina Zenonos 18 C.L.R. 133.

Tseriotis v. Chryssi Christodoulou 19 C.L.R. 216.

Per curiam: As to the claim for specific performance (*v. ante*) the trial Judge was right in holding that inasmuch as the provisions of section 2 of the Sale of Land (Specific Performance) Law, Cap. 238 had not been complied with, no order for specific performance could be granted. It is to be noted that the saving clause in section 76 (2) of the Contract Law, Cap. 192, leaves unaffected the former Law, Cap. 238 (*supra*).

Semble: In cases of sale of land jointly held to outsiders, a co-owner, who is one of the vendors along with other co-owners, cannot avail himself of the provisions of section 24 of the Immovable Property (Tenure, etc., etc) Law, Cap. 231 (*supra*) to purchase the shares of such other co-owners.

Appeal

Appeal by the defendant against the judgment of the District Court of Nicosia (Charilaos Pierides, D.J.), dated April, 7, 1959 (in Action No. 486/57), whereby the plaintiff was awarded damages for breach of contract in an action by which he was claiming : (a) an order directing the defendant to transfer to him the 1/5th share in certain pieces of land (b) £200 damages for breach of contract.

G. Constantinides for the appellant

A. Emilianides for the respondent.

Cur. adv. vult.

The facts sufficiently appear in the judgment of the Court, delivered by:—

ZEKIA, J. : The appellant in this case was one of five co-owners of certain pieces of land in the village of Syrianokhori which, under two contracts of sale, were sold to the respondent in the year 1951. The four co-owners transferred their shares in the properties in the name of the respondent sometime in the year 1955. The appellant, however, declined to transfer her share and instead sought to exercise her right to purchase the shares of the other vendors by virtue of section 24 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231.

The Land Registry proceeded with the registration in the name of the respondent of the 4/5ths share in the lands in question apparently without complying with section 24 of the said Law. The appellant applied to the Land Registry with a view to buy the shares of the co-owners by depositing the purchase price with the Land Registry Office. She was not allowed to do so as there was no advertisement of the sale as per section 24 (1) (b).

On the 6th February, 1957, the Director gave a notice to the plaintiff under section 59 of the Law (Cap. 231) to the effect that the registration in his name of the 4/5ths in the lands in dispute was effected by mistake and that he, the Director, intended to correct the mistake by the cacellation of the title-deeds in the plaintiff's name. The plaintiff did not file any objection within the prescribed 30 days after the service of the said notice on him and the Land Registry Authorities cancelled the title-deeds, three in number, in plaintiff's name.

The respondent-plaintiff brought the present action against the appellant-defendant claiming (a) specific performance in respect of 1/5th share in the name of the defendant-appellant by the transfer of the said share in the name of the plaintiff ; (b) if that was impossible the sum of £200 as damages.

The defendant had denied that she signed any contract of sale in respect of her share in the three pieces of land and also she claimed that at any rate she was not liable to pay more than her share in the stipulated amounts in the said contracts of sale ; £10 and £15 were stipulated as damages in the said two contracts respectively.

The parts of the contracts relating to the purchase price and to the stipulated sums, are quoted hereunder:

"*Selling price :* The whole was agreed by both parties at £20 to be paid by the purchaser as follows : £15 on the signing of the present contract and the balance will be paid on the day of the registration of the above land in the purchaser's name, which will be effected in six months' time from to-day at the latest.

Terms : If any of the contracting parties breaks the present contract he is bound to pay £10 to the other party as damages."

"*Selling price :* Both parties agreed £25 for the two plots which will be paid by the purchaser as follows: £22 on the signing of the present contract and the balance on the date of the registration after deducting the costs of issuing the title-deeds etc. The registration of the above lands will take place at the latest within six months from

to-day. If any of the contracting parties breaks any term of the present contract he will be bound to pay £15 damages to the other party".

The learned trial Judge, having heard the evidence, found that the defendant with full knowledge signed the contracts of sale in question and she was bound by them. There is no doubt that there was ample evidence before the Court for it to come to that conclusion.

The claim for specific performance was again examined by the learned Judge, who correctly found that inasmuch as the provisions of section 2 of Cap. 238 were not complied with no order for specific performance could be granted. It is to be noted that the saving clause in section 76 (2) of the Contract Law Cap. 192 leaves unaffected the Sale of Land (Specific Performance) Law (Cap. 238).

The learned Judge then examined (a) the question of damages and (b) the validity of the cancellation of the registration of the three pieces of land in the name of the plaintiff.

From the pleadings and the evidence it appears that after the signing of the contracts of sale the plaintiff-purchaser was given possession of the lands in dispute and he possessed them wholly since that date. He incurred considerable expenses in improving the land by the removal of stones, levelling, planting of trees, fertilising, etc. In the meantime the value of the land went up and as a result the three pieces of land which were bought for £45 were assessed at the time of the trial as being worth nearly £1,000, and the compensation payable to the plaintiff for one share i.e. 1/5th was ascertained at £183 and the defendant was adjudged to pay as damages to the plaintiff the said sum.

The appellant contends that the trial Judge could not award damages in excess of the stipulated sum and also in excess of her share in the stipulated sum. The learned Judge on the authorities he cited found that he was not bound by the stipulated sum which was not a genuine pre-estimate of damages and that he could award damages over and above the amount stated.

The relevant section is 74 (1) of the Contract Law which reads:

"74 (1). When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable

compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

A stipulation for increased interest from the date of default may be a stipulation by way of penalty.".

It is clear from the wording of the section itself that whether the sums stipulated are in the nature of a genuine pre-estimate of damages or in the nature of penalty that makes no difference as to the discretion of the Judge to award as reasonable compensation to the party entitled thereto a sum not exceeding the amount stipulated. No doubt when the amount named in the contract is in the nature of pre-estimated damages, that will carry weight with the Judge in fixing the amount of damages but in either case a Court is precluded from awarding damages beyond and in excess of the amount named in the contract. There might be other distinct causes of allowing damages in a transaction but the present case is clearly one of estimated damages for the breach of certain contracts in which the amount has been fixed. The learned Judge referred to the case of *Polykarpos v. Despina Zenonos*, 18 C.L.R. 133. In that case Griffith Williams, J. stated at p. 134 :

"In the present case both engagements, the verbal and the written, are simple contracts and merger therefore fails to materialize. Furthermore the two agreements under consideration are vastly different in character. The mutual promises of marriage are the contract to marry ; the dowry document is the contract in consideration of and conditional upon marriage actually taking place".

But in that case there were separate and distinct causes of action, namely, (a) damages flowing from a breach of contract to marry i.e. damages for breach of promise to marry and (b) damages for breach of contract in consideration of marriage.

Christodoulos Nicola Tseriotis v. Chryssi Christodoulou reported in 19 C.L.R. 216 is more to the point. There it was held that—

"where, under the Contract Law sec. 74 a specific amount is to be paid in case of breach, no question arises whether compensation is liquidated damages or penalty. The Court is at liberty to grant such sum by way of compensation as is reasonable".

Hallinan, C.J., after comparing our section with the corresponding section 74 of the Indian Contract Law stated (*loc. cit.* p. 217) :

"Since then we are of opinion that this sum of £200 mentioned in the agreement between the parties is not

an alternative agreement but is intended to be a sum named in the contract as an amount to be paid in the case of breach, we consider that the Court is at liberty to grant such sum by way of compensation as is reasonable, not exceeding £200".

In some old cases in England where the amount fixed in the contract was merely penal the plaintiff was not precluded from seeking damages for breach of contract and recovering a greater sum than the amount of the penalty named. See Chitty on Contract, last edition, at page 430. But the relevant section in our Contract Law makes no distinction between damages pre-estimated and penalty in respect of limiting the liability of the contracting parties at the figure stated in case of a breach.

The specific sum mentioned whether in the nature of pre-estimated damages or penalty is the maximum amount payable when the contract is broken. No doubt the respondent-plaintiff, after having entered into possession, relying on the performance of the contracts, incurred considerable expenses for improving the lands in question. Unless there is an additional distinct cause of action enabling the prospective purchaser to reimburse himself of his expense made on the lands under contract, over and above or in addition to the sum stipulated for damages in the said contract, we do not think that the respondent was entitled to compensation exceeding the sum fixed in the contracts. Such distinct cause of action was not pleaded and damages under a separate cause were not claimed.

The respondent is entitled, however, to the whole of the sum fixed in the contract for an anticipated breach. Unless all co-owners act together a transfer in the name of the purchaser cannot be effected. A co-owner has got the right to purchase the shares of the other co-owners who agree to sell their shares to an outsider, thus rendering possible the transfer of the land in the name of the purchaser. Unless the contract of sale expressly apportions the sum stipulated as damages in case of a breach between co-owners we are of the opinion that any of the co-owners who does not keep to his promise in such contracts is liable to pay the full amount if the full amount mentioned in the contract represents a reasonable compensation in the circumstances of the case.

The trial Court made a declaration that the cancellation by the Director of the Land Registry of the title-deeds in the name of the plaintiff-respondent was *ultra vires* and of no effect. Without going into the merits of the arguments and into the powers of the Director to cancel existing registrations we would like to point out that this question was not, at the close of the pleadings, in issue and that the Director as an interested party was not joined or notified of such proceed-

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ings. There was nothing in the pleadings and no amendment was sought in order to add an issue on the validity of the order of the Director to cancel his title-deeds relating to the 4/5ths of the properties involved in the case.

A Court of law has to confine itself to the issues as appearing at the close of the pleadings or properly added to at the date of the hearing and not take up at the trial other issues which the evidence of a particular witness might suggest.

The appellant also claimed the right of option to purchase the shares of the other co-owners at the price of the contract. The Court below dismissed her claim on the ground that she being one of the vendors must have been taken to consent to the sale of the shares of the other co-owners to a stranger. Again without going into the merits of this argument we do not think that the appellant can press this part of her claim. It is highly questionable whether the pre-conditions to exercise a right of option under section 24 of the Immovable Property. etc. Law, Cap. 231 (*supra*) exist in this case.

The result is that the damages awarded against the defendant-appellant are hereby reduced to £25.

Appeal on counterclaim dismissed. Each party to pay his own costs of the appeal and the appellant-defendant to pay the costs of the respondent in the trial court, on the scale between £25 - £50.

The judgment of the Court below to be varied accordingly.

Appeal allowed to the extent as aforesaid. Judgment of the trial Court to be varied accordingly.