

SMITH, C.J.
&
MIDDLE-
TON, J.
1894
April 23

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

MOLLAH SALIH,

Plaintiff,

v.

ELIA PAPA PHILIPPO,

Defendant,

PROCEDURE — EXECUTION — IMMOVEABLE PROPERTY — JUDGMENT CREDITOR CLAIMING THAT JUDGMENT DEBTOR ENTITLED TO BE REGISTERED FOR PROPERTY REGISTERED IN THE NAME OF A THIRD PERSON—ACTION—APPLICATION—NOTICE TO THIRD PERSON—THE CIVIL PROCEDURE AMENDMENT LAW, 1885, SECTIONS 48, 57—THE FRAUDULENT TRANSFERS AVOIDANCE LAW, 1886—ORDER XX. RULE 2 OF THE RULES OF COURT, 1886.

Where a judgment creditor alleges that his judgment debtor is entitled to be registered for immoveable property registered in the name of a third person, and seeks to have the property sold in execution for the satisfaction of his judgment debt, his proper course is to make an application in the original action, with notice to the third person and the judgment debtor of the order he desires the Court to make.

APPEAL from the District Court of Nicosia.

Economides for the Appellant.

Pascal Constantinides for the Respondent.

The facts and arguments sufficiently appear from the judgment.

April 28

Judgment: An application was made to the District Court in this case on behalf of the Plaintiff for an order directing the sale of certain immoveable property in execution of a judgment of a Daavi Court, alleged to be the property of the Defendant. The property in question was admitted by the Plaintiff to be registered in the name of the Defendant's son, but, according to the Plaintiff's contention, wrongly registered.

The application was apparently based upon Section 48 of the Civil Procedure Amendment Law, 1885, the Plaintiff contending that the property he wished to have sold was property for which the Defendant was entitled to be registered.

The District Court dismissed the application on the ground that it was not made under the Fraudulent Transfers Avoidance Law, 1886, that the registration was over a year old, and that if the Plaintiff required the registration in the name of the son to be set aside he could only do so by action.

Against this order of dismissal the Plaintiff appeals, and it is contended for him that under Section 48 of the Civil Procedure Amendment Law, 1885, he has a right to establish by evidence that the Defendant is the person who by law has a right to be registered as the owner, that if that be established he has a right to have an order,

directing the issue of a writ of execution, and that under Section 57 of the Law, the writ would be sufficient authority to the proper officer of the Land Registry Office to make all necessary alterations in the Registers for the purpose of transferring the property into the name of the judgment debtor, the Defendant.

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For the Respondent it was contended that Sections 48 and 57 were not intended to apply to such a case as the present, where the property is registered in the name of a third person, but only to cases such as, for instance, where the property of an heir remains registered in the name of his ancestor.

The words of Section 48 would, no doubt, include the case put, but they cannot, we think, be restricted to that class of cases. They, in our opinion, include all cases in which the judgment debtor is legally entitled to be registered as the possessor of land registered in the name of a third person.

The words "he has by law a right to be registered as the owner" must be taken to refer to property in respect of which it shall be proved that the judgment debtor has a legal right to be registered as the owner. In this case it is alleged, whether rightly or wrongly we cannot say, that the Defendant could, if he chose, set aside the registration of this property in the name of his son, and procure himself to be registered, as the owner, and, if this be so, we are of opinion that this is property for which the Defendant is legally entitled to be registered, and that it is competent for his judgment creditor to prove this, and if he be successful in establishing it, he will then be entitled to an order directing the sale of the property in execution of his judgment.

The production of a writ of execution would be sufficient authority for the officials of the Land Registry Office to cancel the registration in the name of the son, and register the property in the name of the Defendant.

If it be not competent for the Plaintiff to effect this on an application of this nature, it is difficult to see what means he could take to get the property sold. The Defendant is scarcely likely to oblige the Plaintiff, his judgment creditor, by bringing an action against his son to upset the registration in the latter's name, in order that the judgment creditor may have an opportunity of selling the property in satisfaction of his judgment debt. The Plaintiff has no cause of action himself against the Defendant's son, nor can he force the Defendant to bring an action against his son to set aside the registration in the latter's name. The Plaintiff can neither institute an action in the Defendant's name as

SMITH, C.J. Plaintiff, nor join the Defendant as a Plaintiff in an action, without
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 MIDDLE- the latter's assent, and unless a judgment creditor, under such circum-
 TON, J. stances as these, is entitled to make such an application as the one now
 MOLLAH before the Court, it appears to us that he has no remedy at all.
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 v.
 ELIA PAPA We are, therefore, of opinion that the Plaintiff was entitled to call
 PHILIPPO evidence to shew that the Defendant is legally entitled to be registered
 as the possessor of the property now registered in the name of the
 Defendant's son.

We, however, are of opinion, that under the provisions of Order XX. r. 2 of the Rules of Court of 1886, the Court could not have made the order for the issue of a writ of sale unless notice of the application had first been given to the Defendant's son, the registered owner. It is admitted by the Appellant's Counsel before us that such notice was not given, and we, therefore, think that the order of the District Court was technically correct. We must, therefore, dismiss this appeal, but as the Appellant succeeded in his main contention, we shall not order him to pay the costs, and he will, of course, be entitled to make a fresh application to the District Court. In returning the file of proceedings to that Court, we shall make it clear that the appeal was only dismissed on the ground above mentioned, and that, in our opinion, the application was one which the Appellant was entitled to make on notice to all parties interested.

Appeal dismissed.